December 4, 2018

Office of the Assistant Secretary for Indian Affairs
Department of the Interior
1849 C Street Northwest
MS-4071 MIB
Washington, DC 20240

Dear Assistant Secretary for Indian Affairs,

I am submitting the attached comments in response to your proposed finding against Federal acknowledgement of the Southern Sierra Miwok Nation, published on November 23, 2018. I was a historian with the Office of Federal Acknowledgement from June 2001 to October 2017. During that time I worked on, and wrote large sections of, seventeen findings on Federal acknowledgment in various stages, including, among other things, proposed findings, final determinations, and reconsidered final determinations. I also wrote two dozen technical assistance letters for Indian groups seeking Federal acknowledgment and was part of the Assistant Secretary for Indian Affairs' working group in 2015 and 2018 to revise the acknowledgment regulations that led to the publication of the current rule.

I have also submitted a copy of my comments to the Southern Sierra Miwok Nation.

Aldo E. Salerno, Ph.D.

Aldo E. Salerno's Comments on the Finding Against Acknowledgment of the Southern Sierra Miwok Nation (December 4, 2018)

1. Did the Assistant Secretary for Indian Affairs (AS-IA) issue an unauthorized finding?

On November 16, 2018, the Assistant Secretary for Indian Affairs (AS-IA) issued a proposed finding against acknowledgment of the Southern Sierra Miwok Nation (SSM). The finding evaluated only one of the seven mandatory criteria, criterion 83.7(b), or the community criterion, which a petitioner has to meet for the Federal government to acknowledge it as an Indian tribe. The finding also evaluated only the "modern" period of the SSM community from 1982 to 2011. The AS-IA claims to have the authority to issue a finding on one criterion under a Department directive of May 23, 2008, which permits a proposed finding on one, or more than one criterion, rather than all seven of mandatory criteria as required in most cases under the 1994 acknowledgment regulations, if the evidence shows the petitioner has failed on that criterion.

The directive, however, does not permit the AS-IA to issue a finding on only a portion of the criterion as the Department did in the SSM proposed finding where it examined only modern community. The only time the 1994 regulations allow the AS-IA to evaluate just modern community is when the Department has determined the group has met the requirements for previous unambiguous acknowledgment. But even in those cases, the AS-IA must fully evaluate the other six mandatory criteria. According to precedent, that evaluation of the other six criteria has always been necessary to inform and enhance the evaluation of modern community for a group that has previous recognition.

In the SSM finding, the AS-IA evaluated only 29 years of the SSM's community from 1982 to 20011 and did not examine the other six criteria, which would have certainly enhanced and informed the evaluation of modern community. The AS-IA cannot, in any meaningful way, fully know the basis of the SSM's modern community, without also examining the group's historical tribe and community, politics, descent from the historical tribe, and identification by outside observers. Instead, the AS-IA evaluated the SSM's community from 1982 to 2011 by examining only a smattering of interviews, group minutes, and attendance lists. By failing to examine fully the SSM community from first sustained contact to 1981, the AS-IA lacked any real understanding of how the historical context of the group's history during that period impacted its modern community, even though the regulations require the Department to take into account the historical context of every petitioner when evaluating the evidence.

The SSM will now be compelled to focus in its response during the comment period solely on the modern community. The SSM will not know what inadequacies, if any, exist in its petition record for the period before 1982 and after 2011, nor will it be given a fair chance and adequate time to obtain and review any evidence the Office of Federal Acknowledgment (OFA) might have obtained and analyzed for those periods before the next finding. The SSM should demand the AS-IA follow its own rules and re-issue a finding on all of the group's community from the 1850s to the present or a finding on all seven of the mandatory criteria.

2. Is the AS-IA being transparent and providing the SSM with all the evidence the OFA gathered for all the analyses it conducted during the eight years of active consideration of the group's petition?

When I left the OFA in October 2017, after 16 years of service, it had evaluated the evidence from and conducted several peer reviews of the SSM petition. The OFA then drafted several versions of the

proposed finding, some nearly 200 pages long, reaching majority, affirmative conclusions on all seven mandatory criteria, which it eventually submitted to the Solicitor's office for review. To reach our conclusions, the OFA staff reviewed thousands of pieces of evidence on the group's history from the 1850s to the present. The OFA staff conducted numerous analyses of this evidence on the SSM's historical tribe, community, politics, genealogy, identification by external sources, and previous acknowledgement under all seven of the mandatory criteria. While the Department may re-assess its conclusions regarding these analyses, the evidence it used to conduct them would be invaluable to the SSM in its pursuit of federal acknowledgment. For the OFA to withhold the evidence from the SSM would do the group irreparable harm. The SSM should demand all this evidence from the OFA so that it can submit a full and meaningful response to the AS-IA's negative appraisal of the group's modern community.

3. Has the AS-IA been completely transparent with the SSM about what the Department knows about the critical issues of the historical tribe, identification of the historical tribe's members, and unambiguous previous Federal acknowledgment?

In the proposed finding, the AS-IA appears ambiguous or tentative about reaching conclusions regarding the historical Indian tribe, lists of members of the historical Indian tribe, and unambiguous previous Federal acknowledgment, all critical issues for the SSM to have information about if it is to pursue recognition in any meaningful way.

For example, on the historical tribe, the AS-IA, after discussing some possibilities of the tribes in the Yosemite area from the 1850s to the 1920s from which the SSM may have evolved, makes this comment:

> Theses sources, and others, may suggest that, at some point after the treaties, an Indian-entity---or multiple Indian entities—may have formed in the general area of the Yosemite Valley and the Merced River drainage. The petitioner may wish to review these sources to help it develop a formulation of its historical Indian tribe and, during the comment period, the petitioner or third parties may wish to provide additional evidence supporting or refuting the Department's finding regarding the historical Indian tribe.

This seemingly helpful statement is both disingenuous and misleading. While I was at OFA during the period SSM was under active consideration, OFA staff members analyzed hundreds of documents and reached firm conclusions regarding the historical Indian tribe from which we believed the group descended. To say that these sources "suggest" the identity of the historical tribe is untrue; they define it with great clarity. Indeed, for the Department to profess uncertainty about the historical Indian tribe this late in the process and yet still evaluate the group's modern community is nothing short of bewildering. Moreover, while OFA is not required to do SSM's research, it certainly should not require the SSM to do unnecessary research for answers it already has unless the petitioner disagrees with those conclusions.

On lists of the historical tribe, the AS-IA similarly describes a number of documents the SSM could use to identify members of the historical tribe from which current SSM members could trace descent and then states:

> The Department offers these suggestions as suggestions, not requirements, for identifying people who might have belonged to or descended from a historical Indian tribe in the greater Yosemite area. The petitioner may wish to provide additional evidence supporting the

> Department's findings regarding members of the historical tribe, or the petitioner may wish to provide the Department with its own evidence.

Again this vague statement is disingenuous and misleading for the same reasons as described above. The OFA analyzed scores of documents while SSM was under active consideration that were lists of the historical tribe and reached firm conclusions about their value as evidence of descent, including census, housing, and employment records from the National Park Service which the Department does not even mention in its suggestions in the proposed finding.

On unambiguous previous Federal acknowledgment, the AS-IA after discussing some 1850 treaties the SSM might use as evidence of previous acknowledgment provides this guidance:

> If the petitioner decided to request unambiguous previous recognition because of this treaty evidence, they should submit evidence that sets forth this claim.

This statement is not only disingenuous and misleading but a violation of the spirit and letter of the regulations. The OFA analyzed dozens of documents on previous recognition while the SSM was on active consideration and reached firm conclusions, covering several pages of text, regarding the issue. Those documents included not only the 1850s treaty records but also court case and newspaper evidence from the 19th century. While the OFA is not required to do SSM's research, it is certainly required to examine any evidence of previous recognition it finds during active evaluation, to reach a determination, even if preliminary, about that evidence, and to provide that evidence and conclusion to the petitioner in its finding. For the AS-IA to put the burden of submitting the evidence for previous recognition on the SSM this late in the process when the OFA has that evidence is to put the group at a serious disadvantage. In fact, to do so would be improper.

The SSM should demand the AS-IA provide the group all the information the OFA has on the issues of the historical Indian tribe, lists of the historical Indian tribe, and previous unambiguous Federal acknowledgment.

4. Why did the AS-IA fail to take into account and explain what evidence the 1982 finding for the federal acknowledgement of the Death Valley Timbisha Shoshone Band provides as precedent in the acknowledgment of the SSM?

In 1982, the Department acknowledged the Death Valley Timbisha Shoshone Band of California through the acknowledgement process. As part of the evidence for acknowledgement, the Department's finding took special note of the group's relationship with, and recognition by, the National Park Service from 1933 to the present. Under that relationship, the Park Service provided relief, housing, and employment for the Indians, modeled on a program established earlier at Yosemite Park in California for the Yosemite Indians, from whom the SSM evolved. In fact, the Park Service at Yosemite Park has recognized and had a relationship with the SSM for over 100 years. It also provided relief, housing, and employment for the SSM and other Indians into the 1960s, and still considers and includes the SSM as a critical element of the Park history it provides to the public.

Yet, the AS-IA in the SSM finding barely mentions the National Park Service or its relationship with and recognition of the SSM. Nor does the finding describe the numerous documents, contained in the SSM petition record, which the National Park Service produced about the SSM community. These documents include Park Service correspondence, often to and from the BIA, censuses, and financial, employment,

and housing records. It is beyond comprehension that the Park Service, a part of the Department of Interior, recognizes and maintains a relationship with the SSM similar to that of the Timbisha Shoshone, but the AS-IA in the finding does not describe that relationship or discuss how the precedent of these two cases impacts the SSM petition for acknowledgement. The SSM should demand the AS-IA provided it with all the evidence the OFA has regarding the SSM relationship with the NPS, fully describe the nature of that relationship, and give a full analysis of how it relates to the precedent established in the Timbisha Shoshone finding.

5. Is the AS-IA requiring the SSM to meet a higher standard of evidence for community under the 1994 Federal acknowledgement regulations than it would under the revised 2015 regulations?

In the SSM proposed finding, the AS-IA concluded the SSM did not provided sufficient evidence under the 1994 regulations to demonstrate that "a predominant portion" of the group comprised a distinct community from 1982 to 2011. The 1994 regulations describe the requirement for meeting community as follows:

> (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.
>
> Community means any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers. *Community* must be understood in the context of the history, geography, culture and social organization of the group.

The OFA always interpreted the predominant portion to mean more than half, although it was never clear to me during my tenure at OFA as to how it evaluated the evidence in a petition to reach a quantitative decision about what constituted a "predominant portion" of a group being a distinct community. Nonetheless, over the years, the vagueness of what the term meant and how the OFA evaluated it came under increased scrutiny and criticism. In July 2015, the AS-IA issued a revised set of regulations that tried to address that criticism and other criticisms of the 1994 regulations. In the revised regulations, the Department removed the "predominant portion" language from and revised the criterion to read as follows:

> (b) *Community.* The petitioner comprises a distinct community and demonstrates that it existed as a community from 1900 until the present. Distinct community means an entity with consistent interactions and significant social relationships within its membership and whose members are differentiated from and distinct from nonmembers. Distinct community must be understood flexibly in the context of the history, geography, culture, and social organization of the entity. The petitioner may demonstrate that it meets this criterion by providing evidence for known adult members or by providing evidence of relationships of a reliable, statistically significant sample of known adult members.

As the reader can see, the new rules removed the requirement for a petitioner to demonstrate that a predominant portion of its members comprised a community. It also lessened the span of time needed to demonstrate the criterion from historical times to the present to 1900 to the present. The AS-IA explained the need for the change in the 2015 final rule:

> The final rule requires the petitioner to constitute a distinct community, and provides that the petitioner may demonstrate this criterion by showing evidence that a "significant and meaningful portion" of its members constituted a community. *See* final § 83.11 (b) (1). While the proposed rule included a specific percentage {30 percent} in an attempt to set an objective standard, in reality, the number of members who must constitute a community depends on the historical circumstances faced by the petitioner. In practice, there is a range in which the Department has identified whether the petitioner's members are a distinct community.

Clearly, the AS-IA believed under the new rule that a range of community participation might allow a petitioner to meet the community criterion depending on the historical circumstances of the group. That a range would be evaluated not as a fixed percentage, such as 51 percent, but as a flexible standard dependent on those historical circumstances. Thus, in the case of the SSM that range of a "significant and meaningful portion" of the group could be much lower than 51 percent, perhaps 30 percent, or even less. Indeed, the controlling factor for SSM to meet the criterion for community would not be the percentages of its community activity, but how the Department viewed the significance and meaningfulness of that activity in light of the group's historical context. Under this flexible standard of evaluation, SSM would have a reduced burden of proof both in terms of the level of evidence, which could even include the results of statistical sampling, and in the time frame under evaluation. The Department would also have to apply that reduced standard.

The 2015 regulations also supersede the 1994 regulations and other directives that apply to the substance of the regulations. Under the 2015 regulations, the AS-IA would have to rule on all seven of the mandatory criteria in a series of phases, first on four of the criteria, and then on the remaining three, with the OFA providing technical assistance after each phase. A one criterion finding on just community is simply not permissible under the 2015 regulations. The other six mandatory criteria also have significant differences (as does the requirement for unambiguous previous Federal acknowledgment) under the 2015 regulations from the 1994 regulations. In addition, the 2015 regulations provide for an administrative law judge to review findings and a more transparent process overall, which requires the posting of evidence, comments, and findings on the OFA website at every stage of the process.

While it is true the SSM, as a petitioner already under active consideration, chose to be reviewed under the 1994 regulations rather than the 1994 ones, it was unclear to me while I was a member of the OFA that the group, or any group which chose the same option, understood the implications of that choice. Simply put, the AS-IA has established a two-tiered Federal acknowledgment process, one in which some older petitioners are unwittingly, arbitrarily, and capriciously being evaluated under a stricter and more burdensome standard of evidence than newer petitioners. The SSM should demand, as a matter of fairness and equal treatment, that the AS-IA and the OFA evaluate its petition for all seven of the mandatory criteria under the 2015 regulations.

6. Have the Solicitor's Office and the OFA engaged in behavior detrimental to the SSM and its petition?

During my 16 years at the OFA, I was aware of improper ex parte communications by the Office of the Solicitor on acknowledgement findings under Solicitor review. These communications occurred between the Solicitor's Office and the OFA staff members not working on those findings. The OFA rules regarding the peer review process were clear. After a finding completed the OFA director or with members of the team who had worked on that finding. The Solicitor was not to communicate, lobby, or try to influence

any other members of the OFA staff, or any other office, regarding the merits of the case. This rule was flouted repeatedly by the Solicitor's office as it did communicate with OFA staff members to change, influence, or call into question decisions made during the OFA peer review. This behavior continued while the OGA was evaluating the SSM petition and others. Such behavior tainted the peer review process, cast doubt on its legitimacy, and violated the rules of transparency required by the Department for the acknowledgment process as a whole. The SSM should demand to know if any members of the Solicitor's Office or the OFA had ex parte communications regarding the SSM petition, and if they did, the group should request a full reconsideration of its finding.