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Professor Kevin Washburn: Reflections on Service as Assistant Secretary-Indian Affairs, the State of Indian Law in 2016, and Returning Home to New Mexico

By Sarah M. Stevenson

**Modrall Spering Blog
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Kevin Washburn recently returned to his position as a professor at the University of New Mexico School of Law after serving more than three years as the Department of the Interior's Assistant Secretary-Indian Affairs. A member of the Chickasaw Nation and a graduate of University of Oklahoma and Yale Law School, Professor Washburn has served as a federal prosecutor, a civil litigator in the Department of Justice, as general counsel of the National Indian Gaming Commission, as a law professor at the Universities of Minnesota and Arizona, and as dean of the University of New Mexico School of Law. He recently reflected on his experiences and discussed current issues in Indian law with the attorneys of Modrall Spering's Native American Law practice group, and agreed to answer questions about his service as Assistant Secretary-Indian Affairs and current issues and opportunities in Indian law:

After serving as general counsel of the National Indian Gaming Commission and as the assistant secretary for Indian affairs at the U.S. Department of the Interior, what have you learned about the federal government's relationship with tribes?

That the relationship between tribes and the United States, at least in Congress and the Executive Branch, has been improving steadily for forty years. During my 20-plus year legal career in and out of the federal government, I have seen words like "sovereignty," "self-governance," and the "trust responsibility" become much more ingrained in federal policies and federal employees. Some native people fail to credit this progress and raise the same criticisms that our elders might have made in the 1950s. Most of those criticisms are no longer true, and holding on to them can be counterproductive to progress. If Indian country will engage federal employees in a more constructive manner, tribal communities will find tribal leaders and federal employees capable of working together to be incredibly productive. A lot has changed in the last 30 or 40 years. Indian country must embrace those changes.

Why did you leave the BIA when you did?

My family and I missed New Mexico. When I took the job, I stated publicly that I would serve for only two years. I knew that many people leave this job with their reputation in tatters or they leave one step ahead of an angry mob. I did not want that to happen to me. But early on, Secretary Ken Salazar heard me say “two years” out loud at a public meeting and he took me aside and said, “stop saying that; you will make yourself a lame-duck.” When I stopped saying it, I stopped thinking about it. The truth is that I ultimately stayed much longer than I ever intended, and longer than anyone since Ada Deer left in 1997. It was a rare privilege to work with Sally Jewell and Mike Connor and with Deputy Assistant Secretaries Larry Roberts and Ann Marie Bledsoe Downes and the rest of the team. Together, we accomplished so much to be proud of, and all of those people are still in place, working hard for Indian country. That a few people saw my departure as “abrupt” is a tribute to the professionalism of my team and the leadership at the Department of the Interior. Washington is a very leaky environment where it is hard to keep secrets. My departure date was known for months by numerous people inside the Department and I had moved my children home in August of 2015, but my impending departure was kept secret outside the Department until we announced it in December. That is a stunning feat in Washington.

If you had it to do over again, would you have accepted the job of assistant secretary for Indian affairs? Why or why not?

Yes, in a heartbeat. I would not have accepted the job in the first term because I viewed the job as impossible while the Cobell litigation was pending. I believe that it is impossible to serve Indian people well while simultaneously litigating aggressively against them. But when President Obama, Secretary Salazar, and Deputy Secretary David Hayes settled that fifteen-year-old litigation in 2010, the job suddenly seemed much more attractive. The job has long thought to be one of the hardest in Washington, but I was lucky to serve at a historic time, when the Assistant Secretary had the full support of the President and the Secretary to make strides in Indian country. No Assistant Secretary has ever had such broad support directly from the Commander-in-Chief. Accordingly, we accomplished a number of major initiatives regarding land, self-determination, child welfare, tribal recognition and criminal justice. We also increased federal appropriations for Indian affairs substantially during my tenure, with the strong support of Congress, from \$2.3 billion to \$2.8 billion, despite facing sequestration and difficult fiscal constraints.

While some in Indian Country applauded you for going nose to nose with members of Congress, others complained that you were disrespectful and your pushback was counterproductive. How would you respond to those critics?

Being direct and honest with officials in Washington, D.C., is unusual, I suppose, but I don't think that it was a handicap. Most of Indian country's issues are complex and cannot be reduced to sound bites. These issues require cooperation on both sides of the aisle in Washington. I worked well with most members of Congress on issues of

mutual interest and I never saw honesty as disrespectful. I did sometimes become combative with certain members when I saw issues of real concern to Indian country, but tribal organizations were always standing by my side in those battles. Some people treat high-profile positions like assistant secretary as a job interview, a stepping stone to a higher position. Consequently, they avoid the hard issues and tough messages. I am grateful to UNM for holding my faculty position for me. Knowing that I had a great career waiting for me in Albuquerque meant that I was never tempted to compromise my views or hold my tongue. I felt liberated to do what was right.

I testified before Congress on 30 separate occasions while serving as Assistant Secretary. If I had really been viewed as disrespectful, I doubt that powerful members of Congress would have kept inviting me. Some of them, like Senators John McCain and Tom Udall, seem to appreciate frank discussion. Policymakers must be accountable for their actions and beliefs. If I occasionally turned the tables at oversight hearings and forced members of Congress to be accountable to Indian country for their views, I see that as the ordinary clash of ideas that we should celebrate in a democracy. I won't apologize for fighting for Indian people.

Under your tenure, President Obama set an Administration goal of 500,000 acres into trust for tribes. How many acres were taken into trust under your watch and where did this rank on your list of priorities?

No priority is more important. Tribes have lost so much land and trust land is crucial to tribal self-governance. When the Obama Administration first came into office, some acquisitions were nearly complete on paper but were being held up because of the de facto moratorium that existed under the Bush Administration. The Obama Administration began by quickly restarting the land-into-trust machinery. By the time I arrived, just before the beginning of the second term, the Obama Administration had taken almost 182,000 acres in trust. The President was very much about establishing clear metrics and deliverables. At the beginning of the second term, the President and the Secretary asked us to set an ambitious goal for land into trust and make ourselves accountable to it. We settled on 500,000 acres, knowing that meant that we would need another 300,000 plus before the end of the Obama Presidency. We quickly realized that it would be challenging to meet, in part, because we face litigation on some of the acquisitions. But we streamlined the processes, developed the Patchak Patch, improved the appeals process, and continually implemented improvements (including one that is still in process on title standards). All of this work made a difference. Within weeks of my departure three years later, the Department passed the 400,000 acre mark, and I am confident that the BIA will hit the 500,000 acre mark. I would add that the Land Buy Back Program for Tribal Nations set up pursuant to the Cobell settlement has already restored roughly 1.5 million acres of existing trust land to tribes in only two years of operation. In sum, tribal land holdings have already expanded by nearly two million acres and that number will continue to rise significantly before the end of the Obama Administration.

What was your proudest achievement as the assistant secretary for Indian affairs?

Without question, the most important achievement was working with now-Acting Assistant Secretary Larry Roberts and Secretary Jewell to build an excellent Indian affairs team at Interior. The proof is in the accomplishments. We succeeded in reforming the rules to allow land into trust in Alaska; we settled the Ramah class action lawsuit for \$940 million (and numerous other cases involving individual tribes) and began providing full funding to tribes for self-determination contracts and compacts; we reformed the tribal acknowledgment regulations with an unprecedented level of consultation and public input; we updated the Indian Child Welfare Act guidelines and regulations to better protect Indian children and preserve Indian families; we helped stand up the Tribal Land Buy Back Program which has already restored 1.5 million acres of interests in fractionated trust lands to tribes; we improved tribal sovereignty over leasing and rights of way on Indian lands and implemented the HEARTH Act at more than 25 reservations; we instituted important reforms to place Indian education on a more successful path; we also stood up the White House Native American Affairs Council and, during my time, I presided over four (of the seven so far) annual White House Tribal Nations Conferences; we also helped develop a pathway to recognize a Native Hawaiian government; and we made countless decisions for individual tribes, such as recognizing the Pamunkey Tribe, granting criminal jurisdiction retrocession to the Yakima Nation, supporting concurrent jurisdiction under the Tribal Law and Order Act for the White Earth Nation and the Mille Lacs Band, and creating the Mashpee Wampanoag Tribe's initial reservation and setting them on a path to gaming success. We increased the federal budget serving Indian tribes by more than a half billion dollars at Interior alone, and supported even larger increases by the Administration at the Indian Health Service. And these are only some of the highlights. None of this could have happened without a great political team and very committed career officials throughout Interior. Secretary Jewell was a very successful CEO at REI before joining the Department and I learned a lot from her about building an excellent team and then supporting them to accomplish incredible results.

What was your biggest disappointment as the assistant secretary for Indian affairs?

The hardest issue that we faced was the epidemic of youth suicide in some communities in Indian country. Getting a call or message almost every day about another youth suicide took a toll on our souls, just as each of those deaths took a toll on each of those communities. President Obama characterized the suicide epidemic as kids "dying of broken hearts." We worked hard through policy changes at BIA and BIE, increased funding for social services, and initiatives like Generation Indigenous and the White House Native Youth Gathering to attempt to address the problem. But ultimately, poverty, substance abuse and loneliness are tough foes. I came away convinced that economic development was the long term solution to the serious social problems that continue to plague Indian tribes. But history has had a powerful effect over many decades and it will be a long road to solve those underlying problems.

Please comment on the role of recent Supreme Court decisions on the Department of the Interior's Trust mission.

Over the past decade, the Supreme Court has taken an increasingly literal approach to the laws governing the federal government's relationship to tribes, at least in areas involving the Department of the Interior and the trust responsibility. In some ways, earlier decisions recognizing a broad general (but somewhat undefined) trust responsibility have receded from view in favor of close parsing of statutory words. Despite the literal approach, which might suggest more predictability, the Supreme Court never fails to surprise us. One might wonder if it is good for parties or the field of Indian law in general to have such unpredictability in outcomes at the Supreme Court level.

Modrall Sperling thanks Professor Washburn for sharing his experiences and knowledge with us.

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