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## Indian Country Today interviews Kevin Washburn about federal recognition rules and protecting sacred sites

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<https://indiancountrymedianetwork.com/news/politics/washburn-still-fighting-on-recognition-saving-sacred-sites/>

## **Washburn Still Fighting on Recognition, Saving Sacred Sites**

In August, when Washington, D.C., essentially goes on vacation, some in the Nation's capital continue to work on improving the living conditions for others. Indian Country Today Media Network caught up with Kevin K. Washburn, Assistant Secretary - Indian Affairs, during this lull to discuss his legacy as ASIA, among other hot topics in Indian country like: reformed federal recognition rules, Cobell, Oak Flat, Land in Trust and more.

**By Gale Courey Toensing**

**Indian Country Today  
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Washburn: "We're too focused on making progress, we'll have time to think about legacy after we run through the finish line."

### **How has the legislative session been so far this year?**

It's been a surprising year. We've had to fight for Indian country more than expected. The House Natural Resources Committee threw us for a loop in the spring with statements and questioning that harkened back to the termination era. Congressman Cole's leadership in the fee-to-trust hearing hopefully helped to correct the Committee's course. My hope is that the Committee moves forward in a bi-partisan fashion similar to the Senate Committee on Indian Affairs. Chairman [John] Barrasso and Vice Chair [Jon] Tester have shown real leadership in a Carcieri fix and seem to be having productive discussions. We also have a real chance of getting a self-governance bill through Congress.

### **Are you planning to stay through to the end of this administration?**

Public service is a major sacrifice, not just for me and my family, but also for the law school that has graciously continued to hold a position open for me while I have served in this position. I have promised to return to the law school classroom in my home state of New Mexico by the spring semester of 2017, so I likely will not remain all the way through to the very end. That said, we have a lot of work in progress and I care deeply about it. The Indian Affairs team that Secretary Jewell has assembled at Interior is incredibly strong and the progress will continue through the end of this Administration. It will be a sprint to the finish.

### **Are you thinking about your legacy yet? What do you most want to be remembered for in this position? One of your top priorities when you began was to update, revise and reform the federal recognition procedures – were you hoping that would be your legacy?**

We're too focused on making progress, we'll have time to think about legacy after we run through the finish line. In any event, it is not my legacy at all, or my predecessor's, but the President's and Indian country's. Anything that has been accomplished during my time in the Obama Administration has been possible only because of the unprecedented support of the White House, Secretary Jewell, and tribal leaders in Indian country. The President already has an incredible legacy and it is still not complete because so much remains in process.

### **There was almost universal agreement in Indian country that you did a great job with the draft version. The final document is very different in several important ways. How do you feel about the final document that came out of the process?**

I feel very good about it, and I was pleased by its reception in Indian country. Nearly everyone who was engaged with it has called it an improvement, even those who were disappointed by some aspects of the final rule. Ultimately, the final rule addressed a number of important complaints raised by those who had participated in

the process in the past, including petitioners who succeeded and earned recognition and those that were denied recognition. The new rule reflects good governance improvements in every way. The process will now be more transparent and more fair. It will be more expeditious in some important ways, and in other ways will provide more due process to achieve greater fairness and error correction. To the extent there have been mistakes or unfairness in the process in the past, I am confident that we have produced a rule that will make those mistakes much more rare in the future. Moreover, the standards, while still rigorous are now more just. In sum, I am confident that we have dramatically improved the process.

**If you were hoping the reformed regulations would be your legacy, do you still feel that way?**

This work was very, very important, but nearly everything we work on is critical to Indian country. I am very proud of the work we have accomplished in federal recognition, including acknowledging the Pamunkey Tribe in Virginia. My primary job as Assistant Secretary is to serve my existing constituency, the 567 federally recognized tribes to whom the United States has a clear and established trust responsibility. The acknowledgment process is important because it is a matter of justice to those tribes that deserve recognition. However, the President's legacy is bigger than any single policy initiative. In sheer impact, the President's leadership in restoring a nation-to-nation relationship is part of everything we do. The President has ensured meaningful tribal consultation, settled the Cobell case, advanced a major step forward in the area of Indian country criminal justice, dramatically increased federal spending in Indian country, prioritized restoring tribal homelands, and treated Alaska tribes the same as tribes in the lower 48 states by deciding to allow land to be placed into trust in Alaska, and others. Each of these initiatives moved Indian country forward in dramatic ways.

**There was a cluster of shockingly anti-Indian Republican-led committee hearings in the past couple of months. At one hearing, the revised federal recognition regulations were attacked before anyone had actually read them and federal recognition itself was questioned even to the point of one speaker suggesting that a new termination policy would be appropriate. At another; the Interior Department's authority to take land into trust was challenged by committee members who didn't seem to know Congress gave Interior that authority. And, finally, some unknown person added a rider to the Interior appropriations bill prohibiting the implementation of the new tribal recognition rule by not allowing any expenditures for it. What do you make of this apparently coordinated attack on the most crucial thing a sovereign tribal nation needs in order to enter into a government-to- government relationship with the federal government - recognition that it is a sovereign tribal nation?**

Many people do not understand that acknowledgment is a matter of justice for tribes not yet recognized. But here, too, some context is in order. In those committee hearings, federal acknowledgment was merely a vehicle for issues that are even more important across Indian country. These attacks represent opposition to the very existence of tribes - not only unrecognized tribes, but all tribes. Some members of

Congress are opposed to the whole idea of tribal sovereignty – for any tribe – and our action on acknowledgment brought those hidden viewpoints out into the open.

**What is the status now of the revised regulations? How will you move forward with recognizing tribes with the rider in place?**

The regulations are in effect and are being implemented. Since the rider was attached to an appropriations bill that has not passed Congress, it is still subject to the legislative process. The lack of an appropriations bill, however, is a real problem for us and for Indian country. We are hopeful that Congress will enact an appropriations bill. Now that the members of Congress and their constituents have had an opportunity to see the final regulations on acknowledgment, we are hopeful that they will no longer seek to block them.

(“The Obama Administration’s Part 83 [Federal Recognition Regulations] Revisions and How They May Allow the Interior Department to Create Tribes, not Recognize Them.”; “Inadequate Standards for Trust Land Acquisition in the Indian Reorganization Act (IRA)”)

**And speaking of riders, what progress, if any, has been made on the protection of sacred sites? I’m thinking, of course, of the outrageous giveaway of the San Carlos Apache Tribe’s Oak Flat to a foreign mining company that was achieved by slipping a rider into the military spending bill – at night. What can the fed government do to prevent this kind of giveaway? Why hasn’t anyone invoked the laws protecting sacred sites, religion, religious practices, graves etc.?**

Our work to protect sacred sites is some of the most important and difficult work we do. Congress ultimately has a lot of power in Indian affairs, and it is hard when they subvert the regular process and attach such riders to “must-pass” legislation like defense spending. On Oak Flat, we are working with the Forest Service to insure that the San Carlos Apache Tribe obtains all the process to which it is entitled under that legislation.

We are also working to provide broader protections to tribal sacred sites in other places around the country to prevent this kind of thing from happening in the future. Congress has the power to create protections for public lands, and the President also has the power to do so by Executive Order. The President can act to protect certain lands if Congress fails to act. We are rooting for Congress to enact protections in certain areas, such as the Bears Ears in Southeast Utah. But we are also evaluating the President’s options in case Congress fails to act.

**How do you cope with the constraints on what you can and can’t do?**

The constraints are many. It takes a village to accomplish anything in the federal government, from enacting even a minor regulation to hiring an employee. Moreover, almost any decision I make involving any tribal issue must be approved, or “surnamed,” by a dozen other federal employees in the field and the central office, including the attorneys, before it reaches my desk. It means that teamwork is exceedingly important. It is hard for a person in my position to make a difference

unless he has the support of his staff and other colleagues over whom he has no direct supervisory control. We all face obstacles in life. The most effective people demonstrate team leadership, persistence and keep looking for paths to overcome those obstacles. The best person in my office to do that is Principal Deputy Assistant Secretary Larry Roberts. He consistently shows creativity in overcoming the ever-increasing bureaucratic hurdles faced by Indian country.

**How do you think the history books will look back on the Cobell settlement and later tribal trust settlements made during the Obama administration?**

Very favorably. As I have said over and over, living up to the enormous obligations inherent in the trust responsibility is hard enough under the best of circumstances, but it is nearly impossible when you are actively litigating against the very people whom you are also trying to serve. Settling Cobell, more than 80 tribal trust cases, and much of the contract support costs litigation has resolved many of the tribes' past grievances and allowed tribes and the federal government to work as partners, rather than litigious combatants, and allowed us to focus more on the future to ameliorate the tragic past. Together with President Obama's mandate that all federal agencies develop plans for robust tribal consultation, the government-to-government relationship with tribes has never been stronger. Quite simply, the good faith negotiations that resulted in settlements was crucial to improving this relationship.

**Are you still happy about the land restoration you've been able to achieve? Will you be happier by the end of the term? Please update us on that project - how many acres etc.? Do you know what some or all of the restored lands are being used for?**

The disastrous allotment policy resulted in tribes losing more than 90 million acres of land between 1888 and 1934, and left millions of acres of land burdened by fractionation. In less than three years, the Land Buy-Back Program, authorized in the Cobell Settlement, has restored to tribes more than 1.3 million cumulated acres of trust land in thousands of fractional interests. Likewise, our land-into-trust efforts have brought more than 300,000 acres of fee land into trust for tribes. Together, these initiatives represent more than 1.63 million acres returned to tribes. I expect us to see well over two million acres before the end of the Obama Administration. Our efforts represent the most significant reversals of allotment in history.

**There's growing concern among tribal leaders about states, municipalities, even counties claiming they have a right to tax tribal revenue. Why is this even an issue when the Constitution clearly says "Indians not taxed" and the IRA says in plain English that lands held in trust for tribes or individual Indians are exempt from state and local taxes. How is the BIA dealing with this?**

When units of state government levy taxes on business activity in Indian country, it undermines economic development and forces tribes into the impossible choice of either declining to tax the activity in deference to the state taxation, or levying a tribal tax which creates dual taxation and risks chasing away businesses. Indian country economic development increases if state taxation is pre-empted. That is true whether the activity being taxed is Indian activity or non-Indian activity on tribal

land. We have worked hard to promote economic development on Indian lands, in our leasing regulations and under the HEARTH Act, as well as under our proposed rule on rights of way. Our approach strengthens tribal sovereignty by promoting clear taxation rules in Indian country.

**What are your priorities for the rest of the term?**

The President has committed us to preparing Indian country for the future, by expanding tribal self-governance, restoring tribal homelands, supporting Native youth and confronting climate change. We're focused on running through the finish line on everything from land into trust, to the right-of-way regulations, to the Indian Child Welfare Act regulations. We're going to move forward with other regulatory initiatives that will be dependent on future administrations to finish. Our hope is that the House Natural Resources Committee and the Senate Committee on Indian Affairs focus on legislative priorities, including, of course, a Carcieri fix, and other bills that restore tribal homelands and promote tribal self-governance. There's only so much that we can do administratively to support tribes. Congress needs to do its part. The HEARTH Act was a major accomplishment for the past Congress. Our hope is that the current Committees can build off that and work to make even greater progress for Indian country. We also are working through numerous initiatives with individual tribes. Deputy Assistant Secretary Ann Marie Bledsoe Downes is working hard to develop and staff the White House Council on Native American Affairs so that it becomes a permanent part of the federal landscape. The White House Council engages nearly all of the federal agencies in Indian country work and insures that the trust responsibility is shared across the federal government.

**Could you share anything about the competition - if any - that you faced for the job: Were there a lot of candidates? Was it a difficult process?**

My predecessor served ably for nearly three years. The President and then-Secretary Salazar demonstrated the Administration's commitment to Indian country by insuring that the position did not remain vacant for long. Thus, I was selected and confirmed unanimously and rather quickly, just a month before the last Presidential election. Because of the Administration's swift action, and the hard work of the preceding team, including Del Laverdure and Bryan Newland, the Indian Affairs team transitioned smoothly and quickly. We did not miss a beat.

**What has been the most surprising—in a good way - thing about this job?**

Because of the commitment of President Obama and Secretary Jewell, I have witnessed a sea change in the historical relationship between the United States and Indian country. Ten years ago, tribal leaders carried a lot of mistrust and one would see stinging public criticism of the federal government from those leaders. Since 2009, however, the Obama Administration has gradually earned the respect of tribal leaders through repeated actions of goodwill, not the least of which has been the annual White House Tribal Nations Conference. Today, we routinely hear influential and diverse tribal leaders, from John Yellowbird Steele of the Ogala Sioux Tribe, to Ron Allen of the Jamestown S'Klallam Tribe, standing up in large crowds and publicly thanking the Administration for its good deeds. President Brian Cladoosby, of the

National Congress of American Indians, has publicly said that the Obama Administration is the “best Administration ever” for Indian country. As a result, what has often been described as “the hardest job in Washington” has become a partnership of advancing our nation-to-nation relationship. Indian country now recognizes that the Obama Administration is listening and trusts that we will strive to be faithful to the trust responsibility, treaty rights, tribal self-governance, and tribal sovereignty.

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