

INTERIOR

Solicitor nominee pushed for stronger tribal protections

Michael Doyle, E&E News reporter • Published: Thursday, April 8, 2021



Interior Department headquarters in Washington. Francis Chung/E&E News

As an academic, Robert Anderson advocated giving sharper "teeth" to policies requiring outreach to Native Americans and called "intriguing" a move to enhance the clout of the Interior Department's top American Indian affairs official.

Now, as the Biden administration's newly named nominee to serve as Interior solicitor, the law school professor could be much closer to putting his tribe-empowering ideas into practice.

"It is apparent that Indian tribes in the United States need more than rights to consultation when federal projects or federal-permitted projects take place in off-reservation areas that may nonetheless affect indigenous rights to land and water," Anderson wrote in 2018.

At the least, Anderson added, "any consultation power must have teeth."

The article in the *Harvard Civil Rights-Civil Liberties Law Review* was one of a number that Anderson, an enrolled member of the Bois Forte Band of the Minnesota Chippewa Tribe, penned as the Oneida Indian Nation visiting professor of law at Harvard Law School.

The White House's announcement of his nomination yesterday would promote Anderson, following Senate confirmation, beyond his current post as principal deputy solicitor ([Greenwire](#), April 7).

Allied with Interior Secretary Deb Haaland, the first Native American to head the department, Anderson could start to see which tribal consultation reforms can fly outside the ivory tower and which cannot.

"One approach would be to adopt a model similar to the process established in section 7 of the Endangered Species Act," Anderson suggested in his 2018 article.

Under the ESA, if any action by a federal agency could affect any species listed as threatened or endangered, the agency must consult with the Fish and Wildlife Service or NOAA Fisheries. The wildlife management agency may then impose conditions to prevent harm to the species or its habitat.

While noting that details would have to be worked out, Anderson wrote that mandating these kind of discussions — along with the potential for imposed requirements — "could provide substantive protection for tribal citizens and their territory."

The University of Minnesota Law School graduate learned the ropes of the Interior Department's bureaucracy in prior stints as the associate solicitor for Indian affairs and counselor to Interior Secretary Bruce Babbitt in the Clinton administration and on the transition agency review teams for Presidents-elect Obama and Biden.

In the 2018 article, Anderson pointed out an "intriguing portion" of a 2016 American Indian trust reform law that



President Biden yesterday said he is nominating Robert Anderson to serve as the Interior Department solicitor. University of Washington School of Law

gives the Interior secretary authority to establish a new administrative office with increased power to coordinate the department's various programs related to American Indian affairs.

This potential undersecretary for Indian affairs would be authorized, to "the maximum extent practicable, to supervise and coordinate activities and policies of the [Bureau of Indian Affairs] with activities and policies" of other Interior Department agencies.

"While it represents a starting point for advancing Indian interests within the Interior Department, any advance may be illusory, because the Under-Secretary could be overruled by the Secretary," Anderson wrote.

In a different law review article published that same year, Anderson spelled out the legal case against former President Trump's use of the Antiquities Act to shrink Bears Ears National Monument in Utah ([Greenwire](#), Feb. 5).

"The Act does not include a grant of power to modify or eliminate monuments ... now a matter of intense controversy and litigation," Anderson stated in a 2018 *Ecology Law Quarterly* article.

Anderson added that "Congress retains and exercises plenary power to adjust designations and uses of public lands counsels in favor of interpreting the statute consistently with ... a limited Executive power to [designate] lands, but not to revoke or modify prior designations."

This analysis, or something like it, could next inform Haaland's decision on restoring the monument's pre-Trump boundaries.

And on another Interior-related legal puzzle, Anderson wrote in 2006 that "the President should firmly and officially endorse the policy of settling Indian water right claims through legislation" when tribes request assistance in negotiations.

"This should include a directive that funds for settlement are an Administration priority and the Office of Management and Budget should not be the arbiter of Administration support," Anderson recommended in his *Natural Resources Journal* article.

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