Statement of

The Honorable Russ Feingold

United States Senator

Wisconsin

April 1, 2004

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At the Senate Judiciary Committee Markup of the

Nomination of William G. Myer

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Mr. Chairman, I will oppose the nomination of William G. Myers to the Ninth Circuit Court of Appeals. I believe he should not be confirmed.

I attended the hearing that was held on Mr. Myers, and I submitted written follow-up questions, as did a number of my colleagues. I have to say after listening to Mr. Myers at the hearing and reviewing his responses to our written questions that both his previously expressed views and his lack of candor in discussing them trouble me greatly. Many times during the nomination hearing, Mr. Myers simply evaded or refused to answer questions that were posed to him, claiming that he could not comment on an issue that could come before him if he is confirmed. This was not the approach taken by at least some of President Bush's nominees. Then-Professor, now-Judge Michael McConnell, for example, was forthcoming in his testimony and answers to written questions. He convinced me in his hearing that he would put aside his personal views if he were confirmed to the bench.

In contrast, Mr. Myers has not persuaded me that he can set aside his personal views and objectively evaluate cases that come before him. Since Mr. Myers has never served as a judge, his published articles, his past legal work, his legal opinions at the Department of Interior, and his testimony before this Committee are all we have to assess his legal philosophy and views. This nominee did not simply make a stray comment that can be interpreted as indicating strong personal disagreement with our nation's environmental laws; he has a long record of extreme views on the topic. He had the burden to show us that he will be fair and impartial on the court. He failed to carry that burden.

Mr. Myers has called the Clean Water Act an example of "regulatory excess." He has stated that critics of the Administration's policies are the "environmental conflict industry." He has stated that conservationists are "mountain biking to the courthouse as never before, bent on stopping human activity wherever it may promote health, safety, and welfare." He even compared the management of public lands to King George's "tyrannical" rule over American colonies. Over 175 environmental, Native American, labor, civil rights, women's rights, disability rights, and other organizations oppose the nomination of Mr. Myers, which speaks volumes about the concern that many potential litigants have about his views on a diverse range of issues that would come before his court. Rather than explaining what his views were during the nomination hearing, Mr. Myers repeatedly ducked questions posed by me and my colleagues.

For example, Senator Leahy asked Mr. Myers to identify which regulations he considered to be "tyrannical." After pointing out that he wasn't criticizing government employees, which obviously wasn't the question, Mr. Myers finally identified the Rangeland Reform policy of Secretary Babbitt. Yet, when pressed, Mr. Myers would not say that he personally believed these regulations were unneeded, but that he was merely "advocating on behalf of my clients who believed that [rangeland policies] were harmful to their interests." This is what all nominees say, of course, when challenged about past statements made on behalf of clients, but since Mr. Myers has never been a judge or a law professor, we have no other record to evaluate. And since he was repeatedly unwilling to tell us about his personal views in his hearing, we certainly cannot ignore his previous published statements on important legal issues he will be called upon to decide.

Mr. Myers's views on the jurisdiction of federal environmental laws, which he has called "top down coercion," also concern me. Mr. Myers authored a Supreme Court amicus brief on behalf of the National Cattlemen's Beef Association and others in an important case dealing with the jurisdiction of the Clean Water Act, Solid Waste Agency of Northern Cook County (SWANCC) vs. U.S. Army Corps of Engineers. The SWANCC case involved a challenge to the federal government's authority to prevent waste disposal facilities from harming waters and wetlands that serve as vital habitats for migratory birds. Mr. Myers argued in this brief that the Commerce Clause does not grant the federal government authority to prevent the destruction and pollution of isolated interstate waters and wetlands. The Department of Justice, on behalf of the Army Corps and EPA, has filed approximately 2 dozen briefs in federal court since the SWANCC decision. DOJ has consistently argued that the Clean Water Act (CWA) does not limit coverage of the Clean Water Act to navigable-in-fact waters.

When I asked Mr. Myers about his view of the Clean Water Act at the hearing and in my follow-up questions, Mr. Myers would not say whether he agrees with this Administration's consistent interpretation of the SWANCC case. He would not provide any information on how he reads the Supreme Court's SWANCC decision other than it is "binding precedent", nor would he state what waters, if any, should not receive federal Clean Water Act protection post-SWANCC. His refusal to respond to these issues gives me pause because of a recent Ninth Circuit decision that ruled that the SWANCC decision should be read narrowly and that wetlands, streams and other small waters remain protected by the statute and implicitly that the rules protecting those waters are constitutional. While Mr. Myers

indicated that he would follow this Ninth Circuit precedent, he refused to elaborate on his views on this crucial issue.

In follow-up questions, I also asked Mr. Myers about a 1994 article he wrote for the National Cattlemen Beef's Association, which he also represented in the SWANNC case. Myers wrote that environmental organizations have "aggressively pursued their goals before friendly judges who have been willing to take activist positions and essentially legislate from the bench. No better example can be found than that of wetlands regulation." Mr. Myers argued: "The word 'wetlands' cannot be found in the Clean Water Act. Only through expansive interpretation from activist courts has it come to be such a drain on the productivity of American agriculture."

Mr. Myers' answers to my questions about this article were not forthcoming. Mr. Myers would not list any of the cases he referred to in that article or any cases of which he had subsequently become aware in which there has been an "expansive interpretation from activist courts" of "wetlands regulation." Nor could he provide me with his analysis of United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), where the United States Supreme Court unanimously upheld the Reagan Administration's application of the Clean Water Act to protect wetlands. Mr. Myers stated that he considered the case to be binding precedent, which of course it is, but that doesn't shed much light on his views on the Clean Water Act. Just last December, the Bush Administration decided not to move forward with a rulemaking that would have severely narrowed the reach of the Clean Water Act. Mr. Myers would not say whether he agreed that this decision was consistent with the law of the land.

In addition to being concerned about his views about many potential parties that could come before his courts and his views on the Clean Water Act and other key environmental statutes, I am also deeply troubled by Mr. Myers's record as Solicitor General at the Department of Interior. During his tenure as the chief lawyer for the Department, Mr. Myers authored a very controversial Solicitor's opinion, and approved an equally controversial settlement. This legal opinion interpreting DOI regulations is one of the only guides we have to evaluate how a Judge Myers would interpret statutes. Mr. Myers's opinion overturned legal precedent to permit a previously rejected and controversial mining project, the Glamis mine, on sacred Indian lands. The settlement he approved reversed a long-standing policy on the authority of the Bureau of Land Management to create wilderness study areas.

The Solicitor's opinion that Mr. Myers authored overturned a previous ruling regarding the approval of mining projects and greatly limited the authority of the Interior Department to deny mining permits under the Federal Land Policy Management Act ("FLPMA"). FLPMA amends the Mining Law of 1872 in part by requiring that "in managing public land the Secretary shall, by regulation or otherwise take any action necessary to prevent the unnecessary or undue degradation of public lands." In the Solicitor's opinion, Mr. Myers interpreted this law to mean that the government could only deny a project to prevent unnecessary and undue degradation of public lands. Thus, if the proposed mining activity is "necessary," then Mr. Myers declared that the government would have no authority to prevent a mine for going forward, even if it would harm sacred Native American grounds, historic sites, or environmentally sensitive areas.

Last year, a federal court found that Mr. Myers's opinion incorrectly interpreted the statute and that the opinion violated three separate, basic rules of statutory interpretation: 1) language of the statute should govern; 2) judges should give effect to every word Congress used; and 3) judges should give the word "or" its normal disjunctive meaning. The court declared that Mr. Myers "misconstrued the clear mandate of FLPMA, which by its plain terms vests the Secretary of the Interior with the authority - indeed the obligation - to disapprove mines that 'would unduly harm or degrade the public land.'"

In response to questions posed by Senator Kennedy about this opinion at the hearing, Mr. Myers could not adequately explain his statutory interpretation of "unnecessary or undue," nor could he articulate his rationale for finding that the word "or" in the statute actually meant "and." The legal opinion allowed the Glamis Imperial Mine Project, a 1600-acre cyanide heap-leaching gold mine to move forward. This mine was part of the sacred lands of the Quechan tribe and was proposed for the ecologically sensitive California Desert Conservation Area (CDCA). After Mr. Myers issued his opinion, Secretary Norton decided to approve the mine permit.

Before Mr. Myers served as Solicitor General, he was a lobbyist for the National Mining Association, Arch Coal Company, and Peabody Coal Company. Mr. Myers met with mining industry officials 27 times during the first year of his tenure as the Solicitor General. Mr. Myers obviously has very close ties to the mining industry, which is why I am particularly concerned about his meetings with the mining industry before he issued this legal opinion. Tribal leaders have called the Mr. Myers' legal opinion and the resulting decision to approve the Glamis mine "an affront to all American Indians."

In a series of questions from Senator Kennedy about his involvement in the Glamis decision, Mr. Myers was given the opportunity to clarify why he would meet with one side of the litigation, but not the other. Mr. Myers admitted that he and top Interior officials met with representatives from the mining company who were pressing to open up the Glamis mine. He stated that he did not meet with the tribe, because they did not formally ask for a meeting. I would think that to be fair on this issue, he would have wanted to meet with both sides. Indeed, the tribes are entitled to government-to-government consultation on siting of mines on sacred lands. The National Congress of American Indians, which includes more than 250 American Indian and Alaska Native tribal governments, formally opposes the Myers nomination.

As Solicitor General of the Department of Interior, Mr. Myers also approved a settlement with the state of Utah that will remove the possibility of administrative protection for millions of BLM lands. Mr. Myers supported this reinterpretation despite the fact that every Interior Secretary in the previous 26 years - including James Watt - affirmed and used BLM's authority to administratively protect lands as wilderness study areas. Mr. Myers signed off on the settlement even though the Tenth Circuit Court of Appeals had previously ruled that Utah did not have standing to challenge BLM's inventory authority,

and that Utah therefore could not have successfully pursued the case. When I asked Mr. Myers how he could have approved a settlement with an entity that did not have standing to challenge the agency's action, he dodged my question.

I have discussed my concerns about this nominee at some length, Mr. Chairman, because I wanted to show that my opposition to Mr. Myers is not based on a single intemperate remark he has made as an advocate. I simply am not convinced that Mr. Myers will put aside his personal policy views and fairly interpret and apply the law as passed by Congress. He has shown a willingness to disregard clear statutory language as Solicitor General of the Department of Interior.

It is not enough for Mr. Myers to pledge that he will follow Supreme Court precedent. As we all know, the Supreme Court has not answered every legal question. Circuit court judges are routinely in the position of having to address novel legal issues. Mr. Myers's writings and speeches raise the question of whether he has prejudged many important legal questions. His answers to our questions did not satisfy me that he has not. I will vote No.

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