

Statement of

The Honorable Edward Kennedy

United States Senator
Massachusetts
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Statement of Senator Edward M. Kennedy on the
Nomination of William Myers to the Ninth Circuit
Senate Judiciary Committee

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For the second time, the Committee is considering William Myers' nomination to the Ninth Circuit. The Senate declined to confirm him in the last Congress, and we should do so again.

In fact, the Senate confirmed 204 of President Bush's nominees in the last two Congresses. We rejected only 10, because their records, like Mr. Myers' record, were extreme, and failed to show a commitment to upholding basic protections important to the American people.

Democrats stand ready to work with the President in confirming qualified nominees who will uphold our rights and liberties, but the Administration will have to meet us half way. Renominating persons who have been rejected before does not signal a willingness to do so.

Last year, we voted against Mr. Myers because of his record of hostility to environmental protections, and his failure to respect the rights of Native Americans during his years as Solicitor of Interior. If anything, the reasons to oppose his confirmation to a life-time position on a federal court are even stronger now, because of new revelations about his record.

It's especially important for a nominee to the Ninth Circuit to be able to impartially review cases affecting issues on environmental law and the rights of Native Americans. The states in that Circuit are home to many Native American tribes and contain vast public lands. The court often has the final word on legal issues affecting the environment and the rights of Native Americans. Mr. Myers' record raises major doubts on these issues.

During the two years he served as chief lawyer for the Department of the Interior, he often failed in his duty to ensure that his decisions properly took into account the Department's unique relationship with Native Americans and to consult with Native American tribes on matters affecting them.

No case better illustrates the problem than his role in the Glamis Imperial Gold Mine project. In 2001, as Solicitor of Interior, Mr. Myers issued a formal opinion that cleared the way for a foreign company to build a 1,650 acre open-pit gold mine in the heart of the California Desert Conservation Area - one of America's most culturally and ecologically sensitive areas.

The mine project threatened to devastate a local tribe's ability to practice its religion and culture. The Advisory Council on Historic Preservation concluded that allowing the mine to be built would mean that the tribe's "ability to practice their sacred traditions as a living part of their community life and development would be lost."

As a result, the Department concluded that the mine would violate the Federal Land Policy and Management Act, which prohibits mining that causes "unnecessary or undue degradation" of federal lands. But Mr. Myers then issued an opinion reinterpreting the words of the statute in a way that would have allowed the mine to go forward.

A federal court has held that Mr. Myers' opinion "misconstrued the clear mandate" of the Act, and ignored "well-established canons of statutory construction."

Mr. Myers' obvious mis-reading of the law is very troubling, and so is the way he reached his decision. He had an obligation to engage in government-to-government consultation with the tribe before acting against their interests, but he failed to meet with them or with other Colorado River tribes affected by the mine before making his decision. Instead, he met with representatives of the foreign mining company and, in their words, let them "tell their story." But the tribes were not given the same chance for their story to be heard.

His action is analogous to a judge hearing oral argument in a case only from the side he agrees with. In fact, it's much worse, because the side that didn't get a hearing was the side Mr. Myers had a duty to consult.

Mr. Myers says he knew enough about Native American views to make his decision without speaking to the tribes, because he'd read their court filings and a letter from the attorney for the Quechan tribe explaining its concerns. But that letter stated only that the mine threatened areas sacred to the tribe and asked for a meeting with Mr. Myers, which the tribe never got. Six months later, when Mr. Myers finally got around to replying to the letter, he told the tribe he'd already issued his decision permitting the mine.

It's misleading for Mr. Myers to use the tribe's letter asking for a meeting as a way to justify his decision not to meet with tribal leaders. His other reasons for not meeting with the tribe are equally incredible.

In answers to written questions, he used the 9/11 terrorist attack as a reason for not meeting. But two days after September 11th, he met face-to-face with representatives of the mine.

The Quechan tribe has expressed dismay that Mr. Myers would use this national tragedy to excuse his failure to consult with them, when it never prevented him from meeting with the mining company. Despite many attempts to do so, Mr. Myers refuses to acknowledge that his trust obligation and duty of consultation toward the tribes required that he give them, at the very least, the same hearing he provided the private company.

He also stated in answers to written questions that he would have met with the tribes if they had come to Washington. But he never contacted the tribes to tell them that.

Unfortunately, this is not the only example of Mr. Myers' insensitivity to Native American rights. He also actively supported the efforts of Oil-Dri, the world's largest cat litter manufacturer, to build a kitty litter processing facility on federal land near the ancestral burial grounds of the Reno-Sparks Indian Colony in Nevada. In that case, the Reno-Sparks Indian Colony had asked Mr. Myers, in his role as a trustee for Native American lands, to support the tribe's efforts to oppose permits for the facility. Instead, Mr. Myers urged the Justice Department to file an amicus brief opposing the tribe's interests. Mr. Myers cannot recall a single other instance in which he felt so strongly that he asked the Justice Department to serve as amicus in a case, yet he did so to assist a private company with interests opposed to the tribe.

In that case, the government argued that federal law prevented a Nevada county from denying a permit for the kitty litter plant on private lands, an argument later rejected by a Nevada court.

As a result of this record, Mr. Myers's nomination has generated wide-spread opposition from Native American tribes. That opposition has only grown stronger since we last considered his nomination. He is opposed by the National Congress of American Indians, the oldest and largest national organization of Native American and Alaska Native governments, which has never before opposed a nomination to the federal courts. He's opposed by the Affiliated Tribes of Northwest Indians, which also has never before opposed a judicial nominee, and by many, many other Native American tribes and organizations.

The concerns about Mr. Myers' record on Native American issues alone should be enough to reject to his nomination. But his environmental record is just as troubling.

As Solicitor of Interior, his decisions on these issues often went hand-in-hand with the interests of his former clients in the mining and cattle industries. He issued a legal opinion undermining an environmental group's effort to purchase and retire grazing permits on ecologically sensitive public land. After Mr. Myers' first hearing, we learned that as Solicitor, he supported giving millions of dollars' worth of public land to a private company, although readily available public documents showed that the company had no credible claim to the land. He admits that he never sought an estimate of the land's value before seeking to transfer the land to private interests.

In addition, a new report by the Inspector General of the Interior Department raises serious questions about Mr. Myers's failure to supervise an Associate Solicitor, whom he personally authorized to negotiate a settlement with a politically connected Wyoming rancher who repeatedly violated grazing regulations over many years. That settlement has been widely criticized, including by the Administrative Law Judge in the case, as giving the rancher a sweetheart deal that excused past grazing violations, granted new permits, and made it harder to cite this rancher than other ranchers for identical conduct. The Administrative Law Judge called the behavior by his office in the case "shocking," "disturbing" and "disappointing."

Mr. Myers admits that he was briefed several times about the agreement, but he apparently never asked any question about its substance, and failed to supervise the negotiations. He also admits that he never took any disciplinary action against the Associate Solicitor, Bob Comer, who negotiated the deal, even after problems with the settlement became public. At the very least, the incident raises serious questions about his judgment in selecting and supervising the Mr. Comer in this important task.

Mr. Myers has also criticized environmental protections. In a speech to the Cattlemen's Association, he stated that "[t]he biggest disaster now facing ranchers is not nature . . . but a flood of regulations designed to turn the West into little more than a theme park." He has made numerous other intemperate statements disparaging environmental laws, which he has called "outright, top-down coercion."

Mr. Myers and his supporters dismiss these statements as off-hand remarks with little or no meaning. Like every other nominee before this Committee, Mr. Myers says that if confirmed he will put aside past views and look at the issues. We are asked to trust that despite the intensity with which he's advocated these views, and the years he's devoted to opposing environmental regulations that restrain the mining and cattle industries, he will still "follow the law" if he's confirmed to the Ninth Circuit. Repeating that mantra again and again in the face of his extreme record does not make it credible that he will do so.

The hallmark of our system of justice is that all who go to court must know that they will get a fair hearing. Even those who are poor and have no political power or influence have a right to judges who respect that right.

Mr. Myers' record does not justify a life-time appointment to the court of appeals. He's free to keep advocating for private interests in his law practice, but I doubt we'd even confirm him now for the Department of Interior, and we certainly shouldn't confirm him for a federal court.