

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
March 17, 2005

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On the Nomination of William G. Myers
As Prepared for the Senate Judiciary Committee Meeting

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Mr. Chairman, I will oppose the nomination of William G. Myers to the Ninth Circuit Court of Appeals.

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 hearings in February 2004 and March 2005, 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.

Mr. Myers did not explain his personal views during the nomination hearing. When pressed, Mr. Myers would not say that he personally believed certain environmental regulations were unneeded, but that he was merely advocating on behalf of his clients. 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.

In addition to being concerned about his views on key environmental statutes and his ability to treat all parties who appear before him fairly and objectively, I am 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 two equally controversial settlements.

His legal opinion interpreting DOI regulations is one of the only guides we have to evaluate how a Judge Myers would interpret statutes. 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"). In 2003, a federal court found that Mr. Myers's opinion incorrectly interpreted this statute and that the opinion violated three separate, basic rules of statutory interpretation. Mr. Myers's 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. Tribal leaders have called the Mr. Myers' legal opinion and the resulting decision to approve the Glamis mine "an affront to all American Indians."

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 the Glamis mine legal opinion. Despite its specific request, Myers did not meet with the Tribe before he issued his opinion.

At the March 2005 hearing, I wanted to give Mr. Myers the opportunity to clarify why he would meet with one side of the litigation, but not the other. The Tribe specifically requested a meeting with Myers before he issued an opinion on the Glamis issue. Mr. Myers stated at the hearing that he did not meet with the tribe because they would only meet with him in California. In a letter to Chairman Specter, the Tribe rejects this claim, and states that it would have been happy to meet with Mr. Myers in Washington.

I also asked Mr. Myers to explain why he cited the September 11th tragedy as the reason he did not meet with the Tribe. Mr. Myers indicated that he could not travel to California to meet with the Tribe because planes were grounded after the tragedy. He noted that the mining company officials were available to meet with him in Washington on September 13th, 2001. The Tribe calls this response "unseemly" and "patently offensive." Given that the Tribe's meeting request was sent in August 2001 -- a month before the September 11th tragedy -- and given that Mr. Myers could have simply picked up the phone to talk to the Tribe, I share their views about the inadequacy of Mr. Myers's response.

I was particularly concerned with Mr. Myers's statement that the Glamis issue "was akin to a summary judgment motion." I would think that to be fair on this issue, he would have wanted to meet with both sides. In my written follow up-questions, I asked him when ex parte communications with one party, such as those he had with the mining industry, would be appropriate when considering a summary judgment motion. Mr. Myers dodged my question. He basically stated that since he was not a judge, it was appropriate for him to meet with only the mining company.

I find this matter troubling because tribes are entitled to government-to-government consultation. The National Congress of American Indians, which includes more than 250 American Indian and Alaska Native tribal governments, formally opposes the Myers nomination. The Quechan Tribe states that Myers "remains unfit" to serve on the federal bench, that he "exhibits bias," and that as Solicitor, he violated his Department's Trust and other legal responsibilities to protect tribal interests. I ask that the attached March 14, 2005 letter from the Quechan Indian Nation be admitted into record.

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 again dodged my question.

In February 2005, the Interior Inspector General released its report on its 15-month investigation into an illegal settlement with a politically well-connected rancher. The report concluded that in negotiating the settlement Myers's office overruled concerns of the Bureau of Land Management and shut them out of the negotiations, ignored

concerns raised by the U.S. Department of Justice, and presided over a settlement process that suffered from a "profound lack of transparency." The report declared that the key author of the illegal settlement was political appointee and Associate Solicitor Robert Comer. Mr. Myers hired Mr. Comer as one of his six Associate Solicitors and Mr. Comer reported directly to Myers.

At the March 2005 hearing, Mr. Myers testified that he specifically authorized Comer to negotiate this settlement. I was particularly disturbed that Mr. Myers could not identify any other example where he authorized one of his Associate Solicitors to negotiate a similar settlement with an individual BLM permittee. Even after the details of the Robbins settlement emerged, Mr. Myers did not indicate that he took any action to discipline Mr. Comer. As Solicitor, Mr. Myers authorized Comer to negotiate the Robbins deal, failed to supervise Comer's actions, and failed to take disciplinary action against Comer once the serious problems with the settlement emerged. It is my view that Mr. Myers's responses to questions about his role in this settlement reflects poorly on his judgment.

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.