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"Unfit to Judge"

Hearing and Post-Hearing Record Reinforces the
Case Against the Confirmation
of William G. Myers III

Earthjustice

People For the American Way

Community Rights Counsel

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“Unfit to Judge”¹: Hearing and Post-Hearing Record Reinforces the Case Against the Confirmation of William G. Myers III

Prior to his Senate Judiciary Committee hearing on February 5, 2004, the nomination of William G. Myers III to the United States Court of Appeals for the Ninth Circuit had already garnered significant opposition from environmental groups, Native American tribal organizations, civil rights groups, and a host of other organizations and individuals dedicated to preserving a truly independent judiciary. Myers’ career of service to the mining and beef industries—whether as a lobbyist or as Solicitor of the Department of the Interior—made many doubt that he would be able or willing to leave his pro-industry advocacy behind as a federal judge.

Unfortunately, his answers to Senators’ questions about his record did nothing to quiet these fears and, in many cases, further exacerbated them. Since his Senate hearing, opposition to Myers’ nomination has grown substantially, including numerous editorials and commentary in major newspapers,² unprecedented opposition from groups like the National Congress of American Indians and the National Wildlife Federation that had never before opposed a judicial nomination by any president,³ and a letter from over 40 members of the U.S. House of Representatives urging the Senate to reject Myers’ nomination.⁴ In addition, new evidence has emerged of Myers’ anti-environmental activism at Interior, which recently rescinded a harmful position urged by Myers.

It is rare and remarkable for judicial nominees to express even more troubling views after their nomination than before. Nevertheless, Myers has done so. When given the opportunity to explain to the Senate Judiciary Committee the extreme remarks he had made in the past, Myers did not back down, standing by, for example, his assertion that property rights are as “fundamental” as the right to free speech. In his written responses, Myers elaborated on his views concerning non-profit groups’ access to the courts and articulated a position even more extreme than he had voiced previously. When asked to name cases in which he had fought for the environment, rather than industry, Myers’ inability to name any controversial cases only highlighted the complete lack of balance in his career in the public and private sectors. Given an opportunity to prove that he had properly consulted with leaders of the Quechan Tribe before he authored a formal Interior Solicitor’s opinion, which was later rebuked by a federal judge, that put the Tribe’s entire culture in jeopardy, Myers’ response was misleading and dismissive.

When Senators asked Myers to elaborate on his legal experience, his answer revealed a record even thinner than most had believed. There were also numerous occasions when Myers simply chose to avoid answering questions at all, calling his candor into serious question. For all

¹ Editorial, *Unfit to Judge*, Arizona Daily Star, Mar. 23, 2004.

² Post-hearing editorials opposing Myers have appeared in the *San Francisco Chronicle*, *The New York Times*, *The Boston Globe*, *Los Angeles Times*, *The Mercury News [San Jose]*, *The Buffalo News*, and *Arizona Daily Star*. For excerpts from editorials and commentary opposing Myers, see http://www.earthjustice.org/policy/judicial/commentary/myers_commentary.html.

³ As of March 29, 2004, over 175 environmental, Native American, labor, civil rights, disability rights, women’s rights, senior citizen, planning, and other organizations oppose Myers’ confirmation. http://www.earthjustice.org/policy/judicial/pdf/Myers_National-State_Orgs_Opposed_3-23-04.pdf.

⁴ See <http://www.earthjustice.org/policy/judicial/pdf/9thcircuitdems.pdf> (Mar. 31, 2004).

these reasons, discussed in detail below, it is clear that Myers' answers to Senators' questions and the post-hearing record only further prove that he is unfit for a lifetime position on the Ninth Circuit bench.

I. Myers and Property Rights: Setting the Record Straight

In a Supreme Court amicus brief in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,⁵ William Myers asserted that all regulation of habitat on private lands under the Endangered Species Act (ESA) violates the Takings Clause of the Fifth Amendment of the U.S. Constitution and is facially unconstitutional. While landowners occasionally argue (usually without success) that the application of the ESA to their particular property has a sufficiently severe impact on their property to constitute a "regulatory" taking, it is different, and far more extreme to argue as Myers did, that the government cannot regulate habitat modifications at all under the ESA without compensating landowners.

Myers' brief argued that "the Constitutional right of a rancher to put his property to beneficial use is as fundamental as his right to freedom of speech or freedom from unreasonable search and seizure."⁶ It stated further: "[e]very bit as much as a regulation that restricts speech, the regulation of private property here must be held under the strong light of Constitutional scrutiny."⁷ These assertions, and Myers' application of them to the habitat protection regulations at issue in *Sweet Home*, indicate that Myers holds a radical view of the meaning of the Takings Clause—a view that would thwart a wide range of federal, state, and local protections for public health, workers' rights, civil rights, disability rights, and the environment.

Myers did very little to dispel these concerns at his hearing before the Senate Judiciary Committee. Despite repeated opportunities, Myers did not back away from any of the positions he took in the *Sweet Home* brief, attempting instead to describe his views as a natural extension of the Supreme Court's holding in the case of *Dolan v. City of Tigard*.⁸ In an attempt to support the views Myers expressed in *Sweet Home*, Senator Chambliss cited a passage of a 1972 Supreme Court case called *Lynch v. Household Finance*, which refers to the "fundamentality of property rights in our constitutional system."⁹ Yet despite Myers' and his supporters' reliance on these cases, as will be discussed more fully below, neither of the cases supports the radical interpretation of "regulatory takings" doctrine that Myers espoused in *Sweet Home*.

A. A rancher's right to put his property to beneficial use is *not* as fundamental as the right to freedom of speech.

Myers' statement that "the Constitutional right of a rancher to put his property to beneficial use is as fundamental as his right to freedom of speech or freedom from unreasonable search and seizure" is wrong for a simple reason: the Constitution says otherwise. Protections for freedom of speech and against unreasonable searches and seizures are specifically

⁵ Brief of the National Cattlemen's Association and the CATL Fund, *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995).

⁶ *Id.*

⁷ *Id.*

⁸ 512 US 687 (1994).

⁹ 405 U.S. 538, 552 (1972).

enumerated in the First and Fourth Amendments to the Constitution. For example, the very language of the First Amendment—“Congress shall make no law”—demonstrates that those rights are on a different footing than the rest of the Bill of Rights. The document nowhere mentions any protection for the “beneficial use” of property. Indeed, the Constitution fully anticipates regulation and even seizure of private property within certain parameters.

What the Fifth Amendment Takings Clause says is that the government must compensate a landowner when his or her property is “taken” for public use. The plain meaning and original understanding of the Takings Clause applied only to expropriations of property—it didn’t affect regulation of property usage at all.¹⁰ While the Court has subsequently established the doctrine of “regulatory” takings and held that regulations can go so far as to be the functional equivalent of an expropriation, the Court has never said that beneficial use of property is a right on par with specifically enumerated constitutional protections. Indeed, the Court’s regulatory takings opinions have consistently held otherwise, upholding a wide variety of health, labor, safety, civil rights, and environmental safeguards against regulatory takings challenges and declaring that takings have occurred only as to regulations that have the most extreme impact on property value.¹¹

Dolan v. City of Tigard did not alter this regulatory takings doctrine. *Dolan* involved an order by the City of Tigard, Oregon that required a landowner to relinquish a portion of her property to the city in exchange for a building permit. The question was whether the doctrine of unconstitutional conditions (which prevents the government from requiring a citizen to forego a constitutional right in order to receive a government benefit) should be employed in cases involving the Takings Clause. The Court concluded it should and, in this context, stated: “We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.”¹²

Of course the Takings Clause is “as much a part of the Bill of Rights” as any other provision, but that does not mean that the Takings Clause protects beneficial use of property to the same degree as the First Amendment protects free speech. The Constitution says no such thing, and the Supreme Court has held that most provisions of the Bill of Rights are not subject to the same level of protection as are fundamental rights like free speech. To equate free speech with land use under our Constitution is to ignore the obvious fact that the Constitution explicitly limits government interference with the freedom of speech but contains no similar explicit prohibition on government interference with land use.

¹⁰ The Supreme Court has recognized that “early constitutional theorists did not believe the Takings Clause embraced regulations at all” and “[p]rior to Justice Holmes’s exposition in *Pennsylvania Coal Co. v. Mahon*, . . . it was generally thought that the Takings Clause reached only a ‘direct appropriation’ of property . . . or the functional equivalent of a ‘practical ouster of [the owner’s] possession.’” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15, 1014 (1992) (alterations in original) (citations omitted) (quoting *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879)). See FRED BOSSELMAN ET AL., COUNCIL ON ENVTL. QUALITY, THE TAKINGS ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS 82-104 (1973); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1258 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 783 (1995).

¹¹ See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002)

¹² 512 U.S. at 392.

B. The regulation of property has never been subject to the strict scrutiny applied to fundamental Constitutional rights.

Myers' *Sweet Home* brief appears to argue for strict constitutional scrutiny of regulations that limit the beneficial uses to which a rancher can put his or her property. Myers calls the right of beneficial use "fundamental" and argues that "[e]very bit as much as a regulation that restricts speech, the regulation of private property here must be held under the strong light of Constitutional scrutiny."¹³ He also asked the Court to invalidate the ESA's habitat protection provisions in part because of his view that they are not "narrowly tailored" to reduce their impact on property use, an apparent reference to the strict scrutiny test which demands that regulations impinging on fundamental rights be "narrowly tailored to advance a compelling government interest."¹⁴

The Supreme Court has held that a very limited number of "fundamental" rights, including core aspects of the freedom of speech, are entitled to strict scrutiny. Fundamental rights are generally considered to be inalienable, and as such, no amount of compensation would justify their abridgement. As a result, when the Court applies strict scrutiny to abridgments of fundamental rights, it almost always rules against the government.¹⁵

Myers' argument suggests that courts should apply strict scrutiny to strike down regulations altogether, thus giving property owners the ability to essentially *veto* government regulation of their property. But the very fact that the Takings Clause allows for compensation *itself* suggests that property rights are lower-order rights, not on a par with "fundamental" ones. Applying strict scrutiny to federal, state, and local laws and regulations that limit the use of property would require taxpayers to pay corporations for complying with a vast range of labor, health, environmental, disability, and civil rights, as well as zoning ordinances, and other limits on property use.

When Senator Durbin asked Myers about his *Sweet Home* brief and gave Myers the opportunity to clarify or retract his apparent position that strict scrutiny applied to regulations of property use, Myers refused to do so. While asserting that he would employ strict scrutiny "primarily" in the "context of equal protection and due process," he again invoked *Dolan* as support for the position he advanced in his *Sweet Home* brief, implying again that *Dolan* supported application of strict scrutiny to regulation of property. As described above, this proposition is demonstrably false.

Senator Durbin then asked Myers whether he thought certain Americans with Disabilities Act provisions might constitute a taking. Myers responded that the ADA impacts property rights and could possibly raise takings implications. Specifically, he replied, "I think it is fairly obvious that accommodations for persons with disabilities impacts one's property. Whether that rises again to the level of a takings, I don't know." Perhaps Myers is not aware that the federal

¹³ *Id.*

¹⁴ *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

¹⁵ *See Fullilove v. Klutznick*, 448 U.S. 448, 509 (1980) (Marshall J. concurring) (Strict scrutiny is "strict in theory, but fatal in fact.").

court in *Pinnock v. International House of Pancakes Franchisee*,¹⁶ flatly rejected the idea that the ADA could require compensation under the Takings Clause. Noting that “the ADA was specifically drafted to avoid the imposition of economic hardship upon the operators of public accommodations,” the court held that the mere imposition of reasonable expenditures “necessary to comply with the regulation” is simply not a taking.¹⁷ Myers’ description of this issue is troubling, as it stands in sharp contrast with the reasoning and result of *Pinnock* and is indicative of his apparent desire to elevate property rights over important federal protections.

Myers’ views also appear to support a series of extremely disturbing recent rulings by the Court of Federal Claims that have required taxpayers to pay compensation as a result of: (1) human-health protections against salmonella contamination in eggs;¹⁸ (2) federal permit requirements governing mining in national forests;¹⁹ and (3) protections for in-stream flows necessary for the survival of several species under the Endangered Species Act.²⁰ If confirmed to the Ninth Circuit, Myers could be asked to rule on many similar issues. His record gives no confidence that he could set aside his ideological proclivities and decide cases like these impartially.

Later at Myers’ hearing, Senator Chambliss argued in support of Myers’ *Sweet Home* positions, reading a portion of a 1972 procedural due process case called *Lynch v. Household Finance*, which Chambliss believed supported Myers’ position.²¹ In fact, *Lynch* provides no support whatsoever for the proposition that strict scrutiny applies to regulation of property rights. The question in *Lynch* was whether property rights were included at all in the phrase “rights, privileges, or immunities” that is contained in both 28 U.S.C. § 1983 (which provides a cause of action for deprivation of rights, privileges, or immunities under color of state law) and its jurisdictional counterpart 28 U.S.C. § 1343(3) (which gives federal courts the power to resolve such suits). The Court rejected an earlier distinction drawn between personal rights and property rights under Section 1983 but did not speak at all to the level of Constitutional scrutiny applicable to deprivations of property rights. No Supreme Court justice has ever cited *Lynch* in a takings case. *Lynch* thus provides no support for the proposition that property rights are subject to strict scrutiny under the Takings Clause.

¹⁶ 844 F. Supp. 574 (S.D. Cal. 1993), *cert. denied before judgment*, 512 U.S. 1288 (1994).

¹⁷ *Id.* at 588.

¹⁸ *Rose Acre Farms v. United States*, 55 Fed. Cl. 643 (2003), *appeal docketed*, No. 03-5103 (Fed. Cir. 2003).

¹⁹ *Stearns Co., Ltd. v. United States*, 58 Fed. Cl. 229 (2003), *appeal docketed*, No. 04-5031 (Fed. Cir. 2004).

²⁰ *Tulare Lake Basin Water District v. United States*, 59 Fed. Cl. 246 (2003), *judgmt. vacated* (order entered Mar. 4, 2004). *Rose Acre Farms* and *Stearns* are currently being appealed, and the judgment in *Tulare Lake Basin* was recently vacated by the trial court pending further review.

²¹ 405 U.S. 538, (1972). According to the full text of the opinion:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Id. at 552 (citing J. Locke, *Of Civil Government* 82-85 (1924); J. Adams, *A Defence of the Constitutions of Government of the United States of America*, in F. Coker, *Democracy, Liberty, and Property* 121-132 (1942); 1 W. Blackstone, *Commentaries* *138-140).

When asked by Senator Chambliss to comment, Myers responded that he “would not try to draw any hierarchy among the amendments, or for that matter any particular clause of the Constitution.” Myers’ intent was clearly to lend further support for the position he advanced in *Sweet Home*. Contrary to Myers’ argument there, laws limiting the ability of owners to use property have never been reviewed as closely by the courts as laws limiting the freedom of speech or preventing discrimination. When rights conflict—as they often do when a property owner claims a right to be free of unwanted requirements that provide access to the disabled, protect the environment, and prevent discrimination—courts must adjudicate these disputes through a common understanding of our constitutional structure and precedent, an understanding Myers does not appear to share. At the very least, it is notable that in responding to Senator Chambliss, Myers again made no attempt whatsoever to distance himself from his *Sweet Home* position.²²

Property rights were held dear by the Framers, just as they are cherished by property owners throughout America today. They are, of course, extremely important. But nothing in the Constitution, our traditions, or the Court’s jurisprudence suggests that they are “fundamental” in the constitutional sense of warranting strict scrutiny of protections that limit property use. An affinity for property rights does not justify Myers’ argument in *Sweet Home* for ignoring the text of the Constitution and elevating property use to a fundamental constitutional right. Nor does it allow a judge to ignore nearly a century of Supreme Court precedent to apply strict scrutiny to regulations of property use.

II. William Myers’ Dangerous Views on Access to the Courts Would Effectively Bar Many Vital Public Interest Claims

During his hearing, several Senators questioned Myers on the intemperate remarks he has made throughout his career deriding environmental protections and environmental organizations. As Interior Solicitor, for example, Myers called environmental critics of his Department’s policies the “environmental conflict industry” and stressed the “importance of . . . rejecting [their] scheming.”²³ He previously called environmental organizations “litigation happy,”²⁴ and sarcastically accused environmentalists of “mountain biking to the courthouse as never before, bent on stopping human activity wherever it may promote health, safety, and welfare.”²⁵ These statements call into serious question Myers’ ability, if he were to be confirmed to the Ninth Circuit, to fairly and impartially decide cases brought by environmental organizations. As

²² At the end of his testimony, when pressed by Senator Durbin to explain how his view of the Takings Clause can be squared with Supreme Court decisions upholding statutes like the Civil Rights Act that limit a property owner’s right to exclude Americans on the basis of race, Myers cited Supreme Court precedent holding that property rights are subject to “reasonable regulation.” Myers made no attempt, however, to reconcile these holdings with his position in *Sweet Home* which would invalidate “reasonable” regulations under the ESA and other federal laws that are not narrowly tailored to meet a compelling government need. Nor did Myers distance himself from the argument he made in *Sweet Home* about the meaning of the *Dolan* case.

²³ William Myers, *Agency Lawyer Has Obligation to Speak on Behalf of a Client*, IDAHO STATESMAN, Nov. 26, 2002, available at <http://www.idahostatesman.com/Search/story.asp?id=26580>.

²⁴ Bill Myers, *Litigation-Happy Environmentalists Need Reform*, MOAB TIME-INDEPENDENT, April 30, 1998.

²⁵ Bill Myers, *The Legal Bleat: Kids, Cars and Commodities*, IDAHO WOOL GROWERS BULLETIN, Feb. 1998 at 7.

Senator Schumer has stated, Myers' record "screams passionate activist, and doesn't so much as whisper impartial judge."²⁶

Myers' responses to post-hearing questions asked by Senator Dianne Feinstein vividly illustrate how Myers' hostility to environmental litigation could translate into legal rulings that deny environmentalists access to federal court. Myers' answers to Senator Feinstein's written post-hearing questions indicate that, if confirmed, he could impose a sweeping requirement that non-profit environmental groups and other "non-profit institutions" post prohibitively expensive bonds, pursuant to Federal Rule of Civil Procedure 65(c), in order to deter these groups from asking for "wrongful injunctions."

In her written post-hearing questions, Senator Feinstein asked Myers to name the cases he was referring to in an April 22, 1998 *Telluride Daily Planet* editorial when he wrote:

The courts themselves are partly to blame [for excessive environmental litigation]. A judge may require a plaintiff to post a bond for payment of costs and damages suffered by any opposing party that is restrained or enjoined from an activity later found by the court to be lawful. But judges have been reluctant to apply the rule to non-profit environmental organizations. These outfits face no financial risk when frivolously seeking a court-ordered injunction of a lawful activity.

In his answer, Myers stated that he was not referring to any specific cases, but to Federal Rule of Civil Procedure 65(c), which states that applicants seeking restraining orders or preliminary injunctions must offer a security, in an amount that the court finds appropriate, to cover the costs and damages incurred by the enjoined party in the event the injunction is later overturned. Myers explained:

While the rule does not exempt non-profit organizations from its reach, research for a client led me to believe that some courts were reluctant to apply it to non-profit institutions. Thus, since this rule was designed to curb wrongful injunctions, I was concerned that non-profit institutions would be more likely to seek such injunctions if the rule were not applied to them.

In this answer, Myers articulated his extreme view, which would severely and unjustifiably prevent citizen access to the courts, and actually broadened and extended his ideologically anti-environmental position.

A. Myers' view is in conflict with Ninth Circuit precedent.

Myers' view is contrary to a large body of long-standing Ninth Circuit case law, beginning with *Friends of the Earth, Inc. v. Brinegar*.²⁷ In that case, the Ninth Circuit

²⁶ Sen. Charles Schumer, Remarks on the Nomination of William Myers to the 9th Circuit Court of Appeals, April 1, 2004, available at

http://www.schumer.senate.gov/SchumerWebsite/pressroom/press_releases/PR02546.Myers040104.html

²⁷ 518 F.2d 322, 323 (9th Cir. 1975).

recognized and affirmed the need to exempt public interest organizations from the bond requirement of Rule 65(c) and applied the Rule's requirement that bonds be "in such sum as the court deems proper."

In *Brinegar*, the court overturned the district court's requirement of a \$4,500,000 bond (the district court's estimate of the defendant's potential "costs and damages") and found a nominal \$1,000 bond to be appropriate. The Ninth Circuit's decision was in response to an appeal by Friends of the Earth, which argued that, "if public interest groups and citizens are required to post substantial bonds in NEPA cases in order to secure preliminary injunctions or injunctions pending appeal, plaintiffs in many NEPA cases would be precluded from effective and meaningful appellate review [and] such bonds would seriously undermine the mechanism in NEPA for private enforcement."²⁸ The Ninth Circuit court recognized that "Congress sacrificed some efficiency and economy in order to further a strong policy of environmental protection [through NEPA]" and overturned the district court bond as unreasonable because the plaintiff "private organizations and citizens, with limited resources" had a likelihood of success.²⁹

Myers' view is thus contrary to what the *City of South Pasadena v. Slater* court³⁰ referred to as the Ninth Circuit's "general rule" that "[c]ourts routinely impose either no bond or a minimal bond in public interest environmental cases." The *Slater* court cited the Ninth Circuit's *Brinegar* decision in noting that the court "has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review."³¹ The *Slater* court recognized this policy as the accepted precedent in the Ninth Circuit, stating that it "finds that there is no basis to depart from this general rule" and therefore "declines to require a bond."³²

Courts across the nation have endorsed this view of security bonds. In *Natural Resources Defense Council v. Morton*,³³ for example, the court required a security bond in the amount of \$100 in the face of the government's request that the plaintiffs post a multi-million dollar bond in favor of the United States to cover any estimated lost revenue resulting from an injunction affecting off-shore oil and gas leasing operations. Indeed, in cases brought by non-profit environmental organizations, courts routinely protect the public interest and carry out congressional intent by waiving bonds or requiring a nominal bond for a preliminary injunction.³⁴

²⁸ *Id.*

²⁹ *Id.*

³⁰ 56 F. Supp. 2d 1106, 1148 (C.D. Cal. 1999).

³¹ *Id.*

³² *Id.* See also *People ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) (upholding the district court's waiver of a security bond for a preliminary injunction sought by the League to Save Lake Tahoe, a non-profit environmental group since "requiring security would effectively deny access to judicial review" and "special precautions to ensure access to the courts must be taken where Congress has provided for private enforcement of a statute.").

³³ 337 F. Supp. 167, 168 (D.D.C. 1971), *aff'd on other grounds*, 458 F.2d 827 (D.C. Cir. 1972).

³⁴ See, e.g., *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972) (upholding the district court's decision to not require a security bond under Rule 65(c) before issuing a restraining order); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971) (\$100 bond); *Wilderness Society v. Tyrrel*, 701 F. Supp. 1473 (E.D. Cal. 1988) (\$100 bond), *rev'd on other grounds*, 918 F.2d 813 (9th Cir. 1990); *Sierra Club v. Block*, 614 F. Supp. 488 (D.D.C. 1985) (\$20 bond); *Sierra Club v. Block*, 614 F. Supp. 134 (E.D. Tex. 1985) (\$1 bond); *Highland Co-op*

B. Myers' view on security bonds would thwart congressional intent and ignores the very purpose of security bonds.

In his 1998 article and in his response to Sen. Feinstein, Myers ignored both of the primary reasons that courts have articulated for the general rule on bonds in environmental and other public interest litigation. First, the Ninth Circuit and other courts recognize that requiring plaintiffs to post a substantial bond would effectively deny them access to the courts and discourage litigation brought to protect the environment.³⁵ The general inability of nonprofit organizations to afford substantial bonds underscores this concern. In opposing Myers, Senator Leahy recognized the importance of this public interest litigation, citing the need for “private attorney generals” to assist in enforcing environmental safeguards, particularly at a time when deficits are limiting the resources available for the government to act.³⁶

Thus, courts have routinely waived the posting of bonds for citizen organizations. For example, the court in *Sierra Club v. Norton*³⁷ held that a \$1,000 bond was sufficient for the issuance of a preliminary injunction; the court determined “that nominal bond is appropriate in this instance on the grounds that the injunction to enforce the requirements of a federal environmental statute is in the public interest, and ... to post bond in an amount sufficient to cover the potential losses to [developers] would effectively bar plaintiffs—two non-profit public interest organizations—from obtaining meaningful judicial review or appropriate relief.”³⁸ This court, along with many others, recognized that waiving or requiring only nominal bonds is frequently necessary to give effect to Congress’s intent to provide for citizen enforcement of legislation like NEPA, the Clean Water Act, the Clean Air Act, and other environmental statutes.

Secondly, courts have recognized that non-profit plaintiffs’ lack of financial interest in the outcome warrants a waiver of the bond requirement. Rule 65(c) is based on the theory of unjust enrichment, i.e., that plaintiffs should not benefit financially from the wrongful granting of preliminary relief against defendants. Where plaintiffs gain no pecuniary interest from the injunction, the purpose of Rule 65(c) is not served and no bond should be required.³⁹

v. City of Lansing, 492 F. Supp. 1372 (D. Mich. 1980) (no bond); Citizens for Responsible Growth v. Adams, 477 F. Supp. 994 (D.N.H. 1979) (no bond); Wisconsin Heritages, Inc. v. Harris, 476 F. Supp. 300 (E.D. Wis. 1979) (no bond); Sierra Club v. Froehlke, 359 F. Supp. 1289 (S.D. Tex. 1973) (\$100 bond), *rev'd on other grounds sub nom.* Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974); Boston Waterfront Residents Ass'n v. Romney, 343 F. Supp. 89 (D. Mass. 1972) (no bond); Silva v. Romney, 342 F. Supp. 783 (D. Mass. 1972) (no bond); Environmental Defense Fund v. Corps of Engineers, 331 F. Supp. 925 (D.D.C. 1971) (\$1 bond); Environmental Defense Fund v. Corps of Engineers, 324 F. Supp. 878 (D.D.C. 1971) (\$1 bond); Wilderness Society v. Hickel, 325 F. Supp. 422 (D.D.C. 1970) (\$100 bond), *rev'd on other grounds sub nom.* Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973).

³⁵ See, e.g., People ex rel. Van De Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1325 (9th Cir. 1985); Wilderness Society v. Tyrrel, 701 F. Supp. at 1492; Wisconsin Heritages, 476 F. Supp. at 302; Natural Resources Defense Council v. Morton, 337 F. Supp. at 169.

³⁶ Statement of Sen. Patrick Leahy, The Myers Nomination, April 1, 2004, *available at* <http://leahy.senate.gov/press/200404/040104a.html>.

³⁷ 207 F. Supp. 2d 1342 (S.D. Ala. 2002).

³⁸ *Id.*

³⁹ See *Wisconsin Heritages*, 476 F. Supp. at 302 (no bond required where plaintiff “is a nonprofit organization with no apparent financial stake in the outcome of this suit.”).

C. Myers ignored judicial recognition that the high threshold necessary to obtain a preliminary injunction is itself a bar against meritless actions.

Myers disregards the judicial recognition that the substantial burden necessary to obtain a preliminary injunction, including a showing “of probability of success at trial, irreparable injury and balance of the equities provide protection against frivolous actions.”⁴⁰ Also, Myers’ criticism of courts that waive the bond rule based on the particular facts of a given case indicates that he does not understand that the rule itself requires judges to exercise discretion in decisions about requiring security bonds. The rule he would impose is simply not appropriate. Moreover, Myers offers no reasons why or examples where his concerns about truly frivolous pleadings by attorneys would not be addressed by applicable sanctions under Rule 11 of the Federal Rules of Civil Procedure.

D. Myers’ view would prevent many ordinary citizens from vindicating their rights in court.

The potential harm caused by Myers’ view of Rule 65(c) reaches beyond environmental cases: many organizations and individuals (often representing themselves) would be unable to protect and enforce their rights if trial courts automatically required that bonds covering the costs and damages suffered by any opposing party be posted before granting an injunction in public interest litigation.⁴¹

Myers’ expansion of his position in his written answer to include not only environmental groups or non-profit organizations but also “non-profit institutions” strongly suggests that he would apply an inflexible across-the-board bond requirement that would also chill litigation by, for example, non-profit Native American, Native Hawaiian and Alaska Native organizations, Indian tribes, and tribal institutions.⁴² This is an area of particular relevance to his nomination, given the Ninth Circuit’s oversight of nine western states that encompass Native Hawaiians, Alaska Natives, and many Indian tribes. In addition, Myers’ nomination has engendered unprecedented opposition from American Indian tribes and from Native American and Native Hawaiian organizations based upon his record as Interior Department Solicitor, where he ignored his trust responsibility to Native American tribes.⁴³

Myers’ views of Rule 65(c) further illustrate the danger that he will be an activist judge if permitted to sit on the Ninth Circuit bench. Not only are Myers’ views in conflict with well-

⁴⁰ Bass v. Richardson, 338 F. Supp. 478, 491 (S.D. N.Y. 1971); *see also* State of Alabama ex rel. Baxley v. Corps of Engineers of U.S. Army, 411 F. Supp. 1261, 1276 (N.D. Ala. 1976).

⁴¹ *See* Warner v. Ryobi Motor Products Corp., 818 F. Supp. 907 (D.S.C. 1992) (in a case involving retirees attempting to preserve their benefits, the court imposed a bond of only \$250 in light of several factors, including the adverse effect on the public interest, the potentially irreversible consequences if injunctive relief were denied, plaintiffs’ likelihood of success at trial, and the plaintiffs’ limited financial resources).

⁴² Thus, there is a serious question whether Myers would follow court decisions that waive any preliminary injunction bond for Indian Tribes, which have historically been impecunious and would be hampered in obtaining judicial review by the imposition of a substantial bond. *Governing Committee of Pinoleville Indian Community v. Mendocino County*, 684 F. Supp. 1042, 1047 (N.D. Cal. 1988) (no bond); *see also* *Sac and Fox Nation of Missouri v. Lafaver*, 946 F. Supp. 884, 889 (D. Kan. 1996) (no bond).

⁴³ *See, e.g.*, National Congress of American Indians, Resolution #ABQ-03-061 (Nov. 21, 2003), *available at* <http://www.ncai.org/data/docs/resolution/annual2003/03-061.pdf>.

established Ninth Circuit precedent, but their application would also prevent private citizens from taking steps to enforce key environmental, health, and safety regulations as Congress intended them to do. His insistence that costly security bonds are necessary to prevent issuance of meritless injunctions ignores the extraordinarily high threshold a plaintiff must cross in order to obtain an injunction in the first place. And the undue burden Myers would place on plaintiffs taking action in the public interest would deny many their day in court and permit dangerous activity to continue unchecked.

The serious concerns raised by Myers' views on Rule 65(c) are explained more fully in a memorandum available at www.earthjustice.org/policy/judicial/pdf/Myers_Access_Courts.pdf.

III. Responses to Myers' Attempts to "Greenwash" His Environmental Record

In light of Myers' pro-industry record—both as a lobbyist and as a government official—several Senators asked Myers whether he could give examples of occasions on which he fought for environmental or tribal, rather than industry, interests. In response, Myers claimed that his record actually “demonstrates that I worked vigorously, and in a manner consistent with the law, to safeguard the environment, conserve natural resources, and defend the interests of Native Americans.” Myers supported his claim by summarizing a small number of what he claimed were “important steps that I took at the Department of the Interior to advance these objectives.” But none of the instances named at his hearing or in his responses to Senators' written questions represent a genuine choice by Myers to champion environmental or tribal interests over the desires of the mining or beef industries. At most, they include isolated examples that indicate that he did not *always* violate the bare minimum standards one might expect of a Solicitor. Indeed, they reinforce the conclusion that when Myers is actually presented with a choice, he takes the side of those industries, even when he must distort or rewrite the law to justify his position.

None of the “steps” Myers listed in response to Senators' questions regarding his pro-industry record effectively mitigates his past actions. He pointed to several instances where he supported enforcing the law against individual rogue companies and ranchers, but neglects to mention that this is the Department of the Interior's minimum responsibility as the manager of federal lands. For example, in the Shell Oil flaring matter, Myers attempted to claim that he took a pro-environmental stance for “having supported record royalty recoupment and penalties against Shell Oil Company for its illegal flaring” of approximately 15 billion cubic feet of natural gas from one of its offshore platforms over the course of about four years. According to Myers, Shell also falsified records in its apparent attempt to defraud the American people and avoid paying millions of dollars in royalties. However, Myers' claim to “support” the settlement of a civil prosecution that was initiated during the previous administration only demonstrates that he did not stand in the way of holding Shell accountable for its unlawful behavior. Likewise, in the case of *Harris v. United States*, Myers claimed pro-environmental credit for having merely answered local BLM officials' requests that he ask the Department of Justice to “secure a preliminary injunction against a rancher” who illegally bulldozed a creek in California's White Mountains. Even President Reagan's Interior Secretary James Watt, a frequent opponent of environmental regulation, could point to cases where his Interior Department enforced the law.

It is unremarkable, and certainly not laudable, that the Interior Solicitor sometimes enforced the laws that the Department was charged with administering.

Myers' claims of having taken actions favorable to the Native American community similarly fall flat. For example, Myers claimed credit for "defending an interpretation of the Native American Graves Protection and Repatriation Act" that would have allowed the remains of a 9,000-year-old skeleton excavated in Oregon to be given to a coalition of Indian tribes. A 2000 decision by DOI approved handing over the remains, and was subsequently challenged by a group of scientists. Myers seeks credit for simply adopting the position of his predecessor in ongoing litigation conducted by the Department of Justice in defense of the DOI decision—an extremely passive act.

In the case of *Artichoke Joe's California Grand Casino v. Norton*,⁴⁴ Myers took credit for "support[ing] the defense of the constitutionality of Proposition 1A," enacted by California pursuant to the Indian Gaming Regulatory Act,⁴⁵ which gave Native American tribes the exclusive right to conduct casino gambling in California. Under the Act, DOI is responsible for approving agreements between States and tribes authorizing casino gambling. After DOI approved certain agreements, a number of card clubs and charities brought action against DOI in a facial challenge to the Act. Because the Secretary of DOI is only permitted to disapprove such agreements in very narrow circumstances—none of which were present in the case at hand—it would have been incumbent upon the Department of Justice, with or without Myers' "support," to defend DOI against a constitutional challenge alleging the facial invalidity of the Act. It is also worth noting that the California Nations Indian Gaming Association strongly opposes Myers' confirmation.⁴⁶

Moreover, none of the matters discussed by Myers represents a genuine effort by Myers to champion environmental and tribal interests over those of industries as a whole, rather than discrete companies or individuals in unique circumstances. For example, in the case of the Lower Penobscot River restoration, Myers seeks credit for supporting the removal of dams in Maine, but, as he notes, the "State of Maine, conservation groups, the Penobscot Indian Nation, and the power company that owned the dams all supported the agreement." It would have been difficult indeed to oppose the dams' removal under these circumstances. Similarly, Myers also listed the Sandia Pueblo "legislation, which was backed by a broad bipartisan coalition as well as the Pueblo of Sandia," and did not cite any opposition to resolution of the status of Governors Island National Monument. Another of his purported "pro-environmental" steps, the Gold King Mining claims settlement, involved a taxpayer payment to private owners of gold mining claims that Myers terms "just compensation," even though he admits that the claims may not have been valid. This step can actually be seen as advancing Myers' anti-environmental, extreme view on takings and property rights.

Further, the words that Myers used reveal that his role and involvement in the matters he claims are pro-environment and pro-Native American was minimal; in describing those matters,

⁴⁴ 353 F.3d 712 (9th Cir. 2003).

⁴⁵ 25 U.S.C. 2701 et seq. (2004).

⁴⁶ See Tribes Oppose Myers Nomination to 9th Circuit Court, March 25, 2004, *available at* <http://news.corporate.findlaw.com/prnewswire/20040325/25mar2004134549.html>.

Myers relates how he “supported” or “argued” for the stated position, or “encouraged my staff,” “asked,” “requested,” and “authorized the regional solicitor” to take certain actions. Myers’ own descriptions sharply contrast with the extraordinary pro-industry actions he took as Interior Solicitor that he now apparently is attempting to obfuscate. These include the only two formal Solicitor’s opinions (and one “clarification”) that he wrote, which broadly favored the mining and beef industry interests to which he devoted the bulk of his career, at the expense of the environment and of his trust responsibility as Solicitor to consult with and to protect the interests of American Indian tribes. This imbalance is confirmed by Myers’ Judiciary Committee questionnaire: his “most significant” cases or legal activities only included one of the “steps” he now cites in his defense. The rest of the meager experience that he listed included several anti-environmental matters and three cases as Interior Solicitor in which he opposed Indian tribes in whole or in part.

Myers is a nominee for a lifetime seat on the Ninth Circuit, which oversees almost three-fourths of our federal lands, and decides issues that directly affect many American Indian tribes. He has a well-documented record of hostility to environmental and tribal values. He seeks to counter that record by providing examples of instances in which he actually did his job. It cannot be enough for him to say in response that he should be confirmed to the Ninth Circuit because he did not *always* refuse to support his own agency’s responsibility to enforce the law against blatant wrongdoers, and did not *always* reverse his Department’s historical position or current recommendations on environmental and tribal matters.

IV. New Evidence of Myers’ Anti-Environmental Activism

Since the hearing, new evidence of Myers’ anti-environmental actions as Solicitor has emerged.⁴⁷ On March 8th, the *Los Angeles Times* reported that Myers wrote a letter last June that lamented the fact that the government “unfortunately” did not have the authority to turn over valuable public lands to a private company “without compensation,” and concluded that “the department would support private relief legislation” to give the land to the company. The land contains sand and rock that the Interior Department’s Bureau of Land Management (BLM) says could be worth hundreds of millions of dollars for construction projects. On the basis of Myers’ recommendation, two California congressmen introduced a bill that would give the land to the company, Yuba River Properties, which it turns out had no valid claim to the land.

Myers pledged the Interior Department’s support without even consulting local BLM officials, who opposed the move, or without doing basic title research that would have cast doubt on the company’s claim. The director of the BLM local office stated that, “[t]here is 1.3 million tons of rock and 200,000 tons of sand” on Lot 5. “Why in the world would we give it up? I’m not here to give away public resources.” He added that “[i]t seemed strange for a top attorney” to take a position without doing basic research, confirming that he had never met or talked to Myers. Another local BLM employee remarked, “[t]urns out Solicitor William G. Myers III

⁴⁷ Henry Weinstein, *Interior Attorney Pushed Land Deal: U.S. Agency’s Chief Lawyer, Now an Appeals Court Nominee, Urged Turning Over Publicly Owned Parcel to Firm*, LA TIMES, March 8, 2004, available at <http://www.communityrights.org/Newsroom/crcInTheNews/LAT3-8-04.asp>; Editorial, *Unfit to Judge*, ARIZONA DAILY STAR, March 23, 2004, available at <http://www.azstarnet.com/dailystar/opinion/14915.php>

suggested this solution to [Representatives] Herger and Doolittle. Would have been nice if he had asked us first.”

The Interior Department was forced to reverse its support of the bill this year on the basis of public record facts that should have been readily available to Myers. Myers’ attempt to give away valuable public lands in this case is another example of how he used his position as Solicitor to put the private interests over the public’s interest and was a factor in Senator Feinstein’s Judiciary Committee vote against his confirmation.⁴⁸

V. Myers’ Failure to Consult with the Quechan Tribe

The answers Myers gave in response to Senators’ questions about his lack of contact with the Quechan Tribe before writing the opinion that re-opened the door to the controversial Glamis Mine project were extremely unsatisfactory. The proposed Glamis Mine would be a 1,600-acre open-pit gold mine, which would destroy large parts of the Quechan Indian Tribe’s sacred lands. The mine would produce only one ounce of gold for every 280 tons of rock disturbed, and produce “waste rock piles as tall as 30-story buildings.” During the Clinton Administration, Myers’ predecessor as Interior Solicitor, John Leshy, authored an opinion finding that the Federal Lands Policy and Management Act (FLPMA) provided Interior with the authority to deny the mine if it was determined that it would cause undue impairment of public resources. On the basis of that opinion, Secretary Babbitt rejected the project on the grounds that it would cause undue harm to the Quechan Tribe’s religious traditions.⁴⁹ Myers’ opinion as solicitor overturned the Leshy opinion, and earned a harsh rebuke from a federal judge who found that Myers had misconstrued Congress’s mandate to prevent unnecessary or undue degradation of public lands.⁵⁰

The Quechan Tribe has harshly criticized Myers for failing to consult with them prior to writing his opinion, which had the potential to devastate the Tribe’s culture. Myers failed to meet with Quechan representatives, despite the fact that the Department of the Interior has a trust obligation to preserve Native lands, and even though the Tribe had requested to meet with him. Myers did find time, however, to meet and discuss the matter with officials from the mining company. During his hearing, and in written, post-hearing questions, Judiciary Committee members took the opportunity to ask Myers about his conduct in relation to the Glamis matter. The answers he provided were disturbing and, at times, even misleading.

Myers claimed that it was not necessary for him to personally meet with Quechan officials, because he had received a letter from the Tribe’s counsel in August 2001 that gave him the information he needed on the Quechan Tribe’s views. In making this claim, Myers wildly overstates the content and even the purpose of this letter. The short, five-paragraph letter was only intended to briefly acquaint Myers with the Quechan Tribe. In fact, at the time that it was written, the Quechan Tribe and its counsel were not even aware that Myers was considering

⁴⁸ Statement of Senator Dianne Feinstein on the Nomination of William Myers, April 1, 2004, *available at* <http://feinstein.senate.gov/04Releases/r-myers.htm>.

⁴⁹ Press Release, Department of the Interior, Secretary Babbitt Denies Gold Mine in Imperial County, California, Jan. 17, 2001, *available at* <http://www.doi.gov/news/archives/010118.htm>.

⁵⁰ *See* Mineral Policy Center v. Norton, 292 F. Supp. 2d 30 (D.D.C. 2003).

writing a new opinion concerning the Glamis matter. Though the letter did state that the Tribe had been pleased with the previous denial of Glamis' permit, and asked Myers to defend the denial against Glamis' challenges, it did not even mention the Leshy opinion and barely touched on the "high sacred value" of the land in dispute. It is highly insulting to the Tribe to suggest that this single "get acquainted" letter, written before the Tribe even knew Myers was considering overturning the Leshy opinion, is an acceptable substitute for direct government-to-government consultation.

Myers' claims to have taken the brief letter into account before writing his opinion are further complicated by the fact that he did not respond to the letter until six months later—after his opinion had already been issued. Myers offers two explanations for this. First, Myers says that the letter contained an invitation to visit the Tribe in California, which he was unable to accept because the terrorist attacks of September 11, 2001 made such travel impractical. While it may be plausible for Myers to assert that the tragic events would have made it difficult for Myers to travel to California, there is simply no excuse for his failing to contact Tribal representatives by telephone (a suggestion actually made in the letter), or inviting them to meet with him in Washington. In fact, Myers met with Glamis officials on September 13, 2001, two days after 9/11, to discuss the very same issue. Through counsel, the Tribe has expressed that they are "extremely offended" that Myers is attempting to use 9/11 as an excuse for failing to provide them with appropriate opportunity for consultation.

Secondly, Myers claimed that he did not respond to the letter in a timely fashion because, after receiving the Quechan letter, he received a number of letters from other tribes supporting the Quechan Tribe's position in the Glamis matter, and he decided to wait until a single response could be drafted to address all the letters at once. Certainly, this is no excuse for a six-month delay in responding to the Tribe's letter, especially in light of the fact that Myers was in the process of writing an opinion with such extraordinary potential to harm the Tribe's way of life and had already met with Glamis representatives. It should also be noted that the Tribe's FOIA research reveals that most of the letters Myers refers to had already arrived in his office by fall of 2001, making his excuse for the delay in responding to any of the tribes' letters all the more absurd.

Myers has also attempted to defend his failure to consult with the Quechan Tribe by claiming that his predecessor, John Leshy, did not meet with the Tribe prior to authoring his opinion on the Glamis matter. While Leshy did not meet with tribal leaders face-to-face, it is simply misleading to compare Leshy's office's level of contact with the Quechan Tribe to Myers' office's complete lack of contact. Representatives from Leshy's office met with the Tribe and its counsel and spoke with tribal representatives via telephone before Solicitor Leshy issued his opinion on the Glamis matter. No one from Myers' office ever contacted the Tribe before issuing Myers' new Glamis opinion. Comparing Myers' complete inattention with Leshy's limited face-to-face interaction with Tribal leaders is disingenuous. Furthermore, it should be obvious that personally meeting with the Tribe prior to issuing an opinion that is potentially disastrous to its way of life is more important than personally meeting with the Tribe prior to issuing an opinion that comports with the Tribe's views.

The Department of the Interior has a trust obligation to protect Native American rights,⁵¹ and William Myers failed that trust miserably. Even if every excuse Myers claims were true, it does not change the fact that he had an obligation to meet with tribal representatives before issuing an opinion so damaging to their way of life. Myers' attempts to explain his lack of consultation are not only inadequate, but betray a dismissive attitude toward tribal concerns.

VI. Myers' Limited Legal Experience

In addition to his determination to serve corporate interests over protecting public rights, William Myers simply does not have the stellar credentials that should be required for a lifetime seat on the Ninth Circuit bench. Myers has spent very little of his career in actual legal practice, choosing instead to focus primarily on corporate lobbying. Despite repeated opportunities to defend and explain his resume, Myers has failed to sufficiently demonstrate the practical courtroom and related legal experience necessary for any circuit court judge.

When asked to describe his legal practice in his Judiciary Committee questionnaire, Myers explained that most of his career has been spent lobbying for corporations, advising government officials on legal issues, representing private sector clients in federal and administrative litigation, and assisting with transactional matters. Little of his actual work, however, is relevant experience for a circuit court judge. This may be among the reasons why more than one-third of the panel of the American Bar Association's Standing Committee on the Federal Judiciary that reviews the qualifications of federal court nominees, rejected Myers as "unqualified" for the bench.⁵² Not a single member of the fifteen-member ABA panel considered Myers "well-qualified" for the position. In fact, Myers received the lowest rating given to any of the Bush appellate court nominees, a dubious distinction shared only by Janice Rogers Brown, who the Senate has refused to confirm to the D.C. Circuit.

A. Myers had a sketchy recollection of, and insignificant participation in, several of his "most significant" cases.

In answering Senator Kennedy's post-hearing questions, Myers attempted to highlight his litigation experience. Yet Myers' very limited recollection of, and participation in, several of his "ten most significant litigated matters" demonstrates that even his most important court cases were a distant second to his lobbying career. In one of his post-hearing questions to Myers, Senator Kennedy asked whether any of the "ten most significant litigated matters" Myers listed in his Senate Judiciary Committee questionnaire involved Myers' participation at trial. Myers answered that he had tried *Matthew Johnson et al. v. Board of Trustees* and "may have tried" the *Matter of Estate of Reed*. Myers further stated that he "participated" in the trials of *Public Lands Council v. Babbitt* and *Idaho Watersheds Project v. Hahn*, though he did not elaborate on the nature of his participation.

⁵¹ *E.g.*, *Parravano v. Masten*, 70 F.3d 539, 546 (9th Cir. 1995) ("The federal government is the trustee of the Indian tribes' rights, including fishing rights. This trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole.").

⁵² Ratings of Article III Judicial Nominees: 108th Congress, *available at* <http://www.abanet.org/scfedjud/ratings108.pdf>

It is quite curious that Myers could not even recall for certain whether he actually tried one of what he called the ten most significant cases of his career. The laborious preparation and stressful demands of arguing a “significant” matter at trial would earn a permanent spot in the memory of most attorneys—particularly one who had tried so few matters. And even attorneys with extensive trial court experience could be expected to recall the extent to which they participated in one of the ten most significant matters they had ever handled. Myers’ inability to recall such critical detail calls into question just how “significant” the matter actually was—both in terms of the legal issues raised and in terms of the attention Myers afforded it at the time.

In another written question, Senator Kennedy pointed out that court records indicate that Myers was actually removed as counsel from one of his “ten most significant litigated matters,” *Idaho Watersheds Project v. Hahn*, several months before the district court issued a decision, and asked Myers to elaborate on his participation in the matter. Myers stated that he was only involved from the time his clients intervened in the matter through the preliminary injunction and summary judgment phase of the case. Myers stated that he was not involved in writing the brief in support of a permanent injunction, nor was he involved in the appeal. The fact that Myers was removed as counsel in one of his “ten most significant” cases is a poor reflection on his legal experience.

B. Cases Myers “took to verdict.”

Looking beyond Myers’ “ten most significant cases” further demonstrates his limited legal experience. At his hearing, Myers claimed that he had taken approximately a dozen cases to verdict.⁵³ In his written post-hearing questions, Senator Durbin gave Myers an opportunity to expand on this answer by providing information about the specific cases he had taken to verdict and descriptions of his participation in them. Myers has conceded that he has never tried a case before a jury,⁵⁴ and in the cases he described in response to Senator Durbin’s written questions, only a handful appear to have involved Myers’ taking the case to its final resolution.

Curiously, one of the cases Myers claimed to have “taken to verdict” in his answers to Senator Durbin is a case he made a lesser claim to in answering Senator Kennedy’s questions. In his answers to Senator Kennedy, Myers stated that he “participated” in the trial of *Public Lands Council v. Babbitt*, but in answering Senator Durbin, he claimed to have taken the case to verdict. In further response to Senator Durbin, however, Myers stated that his participation in the case was limited to “facilitat[ing] review of filings and client participation in the case in concert with co-counsel” and attending the hearing. From this description of his involvement, it would appear that his answer to Senator Kennedy was far more accurate, and again reflects very limited participation in the litigation.

⁵³ The technical definition of trying a case “to verdict” is trying a case until a final jury decision (*See* Ballantine’s Law Dictionary, defining “verdict” as “the final determination of the jury;” Black’s Law Dictionary defines “verdict” as “the formal decision or findings made by a jury . . .”). At Myers’ hearing, Senator Durbin asked Myers to list cases he had “taken to verdict, with or without a jury.” Though Senator Durbin did not use the same wording in his written questions, this is presumably why Myers included in his answer cases that were not heard by a jury.

⁵⁴ Senate Judiciary Questionnaire (Answer to Question 17(b)(5)) (stating that Myers has never tried a case before a jury).

Other cases Myers claimed to have taken to verdict do little more to prove that he has had any substantial experience in court. Three of the cases were decided by the Interior Board of Land Appeals, an administrative agency that is not even a court at all.⁵⁵ From his answers, it appears that in two of those three cases, Myers did not even appear in person before the Board, but only filed an appeal and supporting materials. In *Forest Guardians v. U.S. Forest Service*, Myers merely represented intervening parties in an action to prevent the release of FOIA documents that his clients believed would be detrimental to their interests. In four of the twelve cases Myers listed, he claimed he cannot recall even the nature or extent of his participation.⁵⁶

The answers Myers provided in response to questions about his courtroom experience in fact raise more troubling questions. Myers' apparent lack of involvement in several of his "ten most significant litigated matters" and his claims to have "taken to verdict" matters in which he was only marginally involved only serve to demonstrate the extent to which Myers has focused on lobbying for corporate special interests rather than traditional legal practice. Having dedicated his career to lobbying, William Myers simply has neither the legal scholarship nor the courtroom experience that should be demanded of nominees to lifetime positions on a federal court of appeals.

VII. Myers' Non-Responsive and Troubling Answers to Post-Hearing Questions

As discussed above, Myers' answer to a number of Senators' post-hearing written questions raise additional troubling concerns about his nomination. Similarly troubling is his *failure* to provide substantive answers to a number of post-hearing written questions, which he had ample time to research and refresh his memory. Many of Myers' answers were less than forthcoming, and several appeared to be intentionally evasive. This lack of candor is itself a cause for concern. In his statement to the Committee before its vote on Myers, Senator Feingold said that he was troubled by Myers' "previously expressed views and his lack of candor in discussing them."⁵⁷ Myers' failures to explain disturbing aspects of his prior record, reinforce troubling questions about his nomination.

A. Evasive answers to important questions about his record.

In 1994, Myers wrote an article in which he stated that it is "[o]nly through expansive interpretation from activist courts" that wetlands have been brought under the protection of the Clean Water Act (CWA). Myers wrote this article *nine years* after the Supreme Court case of *United States v. Riverside Bayview Homes*⁵⁸ unanimously upheld the authority of the United States to protect wetlands under the CWA. In their written questions to Myers, both Senators Feinstein and Feingold asked the logical question of whether this meant that Myers considered the Supreme Court to be an activist court. To Senator Feinstein, Myers provided a one-word

⁵⁵ *Katsilometes v. Bureau of Land Management*, IBLA 98-287 (Oct. 4, 2002); *Dowton v. Bureau of Land Management*, 154 IBLA 222 (Mar. 30, 2001); *Dowton v. Bureau of Land Management*, 154 IBLA 291 (Apr. 19, 2001).

⁵⁶ *Alside Supply Co. v. Little Construction Co.*; *Wanda Steele v. Darrel Peterson*; *First National Bank of Greybull v. Maryland*; *King's Saddlery v. Sundance Mountain Ski Area* (D. Wyo.).

⁵⁷ Statement of Sen. Russ Feingold. April 1, 2004, *available at* http://judiciary.senate.gov/print_member_statement.cfm?id=1137&wit_id=85.

⁵⁸ 474 U.S. 121 (1985).

answer: “No.” His answer to Senator Feingold, stating that he did not recall if he had considered the Supreme Court opinion when writing the article and asserting that he did not consider the Supreme Court to be an activist court, was no more helpful. When Senator Feingold asked Myers to name the decisions he *was* referring to when he claimed that inclusion of wetlands in the CWA is the result of action by activist courts, Myers replied, “[i]f I had specific cases in mind, I cannot recall which ones they were.”

These evasive answers are very troubling. Myers’ 1994 article specifically branded as “activist” any court that interpreted the CWA to protect wetlands—a serious charge. Yet Myers declined to back up this charge with any specifics and simply denied that the Supreme Court was “activist,” without any explanation, even though it perfectly fit his own definition. Myers’ evasive answer fails to address the serious concern that his own views on what constitutes “activism” are out of the mainstream. Senator Feingold emphasized this evasiveness several times in his official statement on Myers, pointing out that Myers “could not provide me with his analysis of [*Riverside Bayview Homes*], where the United States Supreme Court unanimously upheld the Reagan Administration’s applications of the Clean Water Act to protect wetlands.”⁵⁹ A nominee who, like Myers, apparently believes the Supreme Court to be an “activist” court—even when the Court is acting unanimously—would make a very dangerous judge, inclined to overturn precedent and continually re-visit issues on which he believes the courts have taken an “activist” stance.

B. No comment on important, current legal issues.

Like some other Bush Administration nominees, Myers refused to answer a number of important questions, claiming that it would be improper for him to give an opinion on matters that could come before him as a judge. In Myers’ case, his refusal to answer on these grounds is particularly troubling because he was not asked how he would rule in particular, hypothetical cases. Instead, he was simply asked to offer his opinion on the legality of current positions taken by the Bush Administration. Answering such questions would be unlikely to call his impartiality as a jurist into question, and would give Senators valuable insight into his legal philosophy.

In responding to questions presented by Senator Feingold, Myers claimed it would be inappropriate to comment on his opinion of the Administration’s position that the *SWANCC* decision does not limit coverage of the CWA to navigable waters and adjacent wetlands. Likewise, he would not give his opinion on a recent DOJ brief claiming that exclusion of non-navigable tributaries from the CWA would “disserve the recognized policies underlying the Act” because polluted tributaries will eventually cause harm to adjacent navigable waters. In response to a question posed by Senator Leahy, Myers refused to offer an opinion on the legality of Healthy Forests bill provisions, proposed by the Administration, that would “prohibit judges from granting waivers to filing deadlines, urge[] courts to expedite consideration of cases, and limit[] any preliminary injunction to 45 days.” Myers’ refusal to answer these questions jeopardizes Senators’ ability to make an informed decision about Myers’ fitness for the bench.

C. Silences that speak volumes?

⁵⁹ Statement of Sen. Russ Feingold. April 1, 2004, *available at* http://judiciary.senate.gov/print_member_statement.cfm?id=1137&wit_id=85.

Myers failed to fully answer written questions in a number of other instances. Sometimes, he claimed he did not have enough information to provide an answer, though a review of easily available materials would have given him all necessary information to clearly answer. In another instance, Myers simply “talked around” the question, avoiding the issue at its heart and giving the Committee no more insight into Myers’ legal views than it had before the query was posed.

When Senator Leahy asked whether Myers believed that the Bush Administration’s efforts to roll back environmental protections provided in the Clean Air Act and the National Environmental Policy Act “suffer from a lack of moderation,” Myers claimed ignorance, saying he was “not sufficiently familiar with the examples to say whether they suffer from a lack of moderation.” In another question, Senator Feingold noted a Bush Administration notice of proposed rulemaking, which would have declared that isolated wetlands and intermittent streams were not protected under the CWA, and that notice’s subsequent rescission. Senator Feingold then asked Myers whether he believed such waters were protected under the CWA. Myers claimed it would be inappropriate to answer such a question and stated that he did not have copies of either the proposed rule or the order rescinding it and thus could not comment on them. Again Senator Feingold expressed his frustration with Myers’ refusal to answer the questions put before him by the Senators on the Committee, stating that “[w]hile Mr. Myers indicated that he would follow this Ninth Circuit precedent, he refused to elaborate on his views on this crucial issue.”⁶⁰

Similarly, Senator Durbin asked Myers to comment on the findings of a Defenders of Wildlife report examining the Bush Administration’s record with regard to the Endangered Species Act. The question specifically asked about a case, discussed in the report, in which a court admonished the Department of the Interior for its “dismissive attitude” toward the ESA. Though the report is readily available from the Defenders of Wildlife website,⁶¹ Myers stated, “I have not seen the review and thus cannot respond to it . . . [and] I cannot comment on the one Department of the Interior case because I do not know what case that is.” In any of the above cases, had Myers sincerely wanted to be responsive to the Senators’ written, post-hearing questions, very basic research would have enabled him to give thoughtful and detailed answers. Instead, he chose to plead ignorance and avoid giving straightforward answers.

Another example of Myers’ lack of candor arises from Senator Feingold’s questions regarding the long-standing Reagan-era “Meese Memo.” The Meese Memo states that “it is constitutionally impermissible for the courts to enter consent decrees containing such provisions where the court would not have had the power to order such relief had the matter been litigated.” Senator Feingold asked Myers whether the Utah settlement, approved during his tenure as DOI Solicitor, is consistent with the constitutional standard set forth in the Meese Memo. Myers ducked the question, stating that he assumed that the government officials involved had acted

⁶⁰ *Id.*

⁶¹ Defenders of Wildlife, *Sabotaging the Endangered Species Act: How the Bush Administration Uses the Judicial System to Undermine Wildlife Protections* (2003), available at <http://www.defenders.org/wildlife/esa/report>. (Quotes from the report contained in Durbin’s post-hearing written question are pulled from the executive summary of the report, also available from this website.)

properly and that “presumably” the court that approved the settlement found it to be constitutional. In his next question, Senator Feingold asked Myers whether he believed it was proper for an agency to relinquish powers in a settlement that the agency could not have possibly lost if the matter were litigated. Myers failed to answer. Instead, he offered a few brief sentences explaining that settlements are reached when both parties find the terms mutually agreeable, never touching on the important issue raised in the Senator’s question. As in the examples above, a nominee determined to clarify his positions would have had no difficulty giving a clear response to the Senator’s questions.

Myers’ failure to respond fully to Senators’ post-hearing questions calls his fitness for the federal bench into question. The members of the United States Senate have a constitutional duty to offer “advice and consent” to the President’s nominees to the federal bench. When a nominee fails to adequately address Senators’ questions, it prevents them from giving informed “advice and consent” and jeopardizes their ability to perform their co-equal role in the nominations process. In Myers’ case, his non-responsiveness reinforces the serious concerns about his record.

Conclusion

Having received both a hearing before the Senate Judiciary Committee and the opportunity to answer Senators’ written, post-hearing questions, William Myers has now had every opportunity to demonstrate his fitness for service on the Ninth Circuit. Unfortunately, his answers simply do not warrant approval of his nomination. Myers has proven that his views on property rights and court access are dangerous and extreme. When given the opportunity to defend himself against accusations that he is improperly pro-industry, he was only able to counter with his weak actions in non-controversial, allegedly “pro-environment” cases. He has shown that he cannot be trusted to take Native American concerns seriously or to treat tribal matters with the respect they deserve. When asked to detail his legal background, Myers’ presented a record that proves even more lacking of substantive experience than most believed it to be before he had the opportunity to elaborate on his pre-hearing questionnaire. And, as troubling as Myers’ answers are, Senators are left to imagine what alarming responses Myers would have given to the questions he chose to avoid answering. Myers’ disregard for Native Americans, hostility toward the environment, lack of relevant experience, and evasive approach to addressing the concerns of United States Senators should not be rewarded with a lifetime appointment to the Ninth Circuit bench.