Community Rights Counsel

William Myers' Nomination to a Lifetime Seat on the U.S. Court of Appeals Threatens Environmental and Other Protections

William G. Myers III, an advocate for the grazing and mining industries with a record of hostility towards environmental safeguards, has been nominated to a lifetime seat on the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit encompasses Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington and decides legal disputes concerning the use and conservation of many of the most spectacular and sacred lands in America. These states contain hundreds of millions of acres of public lands, Indian Reservations, and sacred sites and generate some of the nation's most significant disputes regarding the environment and Native American rights. The Ninth Circuit often makes the final decision on critical mining, grazing, logging, recreation, endangered species, coastal, wilderness, and other issues affecting the nation's natural heritage, as well as treaty, statutory, trust relationship, and other issues affecting American Indian tribal governments, Native Americans, and Alaska Native groups.

Myers, who most recently served as Solicitor (chief lawyer) at the Department of the Interior, has very little litigation experience at either the trial or appellate level. He is not a scholar or prolific legal writer. Myers' record is so lackluster that more than one-third of the panel of the American Bar Association's Standing Committee on the Federal Judiciary, which reviews the qualifications of federal court nominees, rejected Myers as "unqualified" for the bench.[1] Not one person on the fifteen-member ABA panel considered Myers "well-qualified" for the position.

Myers' has spent the majority of his legal career promoting the interests of grazing and mining companies over the protection of the nation's public lands and natural resources. From 1993-1997, Myers was Executive Director of the Public Lands Council (PLC), a trade association that promotes the interests of ranchers who graze sheep and cattle on public lands, and the Director of Federal Lands for the National Cattlemen's Beef Association (NCBA). As an attorney with the Boise law firm of Holland & Hart from 1997-2001, Myers continued to represent the interests of public lands industries and served as corporate counsel to "The CATL Fund." CATL—which stands for Cattlemen Advocating Through Litigation—is the litigation arm of the Public Lands Council.[2]

[1] Ratings of Article III Judicial Nominees: 108th Congress, *available at* http://www.abanet.org/scfedjud/ratings108.pdf.

[2] Public Lands Council is a non-profit coalition that represents the National Cattlemen's Beef Association, the American Sheep Industry Association, the American Farm Bureau Federation and the Association of National Grasslands. http://hill.beef.org/ncba/view.asp?DocumentID=553

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Myers was Solicitor of the Department of the Interior from 2001 until his resignation in late 2003 to return to Holland & Hart. With Myers as its chief lawyer, the Interior Department has advocated disturbing positions in litigation and launched a seemingly endless string of legal initiatives to repeal or rollback basic environmental safeguards. In one notable case, he sided with a kitty litter manufacturer over his Department's trust obligation to the Reno-Sparks Indian Colony and made an argument that would significantly undermine the land use control authority of state and local governments.

Both of his formal legal opinions as Solicitor favored the grazing and mining industries that he represented as a lobbyist. In one legal opinion, which was harshly criticized in a recent federal court decision,[3] he overturned important legal precedents to open the way for a previously rejected and enormously controversial mining project on sacred Indian lands. In the other, he debilitated efforts by environmental groups to use the free market to purchase grazing permits to preserve America's rangelands, and then revised and "clarified" his own opinion when he realized it might have unintended adverse consequences for the ranching industry he previously represented.

Throughout his career, Myers has harshly criticized bedrock environmental safeguards and belittled environmentalists. He has also taken extreme legal positions on issues such as the meaning of the Constitution's Takings and Commerce Clauses that place him far outside the mainstream of constitutional thought and threaten health, labor, and environmental protections across the board. In all respects, Myers appears to be a singularly poor choice for this critical court.

I. Myers' Intemperate Expressions of Hostility Toward Environmental Safeguards and Environmentalists.

Bill Myers has made a habit of publicly expressing hostility towards both environmental safeguards and environmentalists. Myers compared the federal government's management of the public lands to King George's "tyrannical" rule over the American colonies and claimed that public land safeguards are fueling "a modern-day revolution" in the American West.[4] He has called environmental laws "outright, topdown coercion" and has criticized "the fallacious belief that centralized government can promote environmentalism."[5] Myers has stated that the "biggest disaster now facing ranchers is . . . a flood of regulations designed to turn the West into little more than a

[3] Mineral Policy Center v. Norton, 2003 WL 22708450 (D.D.C. Nov. 18, 2003), *available at* http://www.dcd.uscourts.gov/01-73.pdf.
[4] William G. Myers III, *Western Ranchers Fed Up with Feds*, FORUM FOR APPLIED RES. & PUB. POL., Winter 1996 at 22.
[5] William G. Myers III, *Environmental Command and Control: The Snake in the Public Lands Grass*, *in* FARMERS, RANCHERS & ENVIRONMENTAL LAW 198 (1995)).

theme park" and he has opined that the federal government's "endless promulgation of statutes and regulations harms the very environment it purports to protect."[6]

Myers has called the Endangered Species Act and the Clean Water Act's wetlands protections examples of "regulatory excesses" that have had the "unintended consequence of actually harming the environment."[7] He has denounced the California Desert Protection Act as "an example of legislative hubris."[8] He called the Clinton Administration's Roadless Area Conservation Policy, which protected 58 million acres of national forests from new road building, "a narrow path toward economic and environmental destruction."[9] He has called the reintroduction of wolves into Yellowstone National Park "unnecessary, unfair, and not affordable" and, again employing Revolutionary War imagery, has likened the occasional visit of a Yellowstone wolf onto private property as akin to the British demand that Colonists "quarter" their soldiers.[10]

Myers is even more intemperate in his criticism of environmental organizations. As Solicitor, he called environmental critics of his Department's policies the "environmental conflict industry" and stressed the "importance of . . . rejecting [their] scheming."[11] He previously accused "professional environmentalists" of having an agenda that has "more to do with selling memberships and magazines than protecting the environment,"[12] called environmental organizations "litigation happy,"[13] 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."[14]

Comments like these from Solicitor Myers led his hometown paper, the *Idaho Statesman,* to write an editorial called "A Rancher's Advocate, or the People's Attorney?"[15] The *Statesman* reported that "at a Nevada Cattlemen's Association meeting … he promised to ease Clinton-era restrictions on livestock grazing, repeated a Bush administration pledge to look at rolling back environmental reviews, and suggested the

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[6] *Behind the Curtain,* MOTHER JONES, Sept. 2003, *available at* http://www.motherjones.org/news/feature/2003/36/ma_534_01.html) (discussing speech by Myers to the National Cattlemen Association).
[7] Myers, *Environmental Command and Control* at 208 (The Act protected 7.5 million acres of wilderness, and another 5.5 million acres that included national park preserves).
[8] *Id*. at 209.
[9] William Myers, *Forest Road Closure Loses Path in Woods*, JACKSON HOLE GUIDE, Mar. 11, 1998.
[10] *Reintroduction of Wolves in Yellowstone: Hearing Before the Subcomm. on Parks and Historic Preservation and Recreation of the Senate Energy Comm.*, May 23, 1995 (testimony of William G. Myers III on behalf of the Public Lands Council).
[11] 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.
[12] Bill Myers, *The Legal Bleat: Environmentalists Are More Concerned With Membership than Environment*, IDAHO WOOL GROWERS BULLETIN, Nov./Dec. 1997 at 5.
[13] Bill Myers, *Litigation-Happy Environmentalists Need Reform,* MOAB TIME-INDEPENDENT, April 30, 1998.
[14] Bill Myers, *The Legal Bleat: Kids, Cars and Commodities*, IDAHO WOOL GROWERS BULLETIN, Feb. 1998 at 7.
[15] *Our View: A Rancher's Advocate, or the People's Attorney?,* IDAHO STATESMAN, Nov. 22, 2002, *available at* http://www.idahostatesman.com/Search/story.asp?id=26232.

Endangered Species Act is applied too broadly to the public lands that fall under his purview."[16] The *Statesman* concluded that "Myers sounds less like an attorney, and more like an apologist for his old friends in the cattle industry."[17]

II. Myers Led an Effort by the Grazing Industry to Advance a Radical Constitutional Agenda in the Courts.

In late 1993, early in his tenure at the Public Lands Council, Myers helped establish the CATL Fund (Cattlemen Advocating Through Litigation), which was designed to make the grazing industry "a force to be reckoned with in the courts."[18]

While it is not unusual for an industry group to seek to represent its interests in court, CATL operated in a decidedly unusual way. Rather than litigate its own cases, CATL was set up primarily to be the silent partner of individual property owners that were challenging environmental regulations in court. For example, Myers noted that "[o]nly through outside, collective financial support" were the Dolans of the Supreme Court case *Dolan v. Tigard* able to "withstand seven straight losses until their Fifth Amendment rights were upheld by the U.S. Supreme Court."[19] CATL was "positioned to help families and businesses like the Dolan's."[20] Put another way, over the past decade, a number of the lawsuits that have been effective in helping resource extraction companies establish precedent under the Takings Clause and other constitutional doctrines to undermine environmental protections were silently bankrolled by cattlemen under the direction of Bill Myers.

Myers explained the need for a group like CATL by reference to environmentalists who, in his words, "aggressively pursued their goals before friendly judges who have been willing to take activist positions and essentially legislate from the bench."[21] CATL's goal was to promote judicial activism from the right. In Myers' words, "federal agencies with their never-ending regulations are a great source of interference for cattlemen."[22] CATL's mission was to identify cases "that provide a cost-efficient opportunity to set broad-based precedent in the courts" and that will "have a tremendous impact on the future of the [grazing] industry."[23] In particular, Myers identified "water allocation, endangered species, private property rights, and virtually every other environmental statute" as the specific area of interest for CATL.[24] Myers warned that "[o]ur opponents are on notice. We are taking a stand in the third branch of government on behalf of all citizens who cherish private property and the protections afforded to us by the constitution."[25]

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[16] *Id.*
[17] *Id.*
[18] Bill Myers, *Having Your Day in Court,* NATIONAL CATTLEMEN (Nov/Dec. 1994).
[19] *Id.*; *see also* Dolan v. City of Tigard, 512 U.S. 687 (1994).
[20] Myers, *Having Your Day in Court, supra* note 18.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*

A. Myers Advocated Extreme Legal Positions that Would Thwart a Wide Range of Bedrock Environmental and Other Safeguards.

1. Myers' Absolutist Views on Property Rights.

In perhaps the most important Endangered Species Act case of the 1990s, Myers argued that habitat regulation under the Act is a violation of the Takings Clause and is facially unconstitutional.[26] In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* Myers not only co-authored a brief with Roger Marzulla, the Chairman of the Board of Defenders of Property Rights, but as Executive Director of the National Cattlemen's Association, Myers served as his own client. Myers' status as both client and counsel makes untenable an assertion that he was merely representing a client and does not espouse the views expressed in the brief.

When landowners bring takings claims challenging a specific application of the ESA to their particular property, these claims virtually always fail because the ESA is almost never applied in a way that eliminates all productive use of property.[27] In contrast to these individual claims, it is completely different, and many times more extreme, to argue, as Myers did, that the government cannot even regulate habitat modifications under the ESA without compensating landowners.[28]

Myers 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."[29] According to Myers' brief, "[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."[30] The Supreme Court has held that a very limited number of "fundamental" rights, including freedom of speech, are entitled to the highest level of protection ("strict scrutiny"). Such rights can be limited only when there is a compelling governmental interest to do so, using means that are "narrowly tailored" to address the government's interest without being overbroad. When the Court applies strict scrutiny, it almost always rules against the government.[31]

Thus, Myers argues for elevating the corporate and individual right to use property above the vast majority of other rights. His approach apparently would apply strict scrutiny to federal and local laws and regulations that limit the use of property,

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[26] 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).
[27] John D. Echeverria & Julie Luhrman, *"Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause*, 16 TUL. ENVTL. L. J. 331, 338 (2003) ("While the alleged economic burdens imposed under the ESA and state analogs are hardly inconsequential, they have proven essentially noncompensable under the Takings Clause.").
[28] 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).
[29] *Id.*
[30] *Id.*
[31] *See* Fullilove v. Klutznick, 448 U.S. 448, 509 (1980) (Marshall J. concurring) (Strict scrutiny is "strict in theory, but fatal in fact.").

having the result of invalidating as unconstitutional a vast range of labor, health, environmental, disability, civil rights, zoning and other limits on property use. Myers' brief proposes a radical extension of the Takings Clause that no court has ever countenanced. Indeed, the Supreme Court upheld the ESA regulations at issue 6-3, and Myers' argument was so extreme the not one of the nine justices—including the dissenters—even discussed the Takings Clause issues he raised.

Myers' expansive views on the Takings Clause are reminiscent of the ideology of California Justice Janice Rogers Brown. Sen. Dianne Feinstein (D-Calif.) and other Judiciary Committee senators cited Brown's view that "the 'free use of property' is 'as important' as freedom of speech or religion" as a strong basis for opposing Brown's nomination to the U.S. Court of Appeals for the District of Columbia.[32] Myers' views on this point are essentially identical to those of Justice Brown.

Myers advanced a similarly absolutist view of property rights in *Public Lands Council v. Babbitt.*[33] Myers brought this facial challenge on behalf of the Public Lands Council to then-Interior Secretary Bruce Babbitt's Rangeland Reform regulations, which gave the Secretary greater management flexibility over public lands and clarified the government's claim to structural improvements on the public lands.[34] Arguing in a "friend-of-the-court" brief filed in the Supreme Court on behalf of farm credit institutions, Myers urged that the Rangeland Reform regulations be struck down. "With a mere stroke of his pen," he wrote, "the Secretary has boldly and blithely wrested away from Western ranchers the very certainty, the definitiveness of range rights, and the necessary security of preference rights that their livestock operations require."[35] The Supreme Court unanimously rejected Myers' rights-based argument.

2. Undermining the Clean Water Act and the Commerce Clause As a Basis for Environmental and Other Protections.

Myers has also advocated a narrow interpretation of Congress' Commerce Clause authority, which is the basis for a wide range of core federal environmental, disability, civil rights, and other protections. Myers filed a "friend-of-the-court" brief in the Supreme Court on behalf of the American Farm Bureau Federation, the National Cattlemen's Beef Association, and the North Dakota Farm Bureau in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers.*[36] This case reviewed a challenge to the federal government's authority to prevent waste disposal

[32] Senator Feinstein Opposes Justice Brown's Nomination to the Washington, DC Court of Appeals, Nov. 6, 2003, *available at* http://feinstein.senate.gov/03Releases/r-brown2.htm.
[33] Myers represented the Public Lands Council in its initial challenge, *Public Lands Council v. Babbitt,* 929 F. Supp. 1436 (D. Wyo. 1996), and filed an amicus brief on behalf of farm credit institutions at the Supreme Court. *Public Lands Council v. Babbitt,* 529 U.S. 728 (2000).
[34] Rangeland Reform 1995, 60 Fed. Reg. 9894 (1995).
[35] Brief of Amici Curiae Farm Credit Institutions in Support of Petitioner, Public Lands Council v. Babbitt, 529 U.S. 728 (2000), *available at* 1999 WL 1128263.
[36] 531 U.S. 159 (2001). The Court in *SWANCC* ultimately interpreted the Clean Water Act narrowly to avoid the Commerce Clause question discussed in Myers' brief. *See SWANCC*, 531 U.S. at 173.

facilities from destroying waters and wetlands that serve as vital habitat for migratory birds.

Myers argued that the Constitution's Commerce Clause does not grant the federal government authority to protect these vital waters and wetlands and amounts to "unauthorized federal regulation of land use."[37] Of course, a great number of federal environmental and other safeguards regulate the uses that may be put to land. If regulation of waste disposal operations does not fall within the scope of the Commerce Clause, then a wide array of environmental and other protections would also fall outside Congress' constitutional authority under the Clause. That is why a large coalition of civil and human rights organizations filed a brief in *SWANCC* arguing that such a narrow interpretation of the Commerce Clause would "cast serious doubt on the previously well-accepted foundations of some of the central civil rights laws of our time."[38]

3. Myers' Writings on the Nomination of Judge Robert Bork.

Myers' only two notable published law journal articles contain his reflections on the hearings on Judge Robert Bork's unsuccessful nomination to the Supreme Court.[39] Myers asserts that "Judge Bork's judicial philosophy was well within the parameters of acceptable constitutional theory, worthy of representation on the Supreme Court."[40] Leading Republicans, including Senators John Warner (R-Va.) and Arlen Specter (R-Pa.), disagreed with this conclusion.[41] In his book *Passion for Truth,* Sen. Specter explained his opposition to Bork. "The Constitution has turned out to be much more dynamic than [Bork believes]: a living, growing document, responsive to the needs of the nation," wrote Specter. "Bork's narrow approach is dangerous for constitutional government."[42] Myers' belief that Judge Bork's legal philosophy is "worthy of representation on the Supreme Court" should give Senators Specter, Warner and others sufficient reason to carefully explore Myers' judicial philosophy.

III. The Interior Department's Assault on the Environmental Safeguards During Myers' Tenure As Solicitor.

With Bill Myers as Solicitor, Secretary Gale Norton's Interior Department launched a seemingly endless string of legal initiatives to repeal or rollback protections for public lands. This enormously disturbing record is comprehensively chronicled on a website that is continuously being updated by Natural Resources Defense Council. This

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[37] Brief of the American Farm Bureau Federation, the National Cattlemen's Beef Association, and the North Dakota Farm Bureau, *SWANCC*, 531 U.S. 159 (2001), *available at* 2000 WL 1059641.
[38] Brief of the Anti-Defamation League, People for the American Way, et al, *SWANCC*, 531 U.S. 159 (2001), *available at* 2000 WL 1369409.
[39] William G. Myers III, *Advice and Consent on Trial: The Case of Robert H. Bork*, 66 DENVER L. REV. 1, 20, 22 (1988); *see also* William G. Myers III, *The Role of Special Interest Groups in the Supreme Court Nomination of Robert Bork,* 17 HASTINGS CONST. L. Q. 399 (1990).
[40] Myers, 66 DENVER L. REV. at 25.
[41] Other Republican senators opposing confirmation were Sens. Bob Packwood (R-Or.), John Chafee (R-R..I.), Lowell Weicker (R-Ct.), and Robert Stafford (R-Vt.).
[42] ARLEN SPECTER, PASSION FOR TRUTH (2001).

"Bush Record" site documents dozens and dozens of specific decisions made at Interior during Myers' tenure that are environmentally destructive.[43] Two reports issued recently by Defenders of Wildlife flesh out this record in the context of arguments and decisions made by the Interior Department under the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA).[44]

As documented throughout this report, Bill Myers has expressed a fundamental hostility to the Endangered Species Act. This hostility carried over into his tenure as Solicitor. For example, in a speech to the Nevada Cattlemen's Association that was criticized in the press, Myers suggested the Endangered Species Act is applied too broadly to the public lands. "We should not be using the Endangered Species Act … as a land management tool," he said. "It is not there as a tool for zoning on federal lands."[45] But as the *Idaho Statesman* opined, "[i]t's naive, and downright misleading, to suggest that the Endangered Species Act has no effect on land management."[46]

As Interior Solicitor, Myers had a key role in shaping the administration's legal responses in cases involving the Endangered Species Act. According to the Defenders of Wildlife report, rather than defending such laws "the agencies responsible for protecting endangered species under the Bush administration have frequently taken illegal actions or presented unlawful arguments that tend to harm endangered species and tend to benefit the very industries previously represented by the Bush nominees who now oversee them."[47] Defenders of Wildlife reviewed some 120 federal court decisions resolving ESA issues between January 21, 2001, and October 31, 2003 in which the Bush administration exerted influence over legal strategy and outcome.[48] In 63 percent of these cases, the Bush administration made what Defenders called ESA-hostile arguments.[49] In 89 percent of these ESA-hostile cases, "courts found that the administration had acted illegally and ruled against them."[50]

Many of the most disturbing ESA arguments were made on behalf of the Interior Department. In one case, the Department was threatened with contempt of court after

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[43] The Bush Record, *available at* http://www.nrdc.org/bushrecord/default.asp.
[44] Defenders of Wildlife, *Sabotaging the Endangered Species Act: How the Bush Administration Uses the Judicial System to Undermine Wildlife Protections* (2003) [hereinafter *Sabotaging the Endangered Species Act*]; William Snape III & John M. Carter II, *Weakening the National Environmental Policy Act: How the Bush Administration Uses the Judicial System to Weaken Environmental Protections*, ENVTL. L. REP. (Sept. 2003), *available at* http://www.endangeredlaws.org/downloads/defenders_nepa_article.pdf.
[45] Scott Sonner, *Interior Department's Top Lawyer Takes Aim at Environmental Laws*, LAS VEGAS SUN, Nov. 15, 2002, *available at* http://www.lasvegassun.com/sunbin/stories/nevada/2002/nov/15/111510527.html.
[46] *Our View: A Rancher's Advocate, or the People's Attorney?,* IDAHO STATESMAN, Nov. 22, 2002, *available at* http://www.idahostatesman.com/Search/story.asp?id=26232.
[47] *Sabotaging the Endangered Species Act* at 11.
[48] Defenders of Wildlife did not include in the study those ESA cases decided during that period but which were initiated in prior administrations and in which the Bush administration made no arguments or significant legal strategy decisions.
[49] *Id*. at 15-16.
[50] *Id.* at I (executive summary).

violating the court's order that required substantive protections for endangered species.[51] In another case involving protections for the Mexican spotted owl, a federal court strongly chastised the Department's decision to reduce by 70 percent the acreage proposed as critical habitat for the threatened species. U.S. District Judge David Bury called the Department's interpretation of critical habitat rules "nonsensical" and "impermissible and contrary to law."[52] In a later ruling in the case, the court criticized the Department's failure to comply with its prior order compelling designation of critical habitat as "an impermissible, unconstitutional intrusion on the judicial power to enforce existing law" and chastised the Department for its "dismissive attitude toward the Endangered Species Act in general, and designation of critical habitat in particular."[53]

The second Defenders of Wildlife report documents a similar pattern with respect to suits under NEPA. Again Myers' personal hostility to NEPA—while serving as Solicitor he said that "[i]t has gotten to the point where you can hardly dig a post hole without having to do an environmental analysis"[54]—appears to have translated into his Department's legal positions. The Defenders' study, published in the *Environmental Law Reporter*, documents numerous cases in which the Interior Department has litigated the necessity of performing environmental review of agency actions.[55] For example, in *Sierra Club v. Norton*, the Interior Department argued that formal environmental review of a high-rise beach condominium project in the critical habitat of an endangered species was unnecessary. The court rejected the Department's position stating, "[s]uch a conclusion is at odds with the absolute, cumulative and relative losses of habitat, and is 'so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'"[56]

A. The "Kitty Litter" Case.

The case of *Oil-Dri Corp. v. Washoe County*[57] provides a particularly vivid example of the aggressive and disturbing legal positions advanced by the Department of Interior during Myers' tenure as Solicitor. The *Oil-Dri* case stemmed from an effort by Oil-Dri Corp., the world's largest manufacturer of kitty litter, to extract and process kitty litter clay on public and private lands that surrounded the Reno-Sparks Indian Colony's residential homeland. Oil-Dri's mining project required that clay extracted from federal

[51] Defenders Report at 17-19, 21-23 (discussing Save the Manatee v. Ballard, 215 F. Supp.2d 88, 88 (D.D.C. 2002); and Center for Biological Diversity v. Bureau of Land Management, 00-927 (N.D. Cal. May 7, 2001)).
[52] Center for Biological Diversity v. Norton, 240 F. Supp.2d 1090, 1098-95, 1102-03 (D. Ariz. 2003).
[53] Defenders Report at 30 (quoting Center for Biological Diversity v. Norton, 01-409 (D. Ariz. Oct. 10, 2003) (unpublished order) at 7, 10).
[54] Scott Sonner, *Interior Department's Top Lawyer Takes Aim at Environmental Laws*, LAS VEGAS SUN, Nov. 15, 2002, *available at* http://www.lasvegassun.com/sunbin/stories/nevada/2002/nov/15/111510527.html.
[55] William Snape III & John M. Carter II, *Weakening the National Environmental Policy Act: How the Bush Administration Uses the Judicial System to Weaken Environmental Protections*, 33 ENVTL. L. REP. 10682 (Sept. 2003), *available at* http://www.endangeredlaws.org/downloads/defenders_nepa_article.pdf.
[56] 207 F. Supp.2d 1310, 1336 (S.D. Ala. 2002) (internal citations omitted); Snape & Carter, 33 ENVTL L. REP. at 10686.
[57] Oil-Dri Corp. v. Washoe County, CV-N-02-0186-ECR-RAM (D. Nev. Mar. 3, 2003).

lands be processed in a plant on private land in Washoe County. To build this processing plant, Oil-Dri needed a land-use permit from Washoe County, and the County's zoning laws prohibited heavy industrial uses in rural areas. To get around this prohibition, Oil-Dri sought approval of the processing plant as an "ancillary" or special use necessary for the clay mining activity.[58] The county considered this special use permit (SUP) application and denied it by a 3-2 vote due to environmental impacts, threats to public health and safety, and overwhelming community opposition.[59]

Oil-Dri responded by suing in federal court, alleging that Washoe County had unlawfully considered the impacts of their mining activity on federal land in denying their zoning permit under local law. Oil-Dri then began an aggressive effort to lobby the Department of Interior to support their position in court.[60]

When the Reno-Sparks Colony learned that Myers' office was recommending the filing of a brief in support of the company's position, Arlan Melendez, the Colony's chairman, met with BLM officials and Erica Niebauer from the Solicitor's Office to express dismay that "the Solicitor places mining interests over trust [responsibilities to the Colony]."[61] After this meeting failed to stop the Department from siding with industry, Melendez wrote a letter directly to Secretary Norton pleading for reconsideration of this decision. Melendez explained the "devastating injuries to our trust resources and the degradation of the health and quality of life of our tribal community" that would result from the project and reminded Norton of her pledge to defer to local control in the West.[62]

According to press reports, Myers responded to this letter on November 18, 2002, citing the Department's "vital interest" in the case.[63] The next week, shortly before Thanksgiving 2002 – offensive timing given the brief's assault on the trust interests of the Colony – the Department of Justice filed a brief supporting the mining company. The government's brief argued that Washoe County's consideration of the impacts of mining activities on federal lands as part of its SUP application process was preempted by federal law.[64] Counsel for Oil-Dri hailed the government's brief for making "the exact points it needed to."[65]

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[58] Brief of the United States as Amicus Curiae at 3 n.2, Oli-Dri Corp. v. Washoe County, CV-N-02-0186-ECR-RAM (D. Nev. Nov. 22, 2002).
[59] *See* Jeff DeLong, *Commissioners Nix Cat-Litter Mine*, RENO GAZETTE-JOURNAL, Feb. 26, 2002
[60] Associated Press, *Oil-Dri Urged Government Intervention in Nevada Mine*, Mar. 4, 2003.
[61] *See* Letter from Robert V. Abbey, State Director, Nevada BLM to Arlan Melendez, Chairman, Reno-Sparks Indian Colony, October 16, 2002.
[62] Letter from Arlan Melendez, Chairman, Reno-Sparks Indian Colony, to Gale A. Norton, Secretary of Interior, October 22, 2002.
[63] Associated Press, *Oil-Dri Urged Government Intervention in Nevada Mine*, Mar. 4, 2003 (documents obtained through a FOIA request "show Oil-Dri's lawyers and officials from the Interior Department and BLM engaged in a series of written and verbal communications from July through November [2002] regarding the company's lawsuit and the possibility of federal intervention.").
[64] Brief of the United States as Amicus Curiae, Oil-Dri Corp. v. Washoe County, CV-N-02-0186-ECR-RAM (D. Nev. Nov. 22, 2002).
[65] Associated Press, *Oil-Dri Urged Government Intervention in Nevada Mine*, Mar. 4, 2003

Three factors make the Interior Department's actions in the *Oil-Dri* case, and Myers' participation in these actions, particularly disturbing. First, it is extremely rare for the Department of Justice to file an *amicus* brief at the district court level. The scarcity of taxpayer resources, coupled with the ability to correct errors by a district court on appeal, have resulted in a practice in which the federal government participates as an *amicus* in the district court only where the government's interest is particularly strong. It is remarkable that the Interior Department would view *Oil-Dri* as such a case.

In a related point, the *Oil-Dri* case had no business even being in federal court. Oil-Dri's claims were brought pursuant to a Nevada cause of action and the company's claim that the county's actions violated federal law was only one of a number of arguments Oil-Dri made in challenging the denial of their permit application. Because their claim "arose under" Nevada law and raised no "essential question" of federal law, the district judge dismissed the *Oil-Dri* case for lack of subject matter jurisdiction shortly after the federal government filed its brief.[66] It may well be unprecedented for the federal government to file an *amicus* brief on the merits in a district court case where the court lacked jurisdiction to hear the federal question discussed by the government. Put another way, faulty legal analysis by Myers and others in his office resulted in a significant expenditure of taxpayer resources on a brief that was not even considered on the merits by the court because of a jurisdictional defect. As an appellate judge, recognizing these jurisdictional defects would be one of Myers' most important responsibilities.

Finally, and most importantly, the merits of the government's position in the *Oil-Dri* case are very weak. Washoe County unquestionably had the authority to prohibit the kitty litter processing plant on private land within county boundaries. Indeed, the county's zoning laws flatly prohibit such heavy industrial uses in rural areas. If the county has the authority to ban the processing plant outright, it seems hard to question the County's authority to consider all of the impacts of the proposed mining operation in deciding whether to approve or deny the processing plant as part of an "ancillary use" permit application. The county never attempted to exercise permitting authority over the mining operation on federal land, standing alone. In Oil-Dri's words, the county's "denial in no way affects Oil-Dri's ability to move forward on federal land with its mining operation."[67]

In *California Coastal Commission v. Granite Rock Co.*,[68] the Supreme Court found no federal preemption even in a case where California required a mining company to seek a state environmental permit simply for mining on federal land. Preemption of local ordinances has only been found where the local regulation amounts to a de facto ban on mining on federal lands within the jurisdiction.[69] No prior case supports the extraordinary federal intrusion into the local land use authority advocated by the government's brief in *Oil-Dri.*

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[66] Oil-Dri Corp. v. Washoe County, CV-N-02-0186-ECR-RAM, (D. Nev.) (order of Feb. 22, 2003).
[67] Jeff DeLong, *Commissioners Nix Cat-Litter Mine*, RENO GAZETTE-JOURNAL, Feb. 26, 2002 (quoting Stephen Mollath, a Reno lawyer representing Oil-Dri).
[68] 480 U.S. 572 (1987).
[69] *See* South Dakota Mining Ass'n v. Lawrence County*,* 155 F.3d 1005 (8th Cir. 1998).

Myers' conclusion that it was "vital" for the Department of Interior to support a kitty litter manufacturer's claim for the right to exploit federal land, over the objections of an Indian tribe with whom the Department had a trust relationship, is telling of his bias towards resource extraction. His advocacy for federal involvement at the district court level in a case that had no business being in federal court in the first place speaks to his legal acumen. His conclusion that Washoe County was preempted from considering the impacts of federal mining activity in deciding whether to permit a processing plant on private lands demonstrates a willingness to twist the law to achieve a particular policy outcome.

IV. Myers' Few Published Opinions as Solicitor Demonstrate His Hostility to Environmental Protections and the Rights of American Indian Tribes.

Perhaps the best indication of Myers' lack of qualification to sit on the Ninth Circuit comes from the formal opinions that he authored as Solicitor. These opinions only raise more questions about his nomination. In over two years as Solicitor, Myers issued only two formal opinions, along with a "clarification" of one of these two opinions.[70] Both of these opinions rely on unsound legal reasoning and seem intended simply to advance the interests of the grazing and mining clients Myers used to represent.

A. Myers' Glamis Mine Opinion and the Threat to America's Natural and Cultural Resources and the Rights of American Indian Tribes.

The first of Myers' two opinions is entitled "Surface Mining Provisions for Hardrock Mining."[71] It overturned the opinion of his predecessor in order to pave the way for Interior Secretary Gale Norton to reverse former Secretary Bruce Babbitt's rejection of a permit for the Glamis Imperial Gold Mine project—a 1,650-acre cyanide heap-leach gold mine proposed for the ecologically and culturally sensitive California Desert Conservation Area (CDCA). The mine would produce just one ounce of gold for every 422 tons of earth disturbed. Former Secretary Babbitt refused a permit to the mine under the Federal Land Policy and Management Act (FLPMA) because the mine would destroy the ancestral lands of the Quechan Indian Tribe. The Advisory Council on Historic Preservation reviewed the proposed mine and concluded: "If implemented, the project would be so damaging to historic resources that the Quechan Tribe's ability to practice their sacred traditions as a living part of their community life and development would be lost."[72] The Council recommended that "Interior take whatever legal means available to deny approval for the project."[73] Secretary Babbitt refused to permit the project pursuant

[70] In contrast, Myers' predecessor averaged 3.5 formal legal opinions per year during his 8 years as Solicitor.
[71] Office of the Solicitor, Memorandum M-37007, Surface Mining Provisions for Hardrock Mining, Oct. 2001.
[72] Office of the Solicitor (John Leshy), Memorandum M-36999, Regulation of Hardrock Mining, Dec. 27, 1999, *available at* http://www.doi.gov/sol/M36999.pdf.
[73] *Id.*

to powers under FLMPA that are detailed in a thorough and persuasive 1999 opinion by then-Solicitor John Leshy.[74]

In October 2001, Myers issued a legal opinion that expressly repudiates Solicitor Leshy's opinion and eviscerates the authority of the Interior Department to deny mining permits under FLPMA. Acting on the basis of Myers' opinion, which as described below, was harshly criticized in a recent federal court decision,[75] Secretary Norton likewise rescinded Babbitt's rejection of the project. The decision not only paved the way for approval of the Glamis mine project, but it seriously undermined the Interior Department's ability under FLPMA to protect Native American sacred sites as well as critical cultural, historic, and environmental resources on public lands.

The crux of the dispute between Leshy and Myers is the meaning of the word "or" in the statutory term "unnecessary or undue." FLPMA amends the Mining Law of 1872 in part by requiring that "[i]n managing the public lands the Secretary *shall*, by regulation or otherwise, take any action necessary to prevent unnecessary *or* undue degradation of the lands." 43 U.S.C. §1732(b) (emphasis added). This language subjects all mining claims to the "unnecessary or undue degradation" standard. As Leshy's opinion maintains: "That the statutory construction is 'or' instead of 'and' strongly suggests Congress was empowering the Secretary to prohibit activities or practices that the Secretary finds are unduly degrading, even though 'necessary' to mining."[76]

Myers rejects this straightforward interpretation and argues that the word "or" actually means its exact opposite—"and." He writes: "It is not clear from the context in which we find the word 'or' in section 302(b) of FLPMA what sort of alternatives 'unnecessary' and 'undue' are. We cannot automatically assume that the terms are disjunctive alternatives with entirely separate meanings."[77] He concludes: "[I]t therefore does not necessarily follow, as [Leshy's opinion] contends, that Congress's use of the word 'or' necessarily suggests that it was empowering the Secretary to prohibit activities the Secretary finds are unduly degrading, even though necessary to mining."[78]

Myers' Orwellian double-speak effectively eliminates the undue degradation standard from FLMPA by holding that activities must be *both* unnecessary and undue before the Secretary can act to limit them. Specifically, Myers argues that the Secretary is powerless to prevent undue degradation "caused by an operator who is using accepted and proper procedures."[79] Myers' decision provided the legal basis for Secretary Norton's action rescinding her predecessor's rejection of the Glamis mine.

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[74] *Id.*
[75] *Mineral Policy Center v. Norton*, 2003 WL 22708450 (D.D.C. Nov. 18, 2003), *available at* http://www.dcd.uscourts.gov/01-73.pdf.
[76] Office of the Solicitor (John Leshy), Memorandum M-36999, Regulation of Hardrock Mining, Dec. 27, 1999, *available at* http://www.doi.gov/sol/M36999.pdf., at 7
[77] Office of the Solicitor, Memorandum M-37007, Surface Mining Provisions for Hardrock Mining, Oct. 2001 at 9.
[78] *Id.* at 10.
[79] *Id.* at 12.

As Sen. Barbara Boxer (D-Calif.) testified to the Senate Indian Affairs Committee in July 2002, "Although the initial permit denial took 6 years and hundreds of hours of consultation, the decision to reopen the permit involved no public input and took only a few months."[80] As importantly, Myers' opinion prohibits any Interior Secretary from acting to restrict future mining proposals—even where significant ecological or cultural values are at stake.

Myers' tortured reasoning and unsupportable conclusion in the Glamis opinion was scathingly criticized in a recent ruling by U.S. District Judge Henry Kennedy Jr. in the case of *Mineral Policy Center v. Norton.* In his decision, Judge Kennedy concluded that Myers' opinion was "erroneous" and ruled that "the Solicitor misconstrued the clear mandate of FLPMA" and failed to apply three "well-established canons of statutory construction."[81] Rejecting Myers' analysis, the court held: "FLPMA by its plain terms, vests the Secretary of Interior with the authority—and indeed the obligation—to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land."[82] Although Judge Kennedy ultimately upheld the Interior mining regulations that were challenged by Mineral Policy Center, he reached this decision only after concluding that the BLM did not "toil" under Myers' "erroneous view of [BLM's] authority."[83] Judge Kennedy's opinion is a remarkable rejection of what was one of only two formal opinions issued by Solicitor Myers in his two-year tenure at Interior.

Myers clearly bent over backward to interpret the law to advance the interest of the mining industry over the Department's trust responsibility to safeguard the rights of the Quechan Indian Nation, which faces potential extinguishment of its tribal heritage. Tribal leaders called the decision "an affront to all American Indians."[84] "They [Department officials] appear destined to break another promise - their promise to protect this sacred area from certain destruction. This is an outrage," said Mike Jackson, Sr., President of the Quechan Tribal Council. "The Quechan Nation will continue to fight for its religion, traditions and history."[85] Adding insult to injury, although Glamis representatives were granted meetings with top Interior Department officials to press their point of view, Myers' legal opinion and Norton's subsequent decision to validate Glamis's claims were issued without any input from the Quechan tribe, which by law is

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[80] Testimony of Senator Barbara Boxer, before the Senate Indian Affairs Committee Hearing on Sacred Sites, July 17, 2002, at http://indian.senate.gov/2002hrgs/071702hrg/Boxer.PDF. The Glamis decision has also come under fire for potential conflicts of interest. In October 2002, Sen. Barbara Boxer (D-Calif.) demanded an inspector general probe of the Glamis decision for potential conflicts of interest. Interior Secretary Norton met with Glamis prior to making her decision. *See Boxer Calls for Probe of Mine Permit*, WASH. POST, Oct. 5, 2002, at A4. The IG did not find any wrongdoing.
[81] Mineral Policy Center v. Norton, 2003 WL 22708450 (D.D.C. Nov. 18, 2003), *available at* http://www.dcd.uscourts.gov/01-73.pdf.
[82] *Id.*
[83] *Id.*
[84] *Gale Norton's Broken Treaties: Interior Secretary Breaks Promise to Tribes, OKs Imperial County Mine*, FAULTLINE, Oct. 26, 2001, available at http://www.faultline.org/news/2001/10/quechanmining.html.
[85] *Id.*

entitled to government-to-government consultation.[86] This is especially disturbing in light of the Interior Department's responsibility as the lead agency in the federal government's trust and treaty relationship with the American Indian tribes.

Sen. Barbara Boxer (D-Calif.) stressed this point in testimony before the Senate Select Committee on Indian Affairs' Hearing on Sacred Sites:

> The decision is a rejection of [Norton's] trust obligations to the Tribe. It ignores her duty to comply with the Executive Order on Sacred Sites. And it rejects her obligation to comply with the Native American Grave Protection and Repatriation Act. But what really bothers me deeply is that Secretary Norton met with the Glamis Corporations—a private Canadian company—prior to reversing the Clinton decision. She did not similarly meet with, or even consult, the Tribe. In fact, she still has not met with the Tribe, despite her plans to move forward with a project that will tear the heart out of their culture.[87]

The National Congress of American Indians (NCAI)—the oldest and largest national organization of more than 250 American Indian and Alaska Native tribal governments—and the California Nations Indian Gaming Association, which represents 57 federally-recognized tribal governments in California, formally oppose Myers' nomination. This is the first time these organizations have ever opposed one of President Bush's judicial nominations. In the words of a resolution adopted unanimously by NCAI on November 21, 2003, "Solicitor Myers' actions and legal advice in the Glamis matter … reveals an activist point of view that disrespects tribal values that should not be reflected on the federal bench."[88]

In the wake of Myers/Norton decisions, the state of California has taken action to protect the Quechan site. Gov. Gray Davis signed legislation on April 14, 2003 requiring that all open pit mines near sacred sites be back filled and restored to "pre-mining conditions."[89] The practical impact of the law is to make mining so expensive that the mines may never be developed. For cost reasons, open pit mine operators rarely backfill their mines. In response Glamis, a Canadian company, filed a notice of intent to sue the state under a provision of the North American Free Trade Agreement that allows investors to sue foreign governments that take actions that are "tantamount to expropriation."[90] The company is reportedly seeking a "negotiated settlement" that would cost California taxpayers as much as $50 million.[91]

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[86] Testimony of Sen. Barbara Boxer before the Senate Indian Affairs Committee Hearing on Sacred Sites, July 17, 2002, at http://indian.senate.gov/2002hrgs/071702hrg/Boxer.PDF.
[87] *Id.*
[88] 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.
[89] James May, *Gov. Davis Signs Legislation to Protect Indian Sacred Site*, INDIAN COUNTRY TODAY, April 14, 2003, at http://www.indiancountry.com/?1050332327&style=printable.
[90] Evelyn Iritani, *Gold Firm Plans Suit Under NAFTA; Canadian Mining Company Says California Limits Make Its Imperial Property Worthless,* LA TIMES, Aug. 20, 2003.
[91] *Id.*

B. Imposing Unjustifiable Hurdles on Conserving Rangeland.

Opponents of environmental protections often criticize environmentalists for being unwilling to pay for the environmental safeguards they promote. There are many responses to this criticism—one is that environmental protection is a public good that benefits our country as a whole, not just environmentalists. But through land trusts and other programs, many environmentalists have started to purchase environmental protection. While most of this activity is directed toward preserving private lands, groups like the Grand Canyon Trust have made significant efforts to protect sensitive public lands by purchasing and retiring grazing allotments through willing-buyer, willing-seller transactions. Indeed, the Trust has invested $1.5 million in its effort to cease grazing permits and reduce grazing impacts on publicly-owned lands and resources.[92]

Although individual ranchers benefit from these voluntary transactions, the professional grazing lobby opposes this example of "free market environmentalism," feeling threatened by even voluntary termination of grazing privileges. As always, Myers was more than attuned to the grazing lobby's interests. After the Grand Canyon Trust had requested the Bureau of Land Management to retire grazing permits for the Grand Staircase-Escalante National Monument in Utah that it had purchased from willing sellers, and after Secretary Gale Norton had written a letter warmly and publicly endorsing such voluntary "buyouts," Myers unilaterally issued a formal legal opinion that sought to place an unprecedented hurdle in the path of any third party seeking to retire public lands from livestock grazing.

Myers' opinion would have required the Bureau of Land Management in considering any proposal to cease grazing on public rangelands within a grazing district (the case for the vast majority) to analyze whether the lands are "chiefly valuable for grazing and raising other forage crops."[93] Myers invented this requirement, which had not been applied in any previous instances in which third parties had purchased permits for conservation purposes. Its adoption placed a new and unjustified hurdle in the way of this shining example of free market environmentalism and indefinitely delayed the processing of the Trust's permits.

It turned out, however, that this new hurdle was not high enough to suit the grazing lobby. Given changes in land use patterns and other factors, many lands within grazing districts were no longer still "chiefly valuable for grazing." Environmentalists were also threatening to use this newly minted chiefly valuable for mining test to challenge cattle grazing on other public lands.[94] Thus, Myers felt compelled to issue a "clarification" of his first opinion. Directly contradicting his first legal analysis, Myers now opined that the BLM was not compelled to consider whether lands remained

[92] Brent Israelsen, *Plan to Cut Grazing in Monument Hits Snag,* SALT LAKE TRIB., Nov. 10, 2002.
[93] Office of the Solicitor, Authority for the Bureau of Land Management to Consider Requests for Retiring Grazing Permits and Leases on Public Lands, M-37008, Oct. 4, 2002 at 2.
[94] Brent Israelsen, *Plan to Cut Grazing in Monument Hits Snag,* SALT LAKE TRIB., Nov. 10, 2002 ("[Kieran Suckling, director of the Tucson, Ariz.-based Center for Biological Diversity] said his group may use Myers' letter as ammunition in lawsuits challenging grazing.").

"chiefly valuable for grazing."[95] Rather, he stressed that while the Secretary has the discretion to discontinue grazing, she will be disinclined to do so. Further, he opined that, so long as the land remains part of a grazing district as classified under the Taylor Grazing Act, "the permit remains available for other permittees" under the "presumption that grazing in a grazing district should continue."[96]

This new "presumption" against stopping grazing is no more compelled by the Taylor Grazing Act than was the now discredited "chiefly valuable for grazing" test. The Act, passed in 1934, did not envision and does not address the willing-buyer, willing seller transactions sponsored by the Grand Canyon Trust. Myers' two opinions thus illustrate quite plainly that his legal analysis is inappropriately driven by the results advanced by his analysis. Either the "chiefly valuable for mining" test is required by the Taylor Grazing Act or it is not. Myers appears to have concluded that it is required only to the extent that it serves the interests of the grazing industry to prevent voluntary termination of grazing privileges. When it became clear that this test did not adequately serve this purpose, he abandoned it and crafted a new presumption against retirement of permits that better advanced the grazing lobby's interests.

V. Myers' Continued Promotion of Grazing Industry Interests.

Myers' formal opinion (and his "clarification" of that opinion) on retiring grazing permits is only one of many important victories grazing interests have won during Myers' tenure as Interior Solicitor. Indeed, two specific matters involving grazing interests have been so one-sided that they have been the subject of investigations by the Interior Department's Inspector General. Although one of these investigations is ongoing and the other did not find actionable wrongdoing by Myers, these favors to the grazing industry raise serious questions concerning his fitness for a seat on the Ninth Circuit.

A. A Sweetheart Deal for a Rogue Grazer.

Myers' willingness to bend over backward to aid grazing interests is particularly evident in a remarkably one-sided settlement agreement reached under Myers' watch between the Interior Department and H. Frank Robbins, Jr., a Wyoming rancher with a long history of range violations and clashes with the Bureau of Land Management. As reported in the press, "the deal is highly unusual within the BLM and appears to depart from long-running requirements spelled out in federal law about who can receive grazing permits."[97] The Interior Department's Inspector General's office—responding to a complaint filed by Public Employees for Environmental Responsibility (PEER)—has

[95] Office of the Solicitor, Clarification of M-37008, May 13, 2003 at 1.
[96] *Id.* at 6.
[97] Mike Stark, *BLM, Rancher Settle Grazing Dispute*, BILLINGS GAZETTE, June 13, 2003.

launched a still-ongoing investigation of this entire matter.[98] Various records indicate that Myers was personally involved in approving this settlement.[99]

Since 1994, Robbins has been a habitual offender of public-land grazing rules and has actively impeded BLM efforts to protect the land, even going so far as to file a federal Racketeering Influence and Corrupt Organization Act (RICO) lawsuit against individual BLM employees. From 1996 to 2001, the BLM cited Robbins for 25 different trespass violations, more than half of which were classified as "repeated willful" violations. As reported in the press, Darrell Barnes, manager of the Worland BLM office, wrote in an internal memo to the BLM state director in March 2002 that "Mr. Robbins has shown a complete disregard for the terms and conditions of the permits and of the authority of the BLM to manage public lands."[100] He further stated, "His conduct was so lacking in reasonableness or responsibility that it became reckless or negligent and placed significant undue stress/damage on the public land resources."[101]

Although Robbins claims that BLM agents have abused their discretion, harassed him and trespassed on his property, both a federal court and an internal BLM review of the field agents' conduct rejected these contentions.[102] Indeed, the review team vindicated the BLM officers' actions and recommended that BLM Law Enforcement should "consider taking criminal action … based on documented violations."[103] All available evidence points inescapably to one conclusion: Robbins is an unrepentant repeat violator of environmental safeguards.

Rather than making an example of Robbins, the Interior Department rewarded him with a personal meeting with top Department officials in 2002 and negotiated a settlement agreement that conditionally forgives 16 grazing violations dating back to 1994. It also awards Robbins: a new grazing permit; management control over certain federal lands; expanded rights-of-way across federal lands; preferential grazing fees; a special recreation permit to operate a "dude ranch"; and a promise to facilitate a land exchange. Even as the agreement was being negotiated, BLM field staff continued to

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[98] *Id.* (quoting Jack Romer of the IG's office); Brodie Farquhar, *Robbins Deal Under Interior Microscope,* CASPER STAR-TRIBUNE, Sept. 2, 2003, *at* http://www.casperstartribune.net/articles/2003/09/02/news/wyoming/fee6b2ccd2a6609970fc1f18f006d537.txt.

[99] Calendar entries, obtained through FOIA, indicate that Myers attended a meeting with Bob Comer, Regional Solicitor, Denver, Colo., to discuss the settlement on Nov. 21, 2002. Additionally, the Inspector General's recent investigation of Myers' dealings with former clients confirms that meeting and at least one other specific occasion on which Myers discussed the agreement with Comer. The IG interviewed both Comer and Myers regarding these meetings, and Comer said in reference to an October 2, 2002, meeting that he "had been working on this settlement since May 2002" and had "occasionally briefed [Myers] on the status of it." Office of the Inspector General, Report of Investigation, PI-NM-03-0309-I (Nov. 24, 2003) at 26. Myers himself described the Nov. 21, 2002, saying "Comer was the lead attorney from the SOL who was responsible for providing legal advice on the settlement and Comer likely wanted to provide Myers with an update on the status of the pending settlement." *Id.* at 32. Myers thus clearly had ongoing knowledge of the progress and terms of this unusual settlement agreement.

[100] Mike Stark, *BLM, Rancher Settle Grazing Dispute*, BILLINGS GAZETTE, June 13, 2003.

[101] *Id.*

[102] BLM, Fact Finding Review—Frank Robbins, April 16, 2002.

[103] *Id.* at 5.

document Robbins' violations of federal law.[104] Field staff reportedly was directed by higher-ups not to pursue further violations against Robbins while the agreement was being worked out.[105] Even more unusual, Robbins obtained a special status whereby only the Director of BLM or her designee may cite him for future violations—a move that would seem to render the local office's enforcement powers merely advisory. As Matthew Mead, President Bush's U.S. Attorney for Wyoming, explained in an August 2002 letter, this special process will complicate enforcement of federal grazing law in Wyoming. "What justification," Mead asks, "is there for prosecuting all permittees other than Robbins for the same conduct?"[106]

Many of the provisions of the settlement agreement appear to violate federal law and regulations. At a minimum, they represent astonishing deference to a rancher whose record of rangeland management, according to the BLM's own review, warrants criminal prosecution—not special benefits. According to published reports, an internal department memo spends eight pages documenting the ways the settlement agreement violates the law by altering or ignoring provisions of the Taylor Grazing Act, the Federal Land Policy and Management Act, the Federal Advisory Committee Act, and the federal regulations.[107] The agreement is now the subject of litigation by public-interest organizations that are seeking to have it invalidated.

Myers bore oversight responsibility for agreements negotiated by his office, especially an agreement such as this which sets new and disturbing precedents for the management of public lands. That Myers would permit such an extraordinary one-sided agreement to be reached during his tenure is damning evidence that he was unable as Interior Solicitor to set aside his advocacy of grazing interests. His record provides little, if any, support for the proposition that he would do so as a judge.

B. Finishing the Business of His Former Grazing Clients

Early in his first term as Secretary of the Interior, President Clinton's Interior Secretary Bruce Babbitt vigorously promoted protections for the nation's public lands against overgrazing, first in the form of federal legislation, then, when this failed, through the federal regulatory process. One of Myers' main jobs as Executive Director of Public Lands Council and Director of Federal Lands for the National Cattlemen's Beef

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[104] BLM records indicate that Robbins continues to violate his grazing permits and the settlement agreement and the BLM director is taking no action to enforce either federal law or the terms of the settlement against him. Letter from David L. Wallace, Supervisory Rangeland Specialist to John L. Kunz, Regional Solicitor's Office, April 14, 2003 (monitoring and allotment analysis showing Robbins's practices to be "inconsistent with the grazing permits and the Settlement Agreement"); Letter from David Wallace, Supervisory Rangeland Specialist, to Alan Kesterke, Associate State Director, BLM, Aug. 4, 2003 (summarizing monitoring efforts that show Robbins's continued permit violations); BLM, Analysis of Billing History (3/24/03) for High Island, HD, and Owl Creek Ranches (documents on file with CRC). *See also* Mike Stark, *BLM, Rancher Settle Grazing Dispute*, BILLINGS GAZETTE, June 13, 2003.

[105] Mike Stark, *BLM, Rancher Settle Grazing Dispute*, BILLINGS GAZETTE, June 13, 2003.

[106] Letter from Matthew H. Mead, US Attorney, District of Wyoming to John R. Kunz, Assistant Regional Solicitor, Department of the Interior, August 28, 2002.

[107] Mike Stark, *BLM, Rancher Settle Grazing Dispute*, BILLINGS GAZETTE, June 13, 2003; *see also* Public Employees for Environmental Responsibility, Analysis of the Robbins Settlement (2003).

Association was to fight the implementation of these regulations at all turns and then to promote federal legislation that would repeal them. At Public Lands Council,[108] and then at Holland & Hart,[109] Myers was also actively involved in an unsuccessful effort to challenge these regulations in court.

Prior to his confirmation as Solicitor, Myers entered into an agreement that prohibited him from participating "in any particular matter involving specific parties in which [he knows] that Holland & Hart, LLP, is a party or represents a party."[110] The agreement took effect upon his confirmation by the U.S. Senate—July 12, 2001—and remained in effect until July 12, 2002. In addition to this one-year ban, Myers agreed to an open-ended ban on substantial participation in any matter or case that he handled at Holland & Hart.

Notwithstanding this agreement, Myers' calendar entries, obtained through a FOIA request, indicate that beginning almost immediately upon his swearing in as Interior Solicitor, Myers started actively participating in deliberations that led the Interior Department to give notice, on March 3, 2003, that it was considering revising many of the grazing regulations that had been implemented in the Clinton Administration and upheld by the Supreme Court in *Public Lands Council v. Babbitt.* [111] After receiving a complaint from the Friends of the Earth, the Interior Inspector General (IG) launched an investigation into whether Myers violated his recusal agreement. [112]

The IG's report documents Myers' continual contact with grazing advocates during his tenure as Solicitor, including meetings with groups such as the Arizona Cattle Growers Association, California Cattlemen's Association, Idaho Cattle Association, Wyoming Stock Growers Association, and the National Cattlemen's Beef Association, among others.[113] Myers also participated in numerous meetings with senior policy staff at the Interior Department at which the administration's grazing reform proposals were discussed.

The ultimate conclusion of the Interior IG was that despite these meetings, Myers did not violate the terms of his recusal agreement, which focuses narrowly on specific "matters" that Myers worked on for paid clients while at Holland & Hart. Under this

[108] Myers was counsel for PLC in Public Lands Council v. Babbitt, 929 F. Supp. 1436 (D. Wyo. 1996).
[109] As counsel with Holland & Hart, Myers authored a Supreme Court *amicus* brief opposing the regulations on behalf of a number of farm credit institutions. *See* Brief of *Amici Curiae* Farm Credit Institutions in Support of Petitioners, Public Lands Council v. Babbitt, 529 U.S. 728 (2000), *available at* 1999 WL 1128263.
[110] Recusal Letter, William Myers to Wendell K. Sutton, (May 1, 2001).
[111] Documents obtained through the Freedom of Information Act (FOIA) by Friends of the Earth and Public Employees for Environmental Protection (PEER) indicate that Myers met with cattle interests and members of his former law firm at least seven times in the fall of 2001 and summer of 2002 in his first year in the post. Immediately after the one-year recusal period expired, Myers' calendar indicates repeated meetings with grazing interests, including meetings concerning potential changes to the Department's current grazing regulations.
[112] *See* R. Jeffrey Smith, *Ethics Probe Opened on Interior Dept. Lawyer: Environmental Groups Allege Conflicts of Interest,* WASH. POST, Aug. 15, 2003.
[113] Office of the Inspector General, Report of Investigation, PI-NM-03-0309-I (Nov. 24, 2003).

standard, even though Myers devoted nearly eight years of his career to challenging the Clinton-era grazing regulations, including bringing the case for PLC and filing a Supreme Court brief on behalf of Holland & Hart clients, Myers was not working on the same "matter" when, as Solicitor, he promoted new regulations that would overturn many aspects of these same regulations.

Even if the IG's conclusion is correct, it absolves Myers only of violating the terms of a narrowly-worded recusal agreement. The IG's report simply does not speak to the appearance of impropriety created by the undisputable fact that as a public servant, Myers continued to press for the same pro-grazing legal reforms that he advocated as a highly paid lawyer in private practice. To say that Myers should not face civil or criminal sanctions because of his aggressive promotion of grazing interests as Solicitor is different from saying that he should now be confirmed to one of the nation's preeminent courts. That question turns on whether Myers will impartially judge the matters that come before him in court and on this issue. Considered in context, the IG's report paints a disturbing picture.

VI. Conclusion

William Myers' long history as an advocate for the grazing and mining industry, coupled with his troubling and undistinguished record as Interior Solicitor, casts serious doubts on his willingness or ability to put aside his personal views and rule fairly in environmental cases, cases involving Native American and tribal issues, and those involving public land management. His ABA rating reflects his minimal qualifications for a lifetime seat on the Ninth Circuit. Myers may share President Bush's bias toward the interests of industries engaged in resource exploitation, but that is no reason to reward him with a nomination to the Ninth Circuit.

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