



EARTHJUSTICE

Because the earth needs a good lawyer

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAI'I JUNEAU, ALASKA
OAKLAND, CALIFORNIA SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

For more information contact:

Glenn Sugameli, Senior Legislative Counsel, 202-667-4500 x221

William Myers' Views on Access to the Courts Violate Ninth Circuit Precedent and Would Effectively Bar Many Vital Environmental and Other Public Interest Claims

I. Introduction

Ninth Circuit nominee William G. Myers III's written response to Senator Dianne Feinstein's post-hearing questions indicate that, if confirmed, he apparently would seek to impose a sweeping requirement that non-profit environmental groups and "non-profit institutions" must post prohibitively expensive bonds in order to deter these groups and institutions from asking for "wrongful injunctions."¹ In so doing, Myers reaffirmed his

¹[Sen. Feinstein:] You have advocated litigation reform in order to curb what you see as the problem of environmental litigation. Specifically, you take the view that judges should take an active role in reducing lawsuits brought by environmentalists. You stated:

*"The courts themselves are partly to blame. 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." **Telluride Daily Planet**, 4/22/98.*

Question: What specific cases can you cite in which a non-profit environmental organization was "frivolously seeking a court-ordered injunction of a lawful activity" and the judge did not impose costs on the environmental plaintiff?

[Myers' Response]: I was not referring to a specific case when I wrote that article. Instead, I was referring to the application of Federal Rule of Civil Procedure 65(c). This rule states:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

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.

previously expressed extreme views that would severely and unjustifiably prevent citizen access to the courts, and actually broadened and extended his ideologically anti-environmental position.

Myers' response to Sen. Feinstein's written question reveals a legal philosophy that as a judge would impose broad, draconian restraints on citizens' ability to get a fair hearing in court. Effectively, this would insulate the mining and other interests that have been the focus of Myers' professional career from the citizen enforcement that Congress intended. Myers' demand that courts require expensive bonds for preliminary injunctions is apparently unqualified; he does not even suggest exceptions, for example, for cases in which the court decides the requested injunction clearly should be issued (e.g., where it finds irreparable harm to plaintiffs and the public interest, and that the plaintiffs are virtually certain to succeed on the merits.)

Myers apparently rejects the long-standing precedent of the Ninth Circuit Court of Appeals. That court and others have routinely refused to require such bonds because to do so would effectively lock the courthouse door on many vital public-interest pollution and other cases that result in preliminary injunctions that prevent irreparable harm to the environment, health, safety and other interests. Myers' position also would frustrate the congressional intent embodied in the citizen-suit provisions that Congress included in many major environmental laws, and in many other public interest statutes. Indeed, the Supreme Court has recognized the role that citizen suits play in halting and preventing pollution. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 174, 185 (2000).

Myers' position targets preliminary injunctions, which by definition are designed to prevent irreparable injury. Preliminary injunctions are particularly important in environmental and other cases in which the courts have recognized that the absence of preliminary relief will result in severe, irreparable injury, including loss of life, serious safety violations, or destruction of the environment. Indeed, preliminary relief is often necessary to prevent an entire case from becoming moot. Unless citizens can petition a court to order defendants to preserve the status quo until the court reaches a final decision, defendants may be able to exterminate species, cause irreversible damage to the environment, and destroy historic landmarks or sacred Native American sites that are protected under the law.

As discussed in detail below, Myers' written response reveals that he is an extremist ideologue on the key issue of access to the courts.

II. Detailed Analysis of William Myers' Response

- A. Myers' view, as expressed in his 1998 article and expanded in his written response to Sen. Feinstein's question, is in conflict with precedent, including decisions of the Ninth Circuit Court of Appeals and other courts that routinely waive the requirement of a bond, or require only a nominal bond, for a preliminary injunction sought by non-profit environmental and other groups in order to preserve the status quo.**
-

Myers' view is contrary to a long-standing body of Ninth Circuit Court of Appeals and other case law that recognizes and affirms the need to exempt public interest organizations from the bond requirement of Rule 65(c), including judicial application of the Rule's language regarding a bond "in such sum as the court deems proper." Myers failed to answer Sen. Feinstein's question on the cases he would cite on this issue, even though his "research for a client" that was the basis for his 1998 article, and any research reflected in his written answer, should have revealed—and presumably did reveal, this longstanding Ninth Circuit precedent. Thus, Myers apparently continues to reject this clear precedent of the very court to which he has been nominated.

In *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975), the Ninth Circuit overturned the district court's requirement of a \$4,500,000 bond and held that "[a] bond in the amount of \$1,000 is reasonable and we order that such bond be imposed." 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 that] such bonds would seriously undermine the mechanism in NEPA for private enforcement." *Id.* 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, "balancing the conflicting interests," overturned the district court bond as unreasonable because the plaintiff "private organizations and citizens, with limited resources" had a likelihood of success. *Id.*

In *People ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319 (9th Cir. 1985), the Ninth Circuit upheld 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. The Appeals Court held that the district court properly dispensed "with the security requirement . . . **where requiring security would effectively deny access to judicial review**" and that "**special precautions to ensure access to the courts must be taken where Congress has provided for private enforcement of a statute.**" *Id.* at 1325 (emphasis added).

Myers' view is contrary to the Ninth Circuit's "**general rule**" that "**[c]ourts routinely impose either no bond or a minimal bond in public interest environmental cases.**" *City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1148 (C.D. Cal. 1999) (no bond was required to enjoin a proposed freeway extension project) (emphasis added). 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." *Id.* The *Slater* court also recognized this policy as the accepted precedent in the 9th Circuit, stating that it "finds that there is no basis to depart from this general rule" and therefore "declines to require a bond." *Id.*

Courts across the nation have endorsed this view of security bonds. In *Natural Resources Defense Council v. Morton*, 337 F. Supp. 167, 168 (D.D.C. 1971), *affirmed on other grounds*, 458 F.2d 827 (D.C. Cir. 1972), 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. 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 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).

B. Myers ignores the important public policy of preserving access to the courts as Congress intended that is served by waiving security bonds for preliminary injunctions sought by non-profit environmental and other groups.

Myers, in his 1998 article and in his response to Sen. Feinstein, ignores 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. 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. The general inability of nonprofit organizations to afford substantial bonds underscores this concern.

Thus, courts have routinely waived the posting of bonds for citizen organizations. For example, the court in *Sierra Club v. Norton*, 207 F. Supp. 2d 1342 (S.D. Ala. 2002) 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.” This court, along with many others, recognized the crucial role that non-

profit organizations play in the enforcement of environmental regulations and the protection of public health and safety as espoused by the broad policy goals of NEPA and other statutes.

Thus, in environmental cases, and in public interest cases generally, courts have routinely waived or required only nominal bonds in order to give effect to congressional intent to provide for citizen enforcement of legislation like NEPA, the Clean Water Act, the Clean Air Act, and other environmental statutes. The Seventh Circuit Court decision in *Scherr* articulates this position by stressing the “broad substantive policies and objectives of NEPA” in which “Congress expressed its basic goal that the federal government should strive for the protection of environmental values.” 466 F.2d at 1030. Private actions brought by individuals or groups to protect the public interest are a critical part of insuring these objectives are met.

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. *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 ignores the United States Supreme Court’s recognition that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

Time and again, the Ninth Circuit Court of Appeals has followed the Supreme Court’s lead in recognizing that damage to environmental resources is often irreparable and therefore should be prevented while cases are being adjudicated lest the entire purpose of public interest litigation – protecting the environment – be rendered moot. In *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291 (9th Cir. 2003) the Ninth Circuit reversed a lower court decision that had denied a preliminary injunction and held that “evidence of environmental harm is sufficient to tip the balance in favor of injunctive relief.” *Id.* at 1299. The Ninth Circuit court cited its earlier decision in *Idaho Sporting Congress Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (which in turn cited the Supreme Court’s *Amoco* decision in explaining that environmental injury is often irreparable and usually cannot be remedied by money damages, and reversing the district court and granting an injunction). The *Earth Island* Ninth Circuit Court also noted the degree of harm by quoting another decision that recognized the irreparable nature of the injury to plaintiffs: “[t]he old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce.” 351 F.3d at 1299, quoting *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1382 (9th Cir. 1998).

D. Myers ignores the specific provisions of Rule 11 of the Federal Rule of Civil Procedure that guard against frivolous legal arguments.

“Frivolous” lawsuits are the domain of Federal Rule of Civil Procedure 11, which imposes penalties on attorneys who file trivial suits or make arguments lacking in any merit. Myers’ article and written response make no mention of Rule 11, which stands as a deterrent against all potential litigants seeking to file frivolous lawsuits. Instead, Myers seems to indicate that Rule 65(c) should be a bar to all lawsuits he considers to be frivolous or wrongful. Myers offers no reason, in either his 1998 article or in his written response to Sen. Feinstein, why a Rule 11 sanction would not serve as a sufficient deterrent against his stated intention to deter non-profit organizations from frivolously seeking a preliminary injunction. Nor does he provide a single example of a case in which he claims that Rule 11 did not serve sufficiently address his stated concerns

E. Myers ignores the judicial recognition that the high threshold necessary to obtain a preliminary injunction is itself a bar against “frivolous actions.”

In addition to ignoring Rule 11’s bar to frivolous suits, Myers completely disregards the substantial burden necessary to obtain a preliminary injunction, including a showing of irreparable harm and a likelihood of success on the merits. Also, Myers’ derision of courts that waive the bond based on the particular facts of a given case indicates that he does not grasp the reasons why decisions about what, if any, security bond should be required of a party seeking a preliminary injunction must be fact-based and committed to judicial discretion, rather than subject to the iron-clad rule he would impose.

In the landmark case *Bass v. Richardson*, involving indigent plaintiffs attempting to enjoin cutbacks to Medicaid benefits, the district court held:

Public policy...mandates that parties in fact adversely affected by improper administration of programs...be strongly encouraged to correct such errors.... *The injunctive standards of probability of success at trial, irreparable injury and balance of the equities provide protection against frivolous actions.* If any difference exists between the language of Rule 65(c) and Congressional intent clearly embodied in the remedial statute at issue, *the federal statutes control.*

Bass v. Richardson, 338 F. Supp. 478, 491 (S.D. N.Y. 1971) (emphasis added).

The court in *Bass* addresses a vital factor that Myers implicitly rejects, ignores or is unaware of— the high standard necessary to obtain a preliminary injunction is itself a bar against “frivolous actions.” In addition, the court recognizes that many remedial federal statutes would be impermissibly stripped of their power were they held subordinate to an unjustifiably limited interpretation of Rule 65(c)’s language.

In a broader context, a federal judge summed up the reasoning behind these decisions:

This court is simply unwilling to close the courthouse door in public interest litigation by imposing a burdensome security requirement on plaintiffs who otherwise have standing to review governmental action. The decision to require only nominal security in such situations is appropriately a matter to be weighed by the court in its consideration of the basic issues which a court must consider in passing upon a request for interlocutory injunctive relief, namely, likelihood that plaintiff will prevail, presence of substantial threat of irreparable injury to plaintiff, balancing threatened injury to plaintiff and threatened harm to defendant, and considerations of public interest.

State of Alabama ex rel. Baxley v. Corps of Engineers of U.S. Army, 411 F. Supp. 1261, 1276 (N.D. Ala. 1976) (Alabama Attorney General, on behalf of the citizens of Alabama, sought and obtained a preliminary injunction against a channel excavation project; the court ordered the Attorney General to post a \$1 bond).

F. Myers' written answer, which expanded his position beyond environmental groups to "non-profit institutions," would prevent many ordinary citizens from attempting to vindicate their rights in court.

The importance of this policy reaches beyond environmental cases: many organizations and individuals (often representing themselves) would be unable to enforce their rights in court were trial courts had to impose a security bond on plaintiffs before granting injunctions. 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 affect 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).

Myers expansion of his position in his written answer to include not only environmental groups or non-profit organizations but "non-profit institutions" strongly suggests that he would apply an inflexible across-the-board bond requirement that would also chill litigation by non-profit Native American, Native Hawaiian and Alaska Native organizations, Indian tribes, and tribal institutions. 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.

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).

G. Myers' written answer expanded his position beyond deterring frivolous litigation to "wrongful injunctions"

Myers' failure to distinguish between the "wrongful" standard addressed in Rule 65(c) and the "frivolous" criterion set forth in Rule 11 shows a lack of understanding of the Federal Rules of Civil Procedure. He seems to expand (and confuse) his definition of suits by organizations "frivolously seeking" injunctions to include what he considers to be "wrongful injunctions" which should be discouraged by Rule 65(c).

H. In his written response, Myers explicitly attributes his views on his "research for a client," but he continues to be unwilling or unable to cite a single case of alleged abuse, even though Sen. Feinstein asked, "What cases can you cite?"

It is remarkable that Myers continues to advocate extreme changes in the law that would severely restrict public interest litigation when he is still unable to cite a single case of alleged abuse that he would rely on to justify this change.

III. Conclusion

Were Myers' perspective to become reality, it would lock the courthouse door to many groups seeking to enforce environmental and other laws and to protect the public interest. Myers implicitly rejects, ignores or is unaware of all of the factors discussed above. Indeed, Myers contends in his answer to Sen. Feinstein that courts have *failed to apply* Rule 65(c) to non-profit organizations, not that these groups are exempted for the numerous and persuasive reasons cited above. It seems in his "research for a client" on this issue, Myers rejected the judicial recognition of the important public policy of not shutting the courthouse door in the face of those who are attempting to vindicate their rights or the public interest but do not have the luxury of posting costly security bonds to prevent irreparable damage from occurring while their claims are adjudicated.

Myers confuses and blurs the meanings of "wrongful" and "frivolous" in his answer and fails to even mention Rule 11's applicability to this issue. He believes that non-profit groups are free to "frivolously" seek a limitless number of "wrongful" injunctions because Rule 65(c), in his view, is "not applied" to them. In fact, Myers is unable to cite even one case to support this erroneous belief, and in his answer he ignores the established body of case law that underscores and vindicates the public policy of a court's discretion to reduce or waive a security bond. Myers' approach would limit courtroom access in many critical arenas solely to those who least need the protection of the judicial system and deny it to those who need it most.

It is rare and remarkable indeed for a judicial nominee to express even more extreme views after nomination than previously. Nevertheless, Myers did so even though in preparing his written responses, Myers had time to reflect, perform research and solicit the advice of Justice Department lawyers.

Myers' written response to Senator Dianne Feinstein's question regarding his nomination confirms that his previously expressed views were not inadvertent. Moreover, Myers' written response demonstrates that the actual views he would implement on the court of appeals are even more ideological, extreme, and contrary to established Ninth Circuit and other precedent.

As Interior Solicitor, Myers repeatedly favored the interests of mining and cattle industry groups (for which previously he had lobbied and advocated), at the expense of the environment and of his trust responsibility to consult with and to protect the interests of Indian tribes. Myers' reiteration and expansion of his extreme position against citizen access to courts in his written response to Sen. Feinstein reflects that he would continue to promote these ideological views if the Senate were to confirm him to the court of appeals.
