



**Report of
People For the American Way
in Opposition
to the Confirmation of
William G. Myers III
to the United States
Court of Appeals
for the Ninth Circuit**

People For the American Way
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Introduction

President Bush's nomination of former Interior Department Solicitor William G. Myers to the United States Court of Appeals for the Ninth Circuit has generated substantial concern from many Americans dedicated to protecting the environment, civil rights, and a truly independent judiciary. The Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, states that contain many of America's natural treasures, making the issue of environmental protection particularly significant in considering nominations to that court. But Myers has spent most of his career challenging or undermining, rather than defending, laws and rules that seek to protect our environment, even at the Department of the Interior. He has shown an alarming insensitivity to the heritage and traditions of Native Americans and demonstrated a strong hostility toward federal environmental protection, including the power of Congress to enact laws to protect the environment, leading to a recent rebuke by a federal judge. Indeed, his views on limiting Congress' authority and elevating private property rights, as well as his favorable comments about rejected Supreme Court nominee Robert Bork, raise serious concerns about his legal philosophy.

Myers has dedicated much of his career to advocating on behalf of grazing, mining, and other interests seeking to use federal lands for their own benefit, sometimes at the expense of the environment. From 1993 – 1997, he was employed as Director, and later Executive Director, of the National Cattlemen's Beef Association and the Public Lands Council.¹ From 1997 – 2001, he was of counsel to the firm of Holland & Hart, spending most of his time representing the interests of public lands industries and serving as corporate counsel for Cattlemen Advocating Through Litigation (CATL), the litigation branch of the Public Lands Council. During this time, Myers was also a registered lobbyist for a number of resource extracting interests, including Arch Coal and Peabody Coal.² He served as Solicitor for the Department of the Interior from 2001 – 2003, when he resigned to return to Holland & Hart. It may be that Myers' focus on lobbying, rather than significant litigation or other actual practice of law, is among the reasons why the American Bar Association's Standing Committee on the Federal Judiciary gave Myers its lowest passing grade – Qualified, with a minority voting Not Qualified.³

Unfortunately, the evidence strongly suggests that Myers did not leave his pro-industry, anti-environmental advocacy behind when he left private practice for public service. As Solicitor for the Department of the Interior, Myers continued to aggressively advocate on behalf of miners, cattlemen, ranchers and others who wish to exploit public lands for their own benefit. In evaluating his career at Interior, an *Idaho Statesman* editorial found that "Myers sounds less like an attorney, and more like an apologist for

his old friends in the cattle industry.”⁴ This conclusion is central to the most troubling aspects of Myers’ record, both inside and outside of government: his disregard and disrespect for Native American concerns; his continued promotion of industry interests at Interior and his hostility toward federal government protection of the environment; and his disturbing legal philosophy. Just as his record shows that Myers brought his anti-environmental views with him when he assumed the very different role of a federal official, so is there every reason for concern that he will bring his troubling views and legal philosophy with him if he becomes a powerful federal appellate judge. For these reasons, as discussed in detail below, Myers’ confirmation to a lifetime position on the important Court of Appeals for the Ninth Circuit should be rejected.

I. Myers’ Disregard and Disrespect for Native Americans’ Concerns

One of the many important responsibilities of the Department of the Interior is to provide for the protection of Native American lands. Unfortunately, in his pro-industry zeal, Myers has frequently shown disrespect for Native American tribes. His actions led the National Congress of American Indians, the nation’s oldest and largest organization of Native American and Alaskan tribal governments, to take the unprecedented step of adopting a formal resolution in opposition to Myers’ nomination to the Ninth Circuit. The organization’s November 2003 resolution cited Myers’ “deep lack of respect and understanding of the unique political relationship between the federal government and tribal governments” as well as his “demonstrated [] inability to set aside personal bias to act in a neutral and objective manner . . .”⁵ The resolution also notes that the Ninth Circuit is home to “well over one hundred Indian tribes, millions of Indian people, millions of acres of public land and important federal and tribal lands management issues,” making Myers’ appointment to this court particularly disturbing.⁶ Two significant matters at Interior demonstrate the reasons for the National Congress’ resolution: the Glamis Mine matter and the Oil-Dri case.

A. The Glamis Mine and the 2001 Regulations

One of the main reasons discussed by the Council for opposing Myers was his involvement in and handling of the Glamis Imperial Gold Mine matter. The proposed Glamis Imperial Mine Project would be a 1,600-acre open-pit gold mine located in the environmentally sensitive and culturally significant California Desert Conservation Area (CDCA) and infringing on parts of the Quechan Indian Nation’s sacred ancestral lands. Opponents contended that the project would irreparably damage part of the Quechan Tribe’s religiously significant Trail of Dreams and cause massive disruption to the area, leaving “an open pit deep enough to swallow Devils Tower National Monument” and “waste rock piles as tall as 30-story buildings.”⁷ Yet, for all the destruction it would require, Glamis’ own estimates reportedly reveal that the mine would produce only one ounce of gold for every 280 tons of rock disturbed.⁸ The Advisory Council on Historic Preservation, an independent federal agency that advises the President and Congress on

historic preservation matters, concluded that the project would be so damaging that “the Quechan Tribe’s ability to practice their sacred traditions as a living part of their community life and development would be lost.”⁹ California Senators Barbara Boxer and Dianne Feinstein have openly opposed the project.¹⁰

- **The Leshy Opinion and the 2000 Regulations**

Like any mine to be established on public lands, the proposed Glamis mine is subject to approval under the terms set forth in the Federal Land Policy and Management Act (FLPMA). The FLPMA requires, as a general rule for all public lands, that “the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”¹¹ Because the Glamis mine would be located in the CDCA, Congress has mandated that its approval be subject to an even higher standard of protection. In considering projects in this particularly sensitive area, the Secretary must also take reasonable measures to “protect the scenic, scientific, and environmental values of the public lands of the California Desert Conservation Area against undue impairment . . .”¹²

During the Clinton Administration, Interior Secretary Bruce Babbitt refused Glamis a permit for the mine, invoking his authority under the FLPMA and its subsection dealing with the CDCA. Babbitt made this decision relying in part on then-Solicitor John Leshy’s reading and interpretation of the FLPMA’s requirements. Leshy’s opinion interpreted the FLPMA language mandating that the Secretary “shall . . . prevent *unnecessary or undue degradation*” of public lands (emphasis added). Leshy found that, while Congress did not define “unnecessary or undue degradation,” its clear intent was to require the Secretary to refuse not only development that involved “unnecessary” degradation not required for mining, but also “undue” degradation that would cause “substantial irreparable harm” to the public lands. This interpretation, strengthened by the heightened requirements for projects on CDCA lands, gave Babbitt clear authority to deny the Glamis permit, which, while it proposed no “unnecessary” activities beyond those required for mining, would be so devastating as to clearly cause “undue” damage and “substantial irreparable harm” to the Quechan land.

Leshy’s interpretation of Congress’ intent was later codified in regulations adopted in 2000 by the Department of the Interior, which included in the definition of “unnecessary or undue degradation” activity that would result in “substantial irreparable harm” to the “significant” scientific, cultural, or environmental value of the public lands. This came to be known as the SIH standard.¹³

- **The Myers Opinion**

The 2000 Regulations were short-lived, however. In October 2001, the Bush Administration’s new Interior Solicitor, William Myers, issued an opinion re-visiting the issues considered by the Leshy opinion.¹⁴ In one of only three formal opinions he issued as Solicitor, Myers drew dramatically different conclusions from those drawn by Leshy.

As recently explained by a federal district court, Myers' opinion eviscerates not only the Leshy opinion, but also the clear intent of Congress in adopting the FLPMA.

Initially, Myers examined the general requirement prohibiting any mining on public lands that will cause "unnecessary or undue degradation." Myers made the improbable determination that, in this instance, "or" was actually intended to mean "and." Therefore, Myers opined, mining projects would have to cause degradation that was both "unnecessary" *and* "undue" before the Department could refuse a permit for the project. From this, Myers concluded that the Secretary is not free to reject a permit so long as the proposed environmental damage is "necessary" to the mining operation.¹⁵ In this way, Myers effectively read out of the regulations any duty to protect federal lands from the environmental devastation of mining operations. His determination held that the Secretary was utterly powerless to prevent any degree of environmental harm, however severe, if the actions of the perpetrator were "necessary" for mining.

In addition to redefining "or" to mean "and," Myers rejected the 2000 regulations' definition of "unnecessary or unreasonable degradation." He found "substantial irreparable harm" to be an overly vague definition, lending itself to arbitrary permit issuing practices.¹⁶ Accordingly, Myers found that "relevant legal authorities require removal of the 'substantial irreparable harm' criterion from both the definition of 'unnecessary or undue degradation . . . and the list of reasons why BLM may disapprove a plan of operations in . . . the 2000 regulations."¹⁷

Myers' opinion went even further, however, turning its attention to the subsection of the FLPMA that gives special protection to the CDCA. In the FLPMA, Congress ordered the Secretary to act to prevent "undue impairment" of the CDCA's "scenic, scientific, and environmental values," though Congress did not specifically define what constituted "undue impairment." Myers concluded that, because Congress did not define "undue impairment," the BLM was not authorized to do so without promulgating a definition, rendering the heightened protections Congress mandated for the CDCA meaningless and unenforceable.¹⁸

Secretary Norton adopted the Myers opinion, overturning the Leshy opinion, and rescinded the Department's previous rejection of the Glamis permit, re-opening the application for consideration. Incredibly, neither Myers nor Norton engaged the Quechan Tribe in government-to-government consultation before implementing this decision with such a devastating impact on the tribe's way of life.¹⁹ In sharp contrast, Glamis executives were granted high-level meetings within the Interior Department prior to the policy change.²⁰ Senator Barbara Boxer strongly criticized the reversal, stating that "[a]lthough the initial permit denial took 6 years and hundreds of hours of consultation, the decision to reopen the permit involved no public input and only took a few months."²¹ Tribal leaders branded the determination as "an affront to all American Indians."²²

The Myers opinion was a major victory for resource-extracting companies, which now apparently had free rein to mine wherever and however they wanted on public lands so long as the activities the company undertook were not "unnecessary" for the purpose

of mining. The opinion was a major blow to Native American tribes, scientific researchers, conservationists, and anyone valuing the protection of the environment, as these groups apparently now had no protection from any company wishing to mine federal lands using any arguably acceptable method. Myers' opinion was codified in the regulations adopted by the Department of the Interior in 2001. Following Myers' direction, the regulations removed "substantial irreparable harm" from the definition of "unnecessary or undue degradation" as well as from the list of reasons why the Secretary could deny a mining permit.

- ***Mineral Policy Center v. Norton and the Myers opinion***

Recently, a D.C. federal district court repudiated key elements of the Myers opinion. Myers' interpretation of the FLPMA regulations was at issue in the case of *Mineral Policy Center v. Norton*,²³ in which a group of non-profit environmental organizations challenged the legality of the 2001 Regulations. The plaintiffs charged several illegal shortcomings in the 2001 regulations, chief among them being Myers' interpretation of "unnecessary or undue degradation."²⁴

In Judge Henry Kennedy's November 18, 2003 decision, he found that, under the FLPMA, the government was responsible for preventing "unnecessary" as well as "undue" degradation to the public lands. In a harshly worded rebuke of the Myers opinion, Kennedy declared that Myers "misconstrued the clear mandate of the FLPMA" which "by its plain terms, vests the Secretary of the 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."²⁵ Kennedy noted that the proper interpretation of the FLPMA was made obvious by "well-established canons of statutory construction," including the principle that Congressional language should be given its ordinary meaning and every word should be given effect whenever possible.²⁶ Kennedy concluded that "in enacting FLPMA, Congress' intent was clear: Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary to mining, is undue or excessive."²⁷

Kennedy went on to uphold the Regulations' removal of the "substantial irreparable harm" definition of "unnecessary or undue degradation," finding that, since Congress did not define the term, Interior was free to define it in any reasonable way it wished.²⁸ Kennedy did note, however, that removal of the definition was only acceptable because he found that the "decision to . . . abolish the SIH standard, while influenced by the Solicitor's (erroneous) opinion concerning the illegality of the SIH standard, was not based primarily upon it." (parenthetical in original) Kennedy also noted that Myers' opinion did "tend to undermine" claims that the "substantial irreparable harm" standard had been properly removed from the Regulations and made the question "extremely close."²⁹ This severe judicial criticism of Myers' opinion reinforces the serious concerns about Myers' 2001 opinion and the Glamis Mine Project. As the National Congress of American Indians concluded, "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."³⁰

B. The Oil-Dri Case

The Oil-Dri case, also known as the “kitty litter case,” is another example of both Myers’ disregard for Native American lands and culture and his extraordinary sympathy for corporate interests. In that case, Oil-Dri, the world’s largest manufacturer of cat litter, sought a permit to mine open clay pits on 340 acres of federal land neighboring the Reno-Sparks Indian Colony, approximately ten miles from downtown Reno, Nevada.³¹ The clay would then be processed at a plant to be constructed for that purpose on adjacent private land. Local residents were concerned the operation would bring noise, air and ground water pollution, as well as increase truck traffic near a school. The Reno-Sparks Indian Colony was also concerned about possible damage to its ancestral burial grounds.³²

Though Oil-Dri’s plan involved operations on both federal and private land, the company sought a single permit from the Washoe County Commission. The Commission voted to deny the permit because of environmental and land-use concerns. The Commission claimed authority to do this because Oil-Dri sought only one application for operations on both federal and private lands, and the Commission has the authority to deny applications for uses of private land.³³ Oil-Dri refused to submit separate permit applications or re-draw its plans to avoid construction on the private lands subject to the Commission’s approval, maintaining that the Commission had no right to deny their permit application since it also involved mining on federal land.³⁴

In 2002, Oil-Dri filed suit against Washoe County in the U.S. District Court in Reno, seeking damages stemming from rejection of the permit. Soon thereafter, Oil-Dri lobbied the government to intervene on its behalf. Documents obtained by the *Reno Gazette-Journal* pursuant to a Freedom of Information Act request show “a series of written and verbal communication” between Oil-Dri officials and Secretary Norton and other Interior and BLM officials urging the Department to “take whatever steps are necessary” to support Oil-Dri’s interpretation of the mining law.³⁵ Commenting on Oil-Dri’s requests for intervention, local activist Tom Myers of Great Basin Mine Watch said, “[t]o me, it shows just how close the industry is with the Norton Department of Interior . . . It shows they are snuggling with the industry.”³⁶ In early November of the same year, the National Congress of American Indians adopted a resolution asking Secretary Norton not to intervene in the case. The resolution cited the threat the mine poses to the colony’s health and traditions and the fact that the “Secretary of the Interior has a legal trust obligation to protect the lands of Indian Tribes.”³⁷

On November 18, Solicitor Myers sent Reno-Sparks Indian Colony Chairman Arlan Melendez a letter explaining that the government had a “vital interest” in ensuring that local governments did not usurp federal authority over federal land, apparently failing to consider the significant private land impacted by the project.³⁸ Just nine days after the Myers letter to Melendez, the Department of Justice filed an *amicus* brief on behalf of the mining interests at the request of the BLM. The Government’s brief asserted that when a proposed mining project impacts both federal and private land, the

local government has no authority to restrict mining activities on federal land. The brief accused the County Commission of “in fact, issu[ing] a de facto ban on mining on the federal land.” Bob Vetere, vice president and general counsel for Oil-Dri praised the government brief, saying, “[i]t’s one I could have written myself.”³⁹ Great Basin Watch’s Tom Myers noted the irony of the governments’ filing: “The feds are preaching local control, but I think they mean local control only when its pro-industry.”⁴⁰

In March of 2003, U.S. District Judge Edward Reed dismissed Oil-Dri’s case against Washoe County, finding that Oil-Dri’s claims of federal preemption were not central to its case for damages, thus making the matter more suitable for the state courts. Melendez reported that he was “very pleased” with the decision. “We’ve always maintained that local governments have some say in the developments that are around them.”⁴¹ Myers’ advocacy in favor of Oil-Dri’s position remains deeply troubling.

II. Myers’ Hostility Toward Federal Environmental Protection Efforts and His Continued Promotion of Industry Interests

When he became Interior Department Solicitor, Myers’ loyalty should no longer have been to the corporate and anti-environmental interests he sought to promote as a lobbyist and advocate in the private sector. Instead, his very different role as Interior Solicitor was to represent the interests of the United States and help preserve and protect its great natural resources.⁴² But the record demonstrates that Myers did not leave his troubling anti-environmental views and advocacy behind when he became a federal official. This is reflected both in his general speeches and writings at Interior and in the private sector, as well as in a number of specific actions he was involved in and had responsibility for at Interior.

A. Myers’ Hostility Toward Federal Environmental Protection and Conservation Policy

Before coming to Interior, Myers strongly criticized federal conservation and environmental protection efforts, questioning even whether the federal government is an appropriate body to enact environmental policy and regulation. In an article he authored, Myers mocked “the fallacious belief that centralized government can promote environmentalism.”⁴³ He has compared the federal management of public lands to King George’s tyrannical reign over the thirteen colonies, asserting that public land safeguards are promoting “a modern-day revolution” in the West.⁴⁴ Myers has denounced the California Desert Protection Act, a law supported by Senators Feinstein and Boxer⁴⁵ as an “example of legislative hubris.”⁴⁶

When he joined the Department of Interior, however, Myers continued to disparage federal environmental protection efforts. In a speech to the Cattlemen’s Association given during his tenure as Interior Solicitor he told the audience, “[t]he biggest disaster now facing ranchers is not nature . . . but a flood of regulations designed to turn the West into little more than a theme park.”⁴⁷ At another 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 insisted “we should not be using the Endangered Species Act . . . as a land management tool. It is not there as a tool for zoning federal lands.”⁴⁸ An *Idaho Statesman* editorial described Myers’ comments on the Endangered Species Act as “naïve, and downright misleading,” pointing out the National Parks Service, BLM, and U.S. Fish and Wildlife Service are all required to ensure the lands under their control provide adequate habitat for endangered species. “That is clearly a land management role.”⁴⁹ Myers’ comments to the Cattlemen’s Association echoed arguments he made in the private sector in his *amicus* brief in the *SWANCC* case (discussed further below), where he decried “multiple layers of restrictive regulations” which have “impaired [farmers’] ability to farm and ranch efficiently,”⁵⁰ and described environmental regulations as placing a “stranglehold” on farmers.⁵¹ In short, in the words of leading environmental action group Earthjustice, “Myers’s official actions and his statements attacking environmental protections indicate that he is an ideologue who would use his position on the court to promote his personal anti-environmental agenda.”⁵²

B. Specific Examples of Myers’ Continued Promotion of Industry Interests at Interior

Myers’ failure to leave his pro-industry, anti-environmental advocacy behind when he became Interior Solicitor is reflected in much more than his speeches. In addition to the Glamis Mine and Oil Dri cases discussed above, Myers’ relatively short two-year tenure at Interior saw several other troubling episodes in which he was involved or had responsibility that demonstrated continued promotion of industry interests. Two of these resulted in government ethics investigations, one of which is still continuing. Even assuming that Myers did not actually violate formal ethical rules in these cases, they clearly document a failure to carry out his responsibilities as a federal official and continued advocacy of industry interests that should not be rewarded by approval of his nomination to be a powerful federal appellate judge.

• Myers’ Opinion on Retiring Grazing Permits

One example of Myers’ hostility toward federal efforts to enhance conservation and continued promotion of industry interests at Interior is the opinion he wrote as Solicitor finding it illegal to permanently retire grazing permits. According to the Grand Canyon Trust, a non-profit organization dedicated to preservation of the area, overgrazing of land may “pollute scarce desert water sources, spread exotic plant species and disease organisms, expose soils to erosion, compete with wildlife for food, and damage archaeological and paleontological sites.”⁵³ In recent years, conservationists had begun using the market system to reduce grazing on public lands. Conservationists would purchase grazing permits and then not use them, or would negotiate with ranchers to relinquish their permits to BLM on the condition that BLM retire the grazing permit. Permits can only be retired if BLM, after a public assessment process, decides to accept retirement of the allotment. Many conservationists had praised the technique as a means of using the market system to protect the environment, and many ranchers were eager

participants as the prices they were paid for their allotments were adequate to help them pay down substantial debt on their farms.⁵⁴

Remarkably, Myers acted as Solicitor to thwart conservation efforts in this area, in accord with the views of the grazing industry, even in the absence of legislative action. He wrote a formal opinion making it much more difficult for environmental groups to employ the free market in promoting their cause. In 2002, Myers issued an opinion providing that the BLM cannot retire a permit even if it meets BLM's statutory requirements for retirement unless the agency determines that the land of concern is not "chiefly valuable for grazing." Even then, he wrote, retirements can be reconsidered by BLM at any time and no retirement can be regarded as permanent. Any surrendered permit on land BLM deems "chiefly valuable for grazing" would remain "subject to applications from other permittees" regardless of the intent of the party initially relinquishing the permit for retirement.⁵⁵ Several months later, Myers issued a "clarification" of the opinion, providing that there is a "presumption that grazing in a grazing district should continue" even in the absence of a "chiefly valuable for grazing" determination.⁵⁶ Myers told the 2002 Convention of the Nevada Cattlemen's Association, "the BLM . . . has no authority to set any allotment aside . . . Before that could be done, we'd have to have such a program written into the regulations, or get congressional authority for it."⁵⁷ Grand Canyon Trust ceased its permit buy-out activity after Myers' opinion, citing significant uncertainty as to the fate of the lands that it was trying to protect.⁵⁸ At this time, environmental groups are seeking legislation that would effectively reverse the Myers opinion and set up a congressionally mandated system for retiring grazing permits.⁵⁹ "Meanwhile," the Grand Canyon Trust laments, "ranchers continue to ask whether we will buy their permits so they can get out of debt and save their private lands. Until the administration establishes a regular procedure for considering and implementing grazing closures, the answer is, 'No.'"⁶⁰ Myers' opinion is largely responsible for that result.

- **The Robbins Grazing Settlement**

The Interior Department Inspector General is currently investigating an alleged ethical violation concerning a settlement reached between the Department of Interior's Bureau of Land Management and rancher Frank Robbins. Mr. Robbins is a Wyoming rancher with a long history of grazing violations, "includ[ing] dozens of trespassing notices, cancellation of permits, charges of unauthorized use of public land, attempts to block BLM workers from monitoring the land, alleged violations of cease-and-desist orders and defiance of emergency closures to protect the environment during drought."⁶¹ Robbins has also had a number of run-ins with BLM officials. In 1997, Robbins stood trial for assaulting BLM employees, though he was acquitted on the charges.⁶² Robbins also filed a RICO complaint against individual employees of BLM, claiming they conspired against him after he refused to give BLM an easement over his land.⁶³

Due to Robbins' numerous grazing violations, BLM officials cancelled two of his grazing permits.⁶⁴ In an internal memo, Darrell Barnes, manager of the Worland, Wyoming BLM office, stated 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 . . . His conduct was so lacking in reasonableness or responsibility that it became reckless or negligent and placed significant undue stress/damage on the public lands resources.” Robbins appealed the decision, and the cancellations were stayed pending judicial review.⁶⁵

In 2002, Robbins went to Washington to meet with top Interior officials to discuss his concerns. The discussions soon became settlement negotiations, and though BLM staff continued to document Robbins’ multiple violations, they were instructed not to pursue the violations while negotiations were taking place.⁶⁶

The resulting settlement, in the words of the *Billings Gazette*, “is highly unusual within BLM and appears to depart from long-running requirements spelled out in federal law about who can receive grazing permits.”⁶⁷ Rather than punish Robbins for his repeated violations, the settlement awarded him absolution for past wrongs as well as a remarkable degree of new autonomy. Under the terms of the settlement: ten trespassing violations and six other cases against Robbins were conditionally stayed and BLM agreed not to use them as evidence in any future trespass proceedings against Robbins; Robbins was given “additional management flexibility” regarding lands in which the government holds less than 50% ownership; he was conditionally awarded a new grazing permit; Robbins was granted a non-reciprocal right of way, which allows him to cross public lands without allowing government officials similar authority to enter his land; and Robbins was awarded a special billing rate on his grazing fees. The settlement also gives Robbins a special status by which only the Director of BLM can cite Robbins for grazing violations, stripping local officials of their authority over him. In exchange, Robbins agreed to put on hold his claims that BLM violated the Freedom of Information Act. Oddly, Robbins did not have to agree to drop his RICO suit against BLM employees.⁶⁸

The extraordinarily one-sided agreement was contentious even within Interior. One internal memo is described as “spend[ing] eight pages documenting several points on which the agreement seems to violate federal law, significantly altering the Taylor Grazing Act, the Federal Land Policy and Management Act, the Federal Advisory Committee Act and the Code of Federal Regulations.”⁶⁹ The memo reportedly notes that “[o]ne of the mandatory requirements is that all applicants and any affiliate of the applicants have a satisfactory performance record. The foregoing is not discretionary.”⁷⁰

Concerned about the settlement, Public Employees for Environmental Responsibility (PEER) launched its own investigation. After a lengthy analysis, PEER determined that the settlement contains seven distinct violations of the law, including: a) it is illegal to grant a private party an easement over federal land without obtaining a reciprocal easement when obtaining such a reciprocal easement is in the public interest, b) “conditional” grazing permits are not recognized in the C.F.R., and grazing permits can only be awarded after a consideration of the applicant’s prior record, c) no law or precedent allows a private party to exercise “additional management flexibility” over lands with less than 50% federal ownership, and d) the procedure by which Robbins

could only be sanctioned by Washington officials violates the procedures set forth in the C.F.R. for public lands management.⁷¹

The settlement's implications with respect to Myers are troubling. Myers' office reportedly wrote and helped negotiate the settlement agreement.⁷² In fact, Myers' calendar and a recent IG report show that he personally attended meetings concerning the settlement.⁷³ The Interior Inspector General is investigating the settlement, including Myers' role in developing and approving it. It is not certain when the investigation will be completed or when its results will be released. Regardless of the extent of his personal involvement, however, Myers' office's responsibility for this "sweetheart deal" provides yet another example of effective promotion of the needs of industry over protection of federal lands and even over the law during his tenure.

- **Other Promotion of Grazing Interests by Myers**

The Inspector General recently concluded an investigation, at the Office of Government Ethics' request, into allegations that Myers had inappropriately failed to recuse himself from a variety of matters during his first year at Interior. Though the OGE determined that Myers had avoided formal ethics violations, the findings of the investigation raise a number of troubling concerns about his nomination.⁷⁴

Before being confirmed as Solicitor, Myers entered into a recusal agreement that was intended to prevent "any actual or apparent conflict of interest"⁷⁵ in the new post. In addition to pledging to avoid appearances of impropriety or using the office for his own financial gain, Myers agreed that he would not participate in matters involving Holland & Hart or its clients for a period of one year. This agreement took effect the day he resigned from Holland & Hart and terminated one year later. Myers also agreed that he would not tend to matters involving his own former clients until one year had passed since he last acted as the client's attorney. Finally, Myers agreed to an open-ended recusal from "participat[ing] personally and substantially in my official capacity in any of the specific cases and other specific matters that I handled while Of Counsel to Holland & Hart, LLP. [sic]"⁷⁶

In August 2003, PEER and Friends of the Earth (FOE) filed a complaint with the Office of Government Ethics, claiming that Myers had repeatedly violated various sections of his recusal agreement.⁷⁷ The organizations had obtained documents through a FOIA request that appeared to show that Myers had repeatedly met with Holland & Hart attorneys and clients and had attended numerous meetings concerning matters he had handled while at the firm.⁷⁸ Most notably, Myers apparently played a substantial role in revising grazing regulations he had been actively involved in challenging during the Clinton administration, both at Holland & Hart and as director of Public Lands Council,⁷⁹ which had been upheld by the Supreme Court in *Public Lands Council v. Babbitt*.⁸⁰ At OGE's request, the Interior Inspector General headed an investigation into Myers' conduct.

The investigation detailed a total of 37 meetings that PEER and FOE suspected were in violation of Myers' recusal agreements. Though the OGE eventually concluded that none of the incidents constituted a formal conflict of interest, in the words of FOE's Kristen Sykes, "these issues are broad and it's open to interpretation."⁸¹

For example, one meeting with Holland & Hart attorneys detailed in the investigation report was a reception the firm held at the exclusive Hay Adams Hotel in Washington, D.C. to celebrate Myers' new post. Notable guests included Vice President Dick Cheney, who attended the festivities to swear Myers into office in the presence of his former colleagues.⁸² The report also discusses a number of meetings with Holland & Hart partners, as well as extravagant dinners paid for by Holland & Hart or its partners, at which participants contend that no "Holland & Hart business" was discussed.⁸³ Though the report details steps Myers and Holland & Hart took to seek compliance with applicable ethics standards, Myers' attendance at such meetings and events could easily be seen as a violation of his promise to avoid "taking any actions that may create the appearance of impropriety."⁸⁴

Perhaps of greater significance, however, are at least seven documented occasions in which Myers participated in meetings at which proposed revisions to Clinton-era federal grazing regulations were discussed.⁸⁵ As director of the Public Lands Council, Myers had been actively involved in challenging those regulations in federal court.⁸⁶ While at Holland & Hart, Myers authored an *amicus* brief on behalf of the Farm Credit Institutions challenging the regulations before the U.S. Supreme Court.⁸⁷ During his first year as solicitor, Myers participated in a number of meetings with grazing advocacy groups, as well as meetings with high-level Interior officials to discuss possible regulation changes. Last March, during Myers term as Solicitor, Interior gave notice of its intent to revise the Clinton-era regulations.⁸⁸ In a letter to PEER and FOE explaining the results of the investigation, however, the OGE's office stated that Myers' recusal agreement "does not prohibit [him] from meeting with anyone on matters of general applicability, i.e. matters that effect an entire class of entities or interests similarly rather than specific entities in a unique or differential matter."⁸⁹ Apparently, because grazing regulations impact many people, and because Myers did not act to change the grazing regulations he had challenged in private practice at the sole request of his former, paying clients, the OGE found no formal ethics violations. It remains clear, however, that Myers spent much of his professional life challenging the regulations on behalf of a number of clients, and then took actions to change them almost as soon as he accepted his new government post. Regardless of whether Myers' conduct constitutes a technical violation of the recusal agreement, Myers' direct involvement as Solicitor in matters pertaining to revising the very regulations that he challenged in private practice remains extremely disturbing. Myers' continued promotion of industry interests while at Interior is conduct that should be deemed unacceptable for a federal appellate judge.

III. Myers' Troubling Legal Philosophy

Though most of Myers' legal work has focused on environmental issues, some of his writings raise serious concerns about his legal philosophy more generally. For

example, in the *amicus* brief Myers authored in the case of *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*,⁹⁰ Myers advocated a very limited view of Congressional power under the Commerce Clause – a view with implications far beyond the environmental policy field.

SWANCC was a wetlands case dealing with the federal government’s authority under the Clean Water Act (CWA) to prevent the destruction of wetlands. The Corps argued that regulation of wetlands used by migratory birds was authorized by the Act, which was properly adopted by Congress pursuant to the Commerce Clause, even when the waters were intrastate bodies of water, due to their substantial impact on interstate commerce. In his brief, Myers argued on behalf of the American Farm Bureau Federation, National Cattlemen’s Beef Association, and North Dakota Farm Bureau against the Corps’ authority to engage in such regulation and for an extremely narrow interpretation of Congress’ authority under the Commerce Clause.

Though Congress enacted the Clean Water Act pursuant to its powers under the Commerce Clause, Myers found “no constitutional basis”⁹¹ for federal jurisdiction over the wetlands and criticized the Corps’ “over-zealous interpretation of its authority under the CWA and the Constitution’s Commerce Clause.”⁹² Myers warned that, if the Corps was allowed to regulate the dredging and filling of the wetlands, then “land use planning, an area of regulation traditionally within state and local jurisdiction, will be usurped.”⁹³ Myers also sharply criticized the Seventh Circuit’s ruling in the case, which found for the Corps on the grounds that hunting and trapping migratory birds that use the wetlands was sufficient to prove a substantial effect on interstate commerce and authorize Congressional legislation under the Commerce Clause. Of the Seventh Circuit opinion, Myers said “citing human exploitation of migratory birds as support for the Corps’ assertion of jurisdiction over isolated, intrastate waters for wildlife ‘protection,’ the court not only contradicted itself, but showed just how farfetched the migratory bird rule is.”⁹⁴ Myers concluded his argument by insisting that allowing such regulatory authority “would amount to unauthorized federal regulation of land use.”⁹⁵

In a 5-4 decision, the Court found that the Clean Water Act itself did not authorize the Corps to regulate waste disposal in the wetlands, a result Myers’ brief supported, thus avoiding the Commerce Clause question altogether. The Court did *not* adopt the restrictive view of the Commerce Clause advocated by Myers. In fact, four Justices did address the Commerce Clause arguments raised by Myers and others, and dismissed the theory that Congress did not have power to regulate the disputed wetlands as having “no merit.”⁹⁶ These Justices also explained that it was not accurate to classify the destruction of the wetlands as a “local” problem, even when the disputed habitat is contained completely within one state, because “the protection of migratory birds is a textbook example of a national problem.”⁹⁷

Myers’ advocacy for a very narrow Commerce Clause has implications that reach far beyond environmental law. Diminishing congressional authority under the Commerce Clause is a primary goal of the modern “federalism” movement, which advocates limited federal powers and severely limiting congressional authority, even to

the extent of literally rolling back the New Deal.⁹⁸ A number of the Administration's most controversial appellate court nominees have embraced such a philosophy.⁹⁹ Myers' arguments in *SWANCC* would not only remove many of our nation's most valuable resources from the umbrella of federal protection, but could also be used to strike down a broad range of federal laws protecting the health, safety, and rights of all Americans.

Myers has also embraced another key tenet of modern "federalist" legal philosophy: elevated protection for private property "rights" as a method to invalidate environmental and other government regulation. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,¹⁰⁰ the Supreme Court considered an Interior Department regulation that implemented the Endangered Species Act by prohibiting significant habitat modification on private property that kills or injures endangered species. Myers filed an *amicus* brief in the case on behalf of cattle ranchers that not only argued that the regulation was invalid under the Act, but also claimed that it was unconstitutional because it violated cattle ranchers' property rights. Indeed, the very first argument in the brief claimed that the regulation "Takes the Private Property of Ranchers Without Just Compensation in Violation of the Fifth Amendment."¹⁰¹ In support of his argument, Myers claimed that the property rights of a rancher were constitutional rights that are "as fundamental as his right to freedom of speech or freedom from unreasonable search and seizure."¹⁰²

The Supreme Court upheld the Endangered Species Act regulation in *Babbitt*. Not a single Supreme Court justice, not even dissenting justices Scalia, Rehnquist, and Thomas, accepted Myers' constitutional argument. Myers' claims echo the extreme property rights rhetoric of California Supreme Court Justice Janice Rogers Brown, who was criticized by her court majority as attempting to impose a "personal theory of political economy on the people of a democratic state" for making a similar argument against a San Francisco housing ordinance.¹⁰³ The property rights philosophy apparently embraced by Myers is far out of the mainstream and could be used to invalidate a wide range of important environmental and other regulation.

Serious questions about Myers' legal philosophy are also raised by his writings in support of the nomination of Judge Robert H. Bork to the United States Supreme Court. In an article Myers published on the subject in 1988, he argued that "Judge Bork's judicial philosophy was well within the parameters of acceptable constitutional theory, worthy of representation on the Supreme Court."¹⁰⁴ This was despite the resounding bipartisan 58 - 42 vote rejecting Bork's nomination, which was premised on the bipartisan conclusion that Bork's legal philosophy was "out of the mainstream."¹⁰⁵

In fact, since the Senate rejected his nomination to the Supreme Court, Robert Bork has described the current Court as a "band of outlaws"¹⁰⁶ who have shown America "what it means to be ruled by an oligarchy."¹⁰⁷ He has claimed that the Justices "are not following any law"¹⁰⁸ and have made decisions so illogical that "constitutional law is useless to study and impossible to teach."¹⁰⁹ Previously, he even advocated radically restructuring our Constitution so that the Court's decisions could be overturned by simple majority votes of both Houses of Congress.¹¹⁰ He has since abandoned this idea, not

because of the incalculable damage it would cause our system of checks and balances, but because he has concluded that the change would not have the desired result.¹¹¹ For Myers to describe a man with such views about the current, conservative Court as holding ideas “well within” the mainstream of judicial thought is an exceptionally troubling statement, and raises serious concerns about Myers’ own legal philosophy.

Conclusion

As the National Congress of American Indians has concluded, William Myers’ “demonstrated [] inability to set aside personal bias”¹¹² makes him an inappropriate candidate for the Ninth Circuit Court of Appeals. His disregard for Native American interests makes him a poor guardian of the rights of the millions of Native Americans who call the Ninth Circuit home. His willingness to read the law and act as Interior Solicitor in the way that best serves the cattle and mining industries, without regard for the intent or the authority of Congress or his proper role at Interior, demonstrates an ideology not likely to be tempered by a seat on the federal bench. His embrace of neo-federalist views and the judicial philosophy of Robert Bork raises extremely troubling concerns about his own legal philosophy. For these reasons, People For the American Way urges the Senate not to consent to the confirmation of William Myers to the United States Court of Appeals for the Ninth Circuit.

¹ Answer 6 by Myers to the United States Senate Judiciary Committee Questionnaire.

² *Id.*; 2000 lobbying reports of Holland & Hart, available at <http://sopr.senate.gov>.

³ Ratings of Article III Judicial Nominees: 108th Congress, available at <http://www.abanet.org/scfedjud/ratings108.pdf>. (The American Bar Association Standing Committee on the Federal Judiciary is the arm of the ABA that rates the qualifications of the President’s judicial nominees. According to its mission statement, the ABA restricts its ratings to consideration of a nominee’s professional credentials, and does not consider a nominee’s ideology or judicial philosophy.)

⁴ Op-Ed, Our View: A Rancher’s Advocate, or the People’s Attorney?, *Idaho Statesman*, Nov. 22, 2002.

⁵ National Congress of American Indians, Resolution #ABQ-03-061, Opposition to Nomination and Confirmation of Interior Solicitor William G. Myers III To Ninth Circuit Court of Appeals, Nov.21, 2003. (hereinafter Resolution #ABQ-03-061)

⁶ *Id.*; See also, Indianz.com, Appeals Court Nominee Favored Industry Over Tribes, Dec. 18, 2003, available at <http://www.indianz.com/News/archives/003073.asp>.

⁷ Charles Levendosky, Is Gold More Sacred than Religion?, Casper Star-Tribune, May 5, 2002.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*; Faultline, Feinstein, Boxer, Reps Oppose Norton on Gold Mine, Dec. 14, 2001, available at <http://www.faultline.org/news/2001/12/Glamisdec.html>.

¹¹ 43 U.S.C. § 1732(b).

¹² 43 U.S.C. § 1781(f).

¹³ 65 Fed. Reg. at 70,115 (formerly codified at 43 C.F.R. § 3809.5(f) (2001)).

¹⁴ Office of the Solicitor, Memorandum M-37007, Surface Management Provisions for Hardrock Mining, Oct. 23, 2001.

¹⁵ *Id.* at 9 – 12.

¹⁶ *Id.* at 14.

¹⁷ *Id.* at 15.

¹⁸ *Id.* at 18.

¹⁹ Resolution #ABQ-03-061.

²⁰ Testimony of Sen. Barbara Boxer before the Indian Affairs Committee Hearing on Sacred Sites, July 17, 2002.

²¹ *Id.*

²² Faultline, Gale Norton's Broken Treaties: Interior Secretary Breaks Promise to Tribes, Oks Imperial County Mine, Oct. 26, 2001, available at <http://www.faultline.org/news/2001/10/quechanmining.html>.

²³ 292 F. Supp. 2d 30.

²⁴ The groups also claimed the regulations illegally renounced the government's responsibility to apply higher standards to those seeking to mine unclaimed or improperly claimed lands and to provide for public review of mines that would disturb under five acres of public land. Judge Kennedy found that while "the 2001 Regulations, in many cases prioritize the interests of miners . . . over the interests of persons . . . who seek to conserve and protect the public lands," the Regulations were for the most part a "reasonable" application of FLPMA that the court could not strike down. Kennedy remanded one portion of the Regulations, which he said failed to ensure that the United States was fairly compensated when industry alters public land in the course of resource extraction. *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30 (D. D.C. 2003) at 79 – 81 (hereinafter *Mineral Policy Center*).

²⁵ *Mineral Policy Center* at 35.

²⁶ *Mineral Policy Center* at 35 – 38.

²⁷ *Mineral Policy Center* at 38.

²⁸ *Mineral Policy Center* at 43 – 45.

²⁹ *Mineral Policy Center* at 44, note 18.

³⁰ Resolution #ABQ-03-061.

³¹ Cat Litter Maker Sues County in Nevada Over Clay Mine Claim, Las Vegas Sun, April 11, 2002; Legal Dispute: Parties Ask to Join Cat Litter Mine Lawsuit, Las Vegas Review-Journal, May 15, 2002.

³² Scott Sonner, Cat Litter Battle Seeks Intervention, Associated Press, Oct. 31, 2002; National Congress of American Indians, Resolution #SD-02-030, Request for Interior Secretary Norton to dissuade the Bureau of Land Management from initiating an Amicus Brief on Behalf of Oil-Dri Mining, Nov. 10 – 15, 2002 (hereinafter Resolution #SD-02-030); Scott Sonner, Northern Nevada: Foes Call Litter Plant a Dirty Deal, Las Vegas Review-Journal, June 29, 2001.

³³ Jeff DeLong, Oil-Dri Plant Rejection Could Ignite Legal Battle, Reno Gazette-Journal, Feb. 27, 2002.

³⁴ *Id.*; Las Vegas Sun, *supra* note 31; Jeff DeLong, Feds: Washoe Out of Line to Reject Oil-Dri Permit, Reno Gazette Journal, Dec. 6, 2002.

³⁵ Jeff DeLong, Oil-Dri Lawyer Says Government Should Seek Reversal on Washoe Rejection, Reno Gazette-Journal, Feb. 3, 2002.

³⁶ *Id.*

³⁷ Resolution #SD-02-030.

³⁸ Jeff DeLong, *supra* note 35.

³⁹ DeLong, *supra* note 34.

⁴⁰ Jeff DeLong, Feds Likely to Weigh In on Lawsuit, Reno Gazette-Journal, Nov. 1, 2002.

⁴¹ Jeff DeLong, Oil-Dri Lawsuit Rejected, Reno Gazette-Journal, Mar. 6, 2003.

⁴² See United States Department of the Interior, Mission Statement, available at <http://www.doi.gov/doimissn.html> (explaining that the Department's mission includes "[r]estoring and maintaining the health of federally managed lands, waters, and renewable resources" as well as "[p]reserving our Nation's natural and cultural heritage for future generations").

⁴³ William Myers III, Environmental Command and Control: the Snake in the Public Lands Grass, Farmers, Ranchers and Environmental Law 191 (1995) at 201.

⁴⁴ William G. Myers III, Western Ranchers Fed Up with Feds, Forum for Applied Res. & Pub. Pol., Winter 1996 at 22.

⁴⁵ Sierra Club, Feature: California Desert Protection Act Passes, Planet Newsletter, Jan. 1995, available at <http://www.sierraclub.org/planet/199412/ft-cadesert.asp>.

⁴⁶ Myers, *supra* note 43, at 200.

⁴⁷ Mother Jones, Behind the Curtain, Sept./Oct. 2003, available at http://www.motherjones.org/news/feature/2003/09/ma_534_01.html.

⁴⁸ Op-Ed, *supra* note 4.

⁴⁹ *Id.*

⁵⁰ Brief for American Farm Bureau Federation et. al. in Support of Petitioners, *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) at 2 (hereinafter Brief).

⁵¹ Brief at 3.

⁵² Earthjustice, The Nomination of William G. Myers III to a Lifetime Federal Judgeship Threatens Environmental Protections, available at http://www.earthjustice.org/policy/judicial/pdf/Myers_discussion_10-8-03.pdf

⁵³ Grand Canyon Trust, Grand Canyon Trust Grazing Retirement Program, available at <http://www.grandcanyontrust.org/arches/grazing.html>.

⁵⁴ *Id.*

⁵⁵ Office of the Solicitor, Memorandum M-37008, Authority for the Bureau of Land Management to Consider Requests for Retiring Grazing Permits and Leases on Public Lands, Oct. 4, 2002.

⁵⁶ Office of the Solicitor, Clarification of M-37008, May 13, 2003 at 1, 6.

⁵⁷ Patricia McCoy, Official: It's Illegal to Permanently Retire Grazing Permits, Capital Press, Nov. 27, 2002.

⁵⁸ Grand Canyon Trust, *supra* note 53.

⁵⁹ Mark Salvo and Andy Kerr, Federal Grazing Permit Retirement: Permits for Cast: A Fair and Equitable Resolution to the Public Land Range War, available at <http://www.Fguardians.org/permit-retire.html>

⁶⁰ Grand Canyon Trust, *supra* note 53.

⁶¹ Mike Stark, BLM, Rancher Settle Grazing Dispute, Billings Gazette, June 13, 2003.

⁶² BLM Says Alleged Violator Treated Fairly, Billings Gazette, Oct. 2, 2001.

⁶³ Stark, *supra* note 61; Don Bowman, Wyoming Rancher Files a Racketeering Lawsuit, Nevada Rancher, Oct. 2003.

⁶⁴ Stark, *supra* note 61.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ PEER letter to Senators Orrin G. Hatch and Patrick J. Leahy, Sept. 3, 2003 (hereinafter PEER letter), attachment II.

⁶⁹ Stark, *supra* note 61.

⁷⁰ *Id.* As of January 31, 2004, this memorandum has not been released to the public.

⁷¹ PEER letter, attachment III.

⁷² *Id.*; Brodie Farquhar, Top Interior Officials Impose Settlement, Casper Star-Tribune, June 23, 2003.

⁷³ PEER letter, attachment IV (obtained through FOIA request). The IG report investigating Myers' contact with former clients also documents Myers' attendance at a number of meetings where a "Wyoming rancher settlement" or a "dispute between BLM and a Wyoming rancher" were discussed. These would appear to be references to meetings discussing the Robbins settlement. Office of the Inspector General, Report of Investigation: William G. Myers, III, Case Number PI-NM-03-0309-I, Nov. 24, 2003 (hereinafter IG Report) at 26, 32.

⁷⁴ Robert Gehrke, IG, Ethics Office, Clear Interior Solicitor of Conflict Charges, San Francisco Gate, Jan. 9, 2004.

⁷⁵ Myers letter to Wendell K. Sutton, Deputy Assistant Secretary for Human Resources, U.S. Dept. of the Interior, May 1, 2001 at 1 (hereinafter Recusal Letter).

⁷⁶ *Id.*

⁷⁷ IG Report at 1.

⁷⁸ *Id.*

⁷⁹ 929 F. Supp. 1436 (D. Wyo. 1996). In addition to being director of PLC at the time, Myers is listed in the decision as appearing at trial "Of Counsel for Petitioners." Brief for Farm Credit Institutions in Support of Petitioners in *Public Lands Council v. Babbitt*, 1998 U.S. Briefs 1991 (Dec. 3, 1999). In fact, the Supreme Court unanimously rejected Myers' argument against the regulations. 529 U.S. 728 (2000).

⁸⁰ 529 U.S. 728 (2000).

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- ⁸¹ Gehrke, *supra* note 74.
- ⁸² IG Report at 6 – 7.
- ⁸³ IG Report at 5 – 6, 8 – 13, 33 – 40, 43 -- 48.
- ⁸⁴ Recusal Letter at 1.
- ⁸⁵ IG Report at 20 – 33.
- ⁸⁶ *See* note 79.
- ⁸⁷ *See* note 79.
- ⁸⁸ Jack Newfield, More Bad Judges, *The Nation*, Jan. 26, 2004. In December, the Bush administration proposed new regulations, reversing much of the Clinton-era regulations. The new proposed regulations are currently in their 60-day public comment period. *See* Ted Monoson, Interior Rolls Back Babbitt Grazing Changes, *Casper Star-Tribune*, Dec. 6, 2003.
- ⁸⁹ Letter from Amy Comstock, Office of Government Ethics, to Dan Myers of PEER and Kristen Sykes of FOE, Dec. 5, 2003 at 3.
- ⁹⁰ 531 U.S. 159 (2001).
- ⁹¹ Brief at 16.
- ⁹² *Id.* at 4.
- ⁹³ *Id.*
- ⁹⁴ *Id.* at 17.
- ⁹⁵ *Id.* at 18.
- ⁹⁶ 531 U.S. at 197 (Stevens, J., dissenting).
- ⁹⁷ 531 U.S. at 195 (emphasis in original).
- ⁹⁸ *See* People For the American Way Foundation, The Federalist Society: From Obscurity to Power, Aug. 2001 (updated Jan. 2003), at 17 – 22.
- ⁹⁹ *See* People For the American Way, Report of People For the American Way in Opposition to the Confirmation of Jeffrey Sutton to the United States Court of Appeals for the Sixth Circuit, Jan. 24, 2003 at 1, 6 – 8, 13 – 15; People For the American Way, Report of People For the American Way In Opposition to the Confirmation of William H. Pryor to the United States Court of Appeals for the Eleventh Circuit, June 10, 2003 at 4 – 11; People For the American Way and the NAACP, Loose Canon: Report in Opposition to the Confirmation of Janice Rogers Brown to the United States Court of Appeals for the D.C. Circuit, Aug. 28, 2003 at 34 – 39, all available at <http://www.pfaw.org>. In fact, in his short time on the bench, Judge Sutton has already issued one dissenting opinion that would have severely limited the scope of federal arson law on “federalism” grounds. United States v. Laton, 2003 U.S. App. LEXIS 24770 (6th Cir. 2003). *See also* People For the American Way Foundation, Confirmed Judges, Confirmed Fears, Jan. 23, 2004 at 11 – 12, 19 – 21, available at <http://www.pfaw.org>.
- ¹⁰⁰ 515 U.S. 687 (1995).
- ¹⁰¹ Brief for the National Cattleman’s Association and the CATL Fund in Support of Defendants in *Babbitt v. Sweet Home Chapter of Communities of Oregon*, 1994 U.S. Briefs 859 (March 24, 1995) at 2.
- ¹⁰² *Id.* at 3.
- ¹⁰³ *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 110 (Cal. 2002). *See also* People For the American Way and the NAACP, Loose Canon: Report in Opposition to the Confirmation of Janice Rogers Brown to the United States Court of Appeals for the D.C. Circuit, Aug. 28, 2003 at 23, 35.

¹⁰⁴ William G. Myers, III, Advice and Consent on Trial: The Case of Robert H. Bork, 66 Denver L. Rev. 1 (1988) at 25. It is also disturbing that, in that same article, Myers praised what he termed the Supreme Court's "retreat" from the privacy protections established by *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973), due to opinions like *Bowers v. Hardwick*, 478 U.S. 186 (1986). *Bowers*, of course, has been overturned by *Lawrence v. Texas* (123 S.Ct. 2472 (2003)). 66 Denver L. Rev. at 24 – 25. 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) at 419, where Myers decries the "senatorial collusion with interest groups in reviewing the qualifications of Supreme Court nominees."

¹⁰⁵ Ronald Rotunda, Symposium: Separation of Powers: The Confirmation Process for Supreme Court Justices in the Modern Era, 37 Emory L.J. 559 (quoting Lawrence Tribe). See also Jeff Miller, Bork Backs Toomey for Senate. Allentown Morning Call (Jan. 6, 2004) (referring to conclusion by Senator Arlen Specter that his questioning of Judge Bork during Senate hearings demonstrated that Bork's views were "outside the mainstream").

¹⁰⁶ Robert H. Bork, Our Judicial Oligarchy, 67 First Things 21 (1996).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Independent Women's Panel, Ex Femina, Supreme Court Decisions and the Culture War, (Oct. 2002), at <http://www.iwf.org/pub/exfemina/October2000e.shtml>.

¹¹⁰ Robert H. Bork, Slouching Toward Gomorrah 175 (1st ed. 1996) at 117.

¹¹¹ Robert H. Bork, Editorial Letter, N.Y. Times, Dec. 12, 2000.

¹¹² Resolution #ABQ-03-061.