



NATIONAL CONGRESS OF AMERICAN INDIANS

January 28, 2004

The Honorable Orrin Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

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Re: NCAI's Opposition to William G. Myers III to the 9th Circuit Court of Appeals

Dear Chairman Hatch and Ranking Member Leahy:

The National Congress of American Indians (NCAI) writes to express our opposition to the confirmation of William G. Myers III to the 9th Circuit Court of Appeals. I am attaching an NCAI resolution to this effect passed at NCAI's 60th Annual Convention this past November. (Resolution #ABQ-03-061).

NCAI believes that the President is entitled to receive the consent of the Senate for his judicial appointments unless there are serious concerns regarding judicial fitness. In our memory, NCAI has seldom, if ever, opposed a judicial nominee of any President. However, former Solicitor of Interior Myers' disregard for federal law affecting Native sacred places compels our view that he is unable to fairly and impartially apply the law and thus should not be confirmed.

As you know, the United States government has acquired ownership of hundreds of millions of acres of land formerly occupied by American Indian and Alaska Native tribes. Among these lands are sacred sites that are essential to the practice of numerous Native American religions. With this ownership, the government has assumed a vital stewardship responsibility for the maintenance and protection of sites of religious significance, a responsibility recognized in basic land management statutes such as the Federal Land Policy and Management Act (FLPMA).

As Solicitor of the Department of the Interior for the first two years of the Bush Administration, William G. Myers was the architect of a rollback of protections for sacred native sites on public lands that are central to the free exercise of religion for many Native American people. A glaring example is the recent decision by the Department of Interior to reconsider the denial of a permit for a massive cyanide heap leach gold mine that would destroy thousands of acres of land in the California desert, including 55 acres that are sacred to the Quechan Tribe. The original denial of a mining permit to Canada's Glamis Imperial Gold Company was the result of a multi-year process in which the Quechan Tribe and other concerned tribes actively participated.

In one of only three formal opinions issued by Myers in his two-year tenure at Interior, Myers reached the sweeping, and clearly erroneous conclusion that the

Glamis permit denial had to be reconsidered because the Bureau of Land Management (BLM) did not have authority under the FLMPA to prevent undue degradation of public lands that was necessary to a mining operation.

The issue concerns the meaning of the word “or” in the requirement of FLPMA that the Department of the Interior protect against public land degradation that is “unnecessary **or** undue.” Myers’s opinion—which overturned a well-reasoned legal opinion by his predecessor—wrote the term “undue” out of this statutory text, concluding that any practice necessary for a mining operation was by definition not “undue.” While specifically addressing only the Glamis project, Myers’ opinion will block BLM from preventing undue degradation of millions of acres of public land.

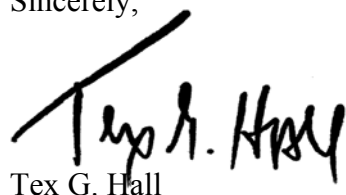
It’s hard to imagine a more fundamental misreading of the language and intent of FLMPA. As federal district Judge Henry Kennedy Jr. – the only judge to have reviewed Myers’s handiwork – has stated, “the Solicitor misconstrued the clear mandate of FLPMA” and failed to apply three “well-established canons of statutory construction.” Rejecting Myers’s 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.” No wonder the American Bar Association has raised serious questions about Myers’s legal qualifications for a position on the federal appellate bench.

Equally troubling to Native Americans is the shameful exclusion of the Quechan Indian Nation from the decision to reconsider the Glamis project. Neither Solicitor Myers nor Secretary Norton engaged in government-to-government consultation with the Quechan Indian Nation or other Colorado River tribes before reopening the Glamis debate.

The Ninth Circuit encompasses nine western states and other territories, including California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii. It also contains scores of reservations, more than one hundred Indian tribes, millions of Indian people, and millions of acres of public lands. The Ninth Circuit is often the critical forum for deciding important federal and tribal land management issues. Myers’ actions and legal advice in the Glamis matter reveal an activist preference for natural resource extraction that disrespects tribal values and raises serious questions about his ability to fairly and impartially decide cases affecting the public lands.

For these reasons, at our recent annual meeting, the National Congress of American Indians—the oldest and largest national organization of American Indian and Alaska Native tribal governments—approved a resolution formally opposing Myers’s nomination to the Ninth Circuit. We do not take this step lightly – but when a nominee has acted with such blatant disregard for federal law and our sacred places, we must speak out.

Sincerely,



Tex G. Hall