



NATIONAL CONGRESS OF AMERICAN INDIANS

May 13, 2005

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

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Dear Senator:

The National Congress of American Indians (NCAI) writes to reiterate our opposition to the confirmation of William G. Myers III to the Ninth Circuit Court of Appeals. I am attaching an NCAI resolution to this effect passed at NCAI's 60th Annual Convention in November 2003. (Resolution #ABQ-03-061).

NCAI is a non-partisan organization and 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 Myers was the architect of a rollback of protections for sacred native sites on public lands that are central to the religion of many Native American people. The centerpiece of this effort was the decision by the Department of Interior to reconsider the denial of a permit for a massive cyanide heap leach gold mine that would literally destroy thousands of acres of land in the California desert 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 FLPMA to prevent undue degradation of public lands that was necessary to a mining operation.

The issue concerns the requirement of FLPMA that the Department of the Interior protect against public land degradation that is "unnecessary or undue"

(emphasis added). 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 would have blocked 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 FLPMA. In Mineral Policy Center v. Norton, 292 F. Supp. 2d 30 (D. DC 2003), a federal court ruled that “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.” 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.

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. At his most recent Judiciary Committee hearing, Myers stated that had the tribe wished to meet with him in his office, he “would have welcomed them.” As the Quechan Indian Nation has made clear, the Tribe asked to meet with Myers and never specified where such meeting should take place. They would have gladly traveled to Washington if an invitation had been extended. Previously Myers attempted to explain his failure to meet with the Tribe by saying that the September 11th tragedy prevented such a meeting. This disingenuous and insensitive explanation fails to explain why Myers did not respond to the Tribe's letter, which was sent in August, before September 11th, nor why he did not attempt to meet with the tribe or contact them via phone after September 11th. Further casting doubt on the legitimacy of Mr. Myers' excuses, Myers met with representatives from the mining company on September 13th. Despite Myers' attempts to suggest otherwise, it is clear that he never intended to meet with the Quechan Indian Nation to discuss this change in policy that would dramatically impact their way of life.

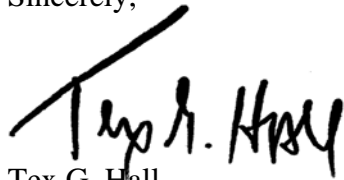
The Reno-Sparks Indian Colony in Nevada similarly suffered from Myers' blatant disregard of the rights of Native Americans. The Colony had asked Myers to fulfill his legal obligation as a trustee and block the permits for a kitty litter processing facility that would have destroyed land sacred to the tribe and degraded the community's health, welfare, and resources. Instead, Myers took the highly unusual step of convincing the U.S. government to file a friend of the court brief in federal district court on behalf of Oil-Dri, the world's largest kitty-litter manufacturer, against the interests of American Indians. The Department of Justice brief took the extraordinary position that federal law prohibited Washoe County from denying the company permission to operate a processing plant on private lands in the county adjacent to their mining claim on federal land. A federal judge held that this was a matter for state court. The Nevada state court rejected the argument promoted by Myers showing once again that Myers not only misconceives his duties as a public servant, but also has questionable legal judgment.

In response to written questions from Senator Feingold, Mr. Myers acknowledged that he could not recall a single other case where he advocated that the Department of Justice participate as an amicus in a federal district court. Myers suggested that he accommodated the tribe's concerns by filing an amicus brief for the company rather than intervening on their behalf as they had requested. This ignores the fact that the Tribe had asked that he either side with them or not take a position in the matter at all. It was irrelevant to the Tribe what form Myers' support for the mining industry took. The fact is that he prioritized the financial interest of the mining industry over the protection of the tribe's sacred land and way of life—just as he had in the Glamis matter.

The Ninth Circuit contains hundreds of reservations, over 400 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. William Myers' record of disregard for federal law protecting Native sacred places demonstrates that he is unfit for a lifetime appointment to the Ninth Circuit Court of Appeals.

For these reasons, at our 2003 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 Mr. Myers's nomination to the Ninth Circuit, and we have not changed our position. 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,

A handwritten signature in black ink that reads "Tex G. Hall". The signature is written in a cursive style with a prominent, sweeping initial "T".

Tex G. Hall
President