



August 21, 2018

Senator Charles Grassley, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Senator Dianne Feinstein, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Nomination of Eric Miller to Serve on the U.S. Court of Appeals for the Ninth Circuit

Dear Chairman Grassley and Ranking Member Feinstein:

The National Congress of American Indians and the Native American Rights Fund are committed to protecting the rights of tribal governments. For nearly two decades we have encouraged the nomination and confirmation of federal judges who, along with their commitment to uphold the Constitution, are committed to the principles of tribal sovereignty, treaty rights, and the federal trust responsibility embedded within. In this regard, we write with concerns and questions about the nomination of Eric Miller to serve on the U.S. Court of Appeals for the Ninth Circuit.

Mr. Miller is a talented attorney with an impressive resume. When entering private practice five years ago, he had a wide range of choices. Our concern is that he chose to build a law practice on mounting repeated challenges to tribal sovereignty, lands, religious freedom, and the core attribute of federal recognition of tribal existence. His advocacy has focused on undermining the rights of Indian tribes, often taking extreme positions and using pejorative language to denigrate tribal rights. Indeed, his law firm website touts his record, with over half of his private practice achievements coming at the expense of tribal governments.

Given his strong preference for clients who oppose tribes, there are considerable questions about whether he would be fair in hearing cases regarding tribal rights. We understand that judicial nominees may have differing opinions around the margins, but a commitment to fundamental Constitutional principles is essential. Upon our review of his record, we are concerned that Mr. Miller does not possess a mainstream understanding of tribal sovereignty, treaty rights, and the federal trust responsibility, or their role in the Constitution and federal law. The positions he has repeatedly advocated would have very serious consequences on the federal-tribal relationship and would undermine fundamental principles of tribal sovereignty, governance, and self-determination.

The following are short summaries of the many federal Indian law cases where Mr. Miller has opposed tribal rights during the last five years:

United States v. Washington, No. 17-269 (2018) – In Supreme Court litigation regarding treaty fishing rights and Washington State’s failure to fix culverts that block fish passage, Mr. Miller brought together a group of business, real estate, and farming organizations and wrote an amicus brief arguing that although tribes may have a treaty right to fish, the treaties did not guarantee that there would be any fish to catch. Under Mr. Miller’s theory, the State could block all the fish, or take all the water out of every river, and

no treaty rights would be violated. This is an extreme anti-treaty rights position. It also runs contrary to the long-standing canon of construction that treaties are to be read as they would have been understood by the tribes and the Supreme Court's statement that the treaties "infer[red] a promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 at 686 (1979). The Supreme Court affirmed the Ninth Circuit's opinion, which held that the treaty right of taking fish imposes a duty on the State to allow for the safe passage of salmon back to their spawning grounds.

***Upper Skagit Indian Tribe v. Lundgren*, No. 17-387(2018)** – In Supreme Court litigation regarding tribal sovereign immunity, Miller represented parties claiming adverse possession over land purchased by the Tribe. In opposing the tribe, Mr. Miller argued that the tribe cannot assert its sovereign immunity in a suit where only tribal property is sued and not the tribe itself. He advocated a position that, if adopted, would expose already limited tribal assets to defeasance in a manner unlike the federal and state governments. He wrote, "The limited nature of tribal sovereignty suggests that to the extent tribal sovereign immunity differs from that of other sovereigns, it should be narrower, not broader. Unlike foreign and state sovereignty, tribal sovereignty has been significantly divested." *Response Br.* at 27. Miller's embrace of implicit divestiture of tribal rights is cause for serious concern. *Id.* at 27-29.

***Lewis v. Clark*, 137 S.Ct. 1285 (2017)** – Mr. Miller represented the petitioners in Supreme Court litigation that questioned tribal sovereign immunity from negligence suits against tribal employees. Miller argued that the Tribe was seeking "an unprecedented expansion of tribal legislative authority", where the Mohegan Tribe of Indians of Connecticut had waived its immunity to tort suits in its own tribal court system. *Petitioner's Br.* at 31. Nevertheless, Mr. Miller implored the Court to adopt the 9th Circuit's outlier "remedy sought" approach in handling ordinary negligence actions against tribal employees. See, *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013). The Court ultimately agreed, delivering a blow to tribal sovereign immunity.

***Citizens Against Reservation Shopping v. Zinke*, No. 16-572 (2017)** – Mr. Miller represented a coalition challenging federal recognition and land acquisition for the Cowlitz Tribe. He began his representation in the D.C. District Court and continued through the writ of certiorari filed at the U.S. Supreme Court. *Citizens Against Reservation Shopping v. Zinke*, No. 16-572, *cert denied*, 137 S. Ct. 1433 (2017). He argued that the Secretary's actions circumvented the terms of the Indian Reorganization Act. Without citation to authority, he urged the narrowest possible test: "[i]n 1934, it was understood that a tribe was 'under Federal jurisdiction' if it had federally managed lands set aside for its benefit, or if it received funds generated from tribal lands that were under federal management." *Petitioners' Reply Br.* at 7-9. Instead, the standard for federal jurisdiction relating to Indian tribes has always been understood to be maintenance of tribal relations. See, Wood, "Indians, Tribes, and (Federal) Jurisdiction," 65 *Univ. Kansas Law Review* 415 (2016). Mr. Miller's argument, if adopted, would be very problematic for the many tribes who had not been placed on reservations by the 1930's and would have chaotic consequences on the federal-tribal relationship. The D.C. Circuit and Supreme Court declined to accept Miller's arguments and affirmed the District Court's judgment favoring the Secretary of Interior and the Cowlitz Tribe.

***State of New Mexico v. Department of Interior*, 854 F.3d 1207 (10th Cir. 2017)** -- Mr. Miller represented the State of New Mexico in litigation regarding the Indian Gaming Regulatory Act (IGRA).

Mr. Miller obtained a decision invalidating the Department of the Interior's regulations providing alternative procedures when states fail to negotiate in good faith for a compact for gaming on Indian lands, 25 U.S.C. §9, which provide that the Secretary, "may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs...." This decision harms tribal governments, and Congress's careful balancing of state and tribal interests enacted in IGRA.

***Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d. 457 (2nd Cir. 2013)** - In Second Circuit litigation, Mr. Miller represented the Town of Ledyard seeking to tax leased tribal gaming machines. Miller successfully argued that Ledyard's interest in collecting taxes outweighed the federal and tribal interests reflected in IGRA. IGRA provides that "nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." 25 U.S.C. § 2710(d)(4). Miller convinced the Second Circuit to disregard the federal prohibition on taxing tribal gaming activities, arguing that such taxes impose "no economic burden on the Tribe." Appellant's Br. at 60. Consequently, a share of revenues that Congress intended to be used for tribal programs and services are diverted to a local government.

***La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee v. U.S. Department of Interior*, 136 S.Ct. 2407 (2016)** - Native American religious practitioners brought Religious Freedom Restoration Act (RFRA) suit regarding a solar project on BLM land. They alleged that the project imposed a substantial burden on their exercise of religion, interfering with religious pilgrimages to sacred locations traveling the ancient Salt Song Trails. Not only did Mr. Miller advocate an extremely narrow reading of RFRA's protections, he questioned petitioners' "vague and conclusory declarations" and how "the loss of access to the small portion at issue," (six square miles) would pose a significant burden. The views espoused by Mr. Miller demonstrate little regard for native religions and sacred landscapes where Native peoples have practiced their beliefs for millennia.

***Friends of Amador County v. Jewell* – No. 14-340 (2014)** – Mr. Miller filed a petition for certiorari in litigation challenging Buena Vista Rancheria's status as a federally recognized tribe. The Rancheria was established in the 1920's, mistakenly terminated in 1958, and restored in 1985 during the Reagan Administration. Thirty years later, despite the federal government's recognition of the Tribe, Mr. Miller pejoratively labelled Buena Vista as a "putative" tribe and argued that the Ninth Circuit was "allowing a would-be tribe to bootstrap its federal recognition into an immunity from any challenge to the lawfulness of that recognition," Petitioner's Br. at 14-15. He urged that sovereign immunity cannot be invoked when tribal status is the ultimate issue. The petition was denied, but the standard urged by Mr. Miller is alarming, as it could be used to challenge the legitimacy of any federally-recognized tribal government and would encourage a scorched earth approach to litigation involving tribal rights.

***Saint Regis Mohawk Tribe v. Mylan Pharmaceuticals Inc.*, No. 18-1638 (2018)** -- Before the Federal Circuit reviewing a decision of the Patent Trial and Appeal Board, Mr. Miller represented a group of pharmaceutical companies against the Saint Regis Tribe challenging their sovereign immunity claim to protect intellectual property. Mr. Miller accused the tribe of "selling their sovereign immunity" and referred to the business arrangement between Allergen and the Saint Regis Mohawk Tribe as a "sham" and a "scheme." Appellee Br. at 11. "Tribal sovereign immunity is therefore significantly different from state sovereign immunity. "Even if tribal sovereign immunity could apply in IPRs in other circumstances,

it does not apply here because appellants have abused any such immunity.” *Id.* at 23. “This transaction is an unadulterated exchange of money for immunity.” *Id.* at 24. Again, Miller resorts to demeaning language to address both tribal rights and motivations. More troubling, he advocated disparate treatment of tribal governments under the law – encouraging a court to adopt a view of sovereign immunity that exposes tribes to suits in a manner other sovereigns are not.

Robinson v. Jewell, No. 12–17151 (2015) - Before the Ninth Circuit Court of Appeals, Mr. Miller represented the Tejon Ranch Company intervening in a land claim by the Kawaiisu, a non-federally recognized tribe in the Central Valley of California. Mr. Miller argued that the tribe’s claim should be dismissed because the tribe failed to present its claim under the California Land Claims Act of 1851. Notably absent from the briefing was any citation to *Cramer v. United States*, 261 U.S. 219, 231 (1923), where the Supreme Court held that aboriginal title still existed in California, explaining that the 1851 Act did not require Indians to present aboriginal rights claims to the commission. The decision reinforced historical omissions and legal misunderstandings and perpetuates the falsehood that aboriginal title in California was extinguished through the 1851 Act.

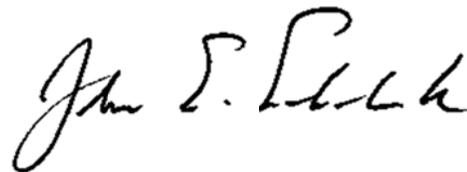
Stand Up for California! v. United States Dep't of Interior, No. 2017-0058 (2018) – Miller represented an anti-gaming advocacy group challenging the Interior Department’s decision to approve acquisition of land in trust for Wilton Rancheria. He offered a technical argument that land decisions must be made by Senate-confirmed appointees, not anyone in an “acting” position, which was rejected by the D.C. District Court. Mr. Miller’s position would seriously hamper tribal land acquisitions, which are essential for services and economic development, as repeatedly recognized by Congress since the 1930’s.

Conclusion -There are 427 federally-recognized tribes in the Ninth Circuit, more than any other Federal Court of Appeals. It is crucially important that tribes coming before this court are heard by judges who share our Nation’s fundamental understanding of tribal government rights. As you consider the Senate’s duty to advice and consent to the appointment, we urge you to consider these concerns and questions regarding Miller’s record.

Very Respectfully,



Jefferson Keel, NCAI President



John Echohawk, NARF Executive Director