

**Responses of William Myers
Nominee to the U.S. Court of Appeals for the Ninth Circuit
to the Written Questions from Senator Patrick Leahy**

1. There have been some questions surrounding your role in supporting legislation that would have given away title to public lands in the Yuba Goldfields in California. In June 2002, you responded to a letter from Congressmen Wally Herger and John Doolittle by asserting that "the Department [of the Interior] would support private relief legislation conveying Lot 5 to [Yuba River Properties] should legislation be introduced." Private legislation was indeed introduced in response to this letter and now the Department of the Interior has withdrawn support for this legislation.

BLM employees in California have been highly critical of your decision to support legislation giving away this land. Deane Swickard, the Director of the BLM Office in Folsom, California, told the LA Times: "There is 1.3 million tons of rock and 200,000 tons of sand [on the land in question . . . Why in the world would we give it up? I'm not here to give away public resources." Timothy Carroll, also of the BLM's Folsom office commented to another BLM staffer, that it "turns out Solicitor William G. Myers III suggested this solution to Herger and Doolittle. Would have been nice if he had asked us first."

Before agreeing to give away valuable public lands, why didn't you make sure you knew everything the local officials knew about the property in question?

Response: I received a letter from two Congressmen stating that Yuba River Properties had a 1943 quitclaim deed from the Secretary of War in their chain of title. The letter also said the predecessors-in-interest had for nearly 50 years paid taxes on the property. I asked attorneys in my Washington, D.C. office and my Sacramento office to look into these claims and draft a response. The draft response was researched by my staff and BLM and reviewed by my office and other offices before it was presented to me for signature.

My letter told the Congressmen that the land was still owned by the United States, regardless of the quitclaim deed and payment of taxes. The letter stated that the matter had been reviewed by BLM and the Regional Solicitor's Office. The letter also summarized the view of BLM and my staff to the effect that the tract was an isolated parcel, not essential to BLM's management of the public lands in the area, and lacking in special environmental value and management goals. I understood this to be the opinion of BLM and my staff as presented to me in the draft letter. Certainly, no one told me the eight-acre parcel was worth hundreds of millions of dollars. I was not informed that the local BLM office opposed the draft letter, nor did anyone raise any objections to me over the 16 months that I remained in office after I signed the letter. Not until I was out of office did I learn that BLM and the Solicitor's Office had new information that cast doubt

on the information I had relied upon 21 months earlier. The Department's March 4, 2004 letter makes clear that the key facts counseling a reversal of position did not come to light until a 2004 report by the same offices I relied upon.

Were you aware at the time that the private legislation could set precedent that would have made it more difficult for the Department of the Interior to resolve similar title disputes for many other properties in the area with a total resource value of hundreds of millions of dollars? Isn't that a critical fact?

Response: I was not informed that this issue could set a precedent. As stated in Interior's March 4, 2004 letter, the information I had suggested that this eight-acre parcel was a "one of a kind problem that could be fixed better by legislation than by litigation." Had I been informed of that precedential value, it is likely my response would have been different.

2. In case after case, it seems that President Bush's campaign promise to give local citizens more control over federal land activities only applies when that local control favors the proposals of polluting industries. This appears to have been the case in both the Glamis and Oil-Dri matters. In other instances, your office in Washington has trumped the decisions of local BLM offices when those field offices have tried to clamp down on the improper or unlawful conduct of polluters and others who want to take advantage of federal land, at the taxpayers' expense. This was the case in both the Yuba Flats and Robbins matters. How do you reconcile this discrepancy between stated policy and actual fact?

Response: My former client, the Secretary of the Interior, had and has a strong emphasis on working with local citizens, communities and groups. I supported that emphasis where and when I could, always bounded by federal law and regulations. Sometimes those laws and regulations were sympathetic to local control, sometimes they were not.

3. In case after case, it also seems that your trust responsibility to the tribes gives way to the interests of polluting industries who want to exploit federal land for their own profit. This was true in the Glamis and Oil-Dri cases. In each of these cases, did you perform any legal research that led you to the determination that your trust responsibility to the tribes was of lesser import than your responsibility to assist polluting industries in making a profit?

Response: No.

4. One of the things that troubles me about your role in the Robbins deal is that by authorizing Mr. Comer to work on the settlement, you signaled that your office was open for use by politically-connected ranchers who want to get around compliance with federal grazing law. There are thousands of ranchers that graze their cattle on public land, Mr. Myers, and thousands of disputes between these ranchers and BLM officials. Isn't it pretty unusual for an Associate Solicitor in the headquarters

office in Washington DC, who is responsible for the legal disputes arising out of the BLM and the Bureau of Reclamation across the country, to get directly involved in settling an administrative dispute between a local BLM office and a single rancher?

Response: I had no information at the commencement of or during Mr. Comer's efforts that this settlement effort would be particularly controversial. The client agency asked Mr. Comer to assist, apparently because of the ill will between Mr. Robbins and BLM field staff. Associate Solicitor involvement in administrative settlements has been sufficiently common to warrant express delegation of that authority in the Solicitor's Manual written by my predecessors and retained by me during my tenure.

5. In your time as Solicitor, were there any similar examples?

Response: Often Associate Solicitors would engage in local issues in an attempt to resolve them. Often that engagement was in concert with one of the 19 field offices of the Solicitor's Office. Like Associate Solicitors, Regional Solicitors report directly to the Solicitor and Deputy Solicitor. I often had Regional Solicitor involvement in local matters that were in various stages of administrative or judicial litigation. One example was the involvement of the Regional Solicitor in Sacramento in pursuing ranchers who trespassed on BLM land. His efforts were undertaken with my knowledge and approval.

6. In answer to my question at your hearing about your selection of Bob Comer for transfer to a career position from which it is more difficult to fire him, you said had you known then what you know now, you would have made a different decision. When was Mr. Comer's transfer to the career position approved and when was it finalized?

Response: The Office of Personnel Management had final approval over Mr. Comer's selection. I believe OPM approved it in March or April 2003.

When did Mr. Comer actually leave your office for the position in Denver? If you do not know for sure, please consult the Office of the Solicitor at the Department of the Interior for that information, including any and all dates relevant to the personnel decisions made about Mr. Comer in relation to his transition to a career position.

Response: I recall that a vacancy occurred in the Regional Solicitor position in Spring of 2002. The personnel contractor for the Solicitor's Office then advertised the opening, solicited applicants and impaneled three Senior Executive Service officials to rank the candidates. The panel presented the top applicants to me, including Mr. Comer. In August 2002, I selected Mr. Comer from the list of top applicants and sent my recommendation to the Department's Executive Review Board for consideration. In December 2002, the Executive Review Board approved the selection of Mr. Comer and sent its recommendation to the Office of Personnel Management for review, including heightened scrutiny of a political appointee seeking a career position. OPM approved the selection of Mr. Comer and he became the Regional Solicitor in early April 2003.

7. When did you first learn that the Interior Inspector General was investigating the Robbins settlement? What actions, if any, did you take when you learned of this investigation?

Response: I do not remember when I first learned about the August 14, 2003, commencement of the Inspector General's investigation. I did not want to take any action that would interfere with the investigation and he did not ask my assistance in his investigation other than to interview me. I left office before his investigation was complete.

8. When did you first learn about the objections to the Robbins agreement expressed by the Wyoming U.S. Attorney's office? What did you do upon learning these concerns?

Response: I remember press reports in early July 2003, at least regarding the RICO claims. I asked Mr. Comer to explain why those claims had not been dismissed as part of the settlement. Later, I assigned a senior attorney in my office to assist Assistant Secretary Watson's efforts to look into the situation. The senior attorney had not been involved in the settlement negotiations.

9. Did you ever recommend or take administrative or disciplinary action against Mr. Comer for his role in the Robbins settlement?

Response: When I left office, the Inspector General had not yet released his report. I did not discipline anyone prior to the time I left office because I thought the investigation should conclude before assessing blame.

10. Based on what you know now about Mr. Comer's conduct in negotiating the Robbins settlement, do you agree with the inspector general that Mr. Comer's conduct cries out for administrative action?

Response: I was very disconcerted by the information contained in the redacted report. I must assume that the Inspector General's recommendation is well-founded based on his access to the full investigation and report.

11. While serving as Solicitor at the Department of the Interior, what contact did you and your office have with Jack Abramoff?

Response: I do not recall having any contact with Mr. Abramoff. I do not know if any employee of the Solicitor's Office had contact with Mr. Abramoff.

Responses of William Myers
Nominee to the U.S. Court of Appeals for the Ninth Circuit
to the Written Questions from Senator Dianne Feinstein

Question 1: Three of President Bush's other nominees apparently asked not to be renominated—Judge Pickering, Judge Kuhl, and Claude Allen. But you stated in your updated questionnaire that when the President asked if you wanted to be renominated, you said that yes, you did. Can you please explain why you responded to the President that you wanted to be renominated, given that you know how many Senators opposed your nomination last year?

Response: Service as a circuit court judge is one of the greatest opportunities for an attorney to engage in public service. I have spent a decade in public service in the United States Senate, the Department of Justice, the Department of Energy, and the Department of the Interior. I find public service to be very rewarding. It is a chance to "give back" something to this great Nation. It is for these reasons that I wanted to be renominated and hope to be confirmed.

Question 2: What is it that you can say to me to persuade me to vote for you, given that I opposed your nomination last year? This is an opportunity for you to help us understand more about you. What new information is there that I, and the Senate, should focus on?

Response: I appreciate this opportunity to discuss my entire record as an attorney in private practice and in the public sector.

Private Sector: I have worked approximately 14 years in the private sector. In the course of my career in the private sector, I zealously represented clients according to the Rules of Professional Conduct by advancing "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Throughout my career, it has been important to me to give back to the profession and community through some sort of public service. To that end, I served as Vice-Chairman of the Public Lands and Land Use Committee of the American Bar Association Section on Environment, Energy, and Resources. I also chaired the Idaho State Bar Board of Land Commissioner's Federal Lands Task Force Working Group and the Boise Metro Chamber of Commerce's State Affairs and Natural Resources Subcommittee. I have lobbied for varied interests including ranchers and I currently lobby for an Indian Tribe on water and salmon habitat issues.

Public Sector: Another decade of my career has been devoted to public service. I was a legislative counsel to Senator Simpson and I served in the Departments of Justice and Energy. Most recently, I served as Solicitor at Interior. I believe a review of my tenure as Solicitor shows that I was balanced in my advice to my client, the Secretary of the Interior. The Department manages 20% of the United States and much of its minerals. A unanimous Supreme Court recently opined that "'multiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put, 'including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.'" *Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct. 2373 (2004). Like Solicitors before me, I strove to perform that "enormously complicated task" in a manner consistent with my client's goals. One indicator of my success is this: As Solicitor, I was involved in 8 cases decided on the merits by the U.S. Supreme Court. In 7 of those 8 cases, the Court ruled in a manner favorable to my client.

Finally, I would point to (1) widely-respected Republican and Democrat leaders who support my nomination, including former Secretary of the Interior Cecil Andrus and former Wyoming Governor Mike Sullivan, (2) the fact that a substantial majority of the ABA committee thinks I am qualified for the job, (3) the support I enjoy from my tribal clients, and (4) my personal devotion to our environment.

Question 3: Do you agree with Chairman Specter that we should confirm your nomination in order to give ideological balance to the Ninth Circuit? In light of Chairman Specter's comment, if the Senate does ultimately confirm you to the Ninth Circuit, do you think that you will have a mandate from the Senate to be an ideologically conservative judge?

Response: I do not believe that confirmation provides a judge with any mandate other than to uphold the oath of office without regard to political ideology.

Question 4: You told me at last week's hearing that, in retrospect, you do not think that that your office—the office of the Solicitor of the Department of the Interior—should have entered into the Robbins settlement. Specifically, you told me, "I think from my reading of the IG's report, there were serious concerns raised by the U.S. Attorney's Office that apparently were not adequately considered in that settlement." The Inspector General found in its 2003 investigation of some of your activities that you had been briefed on the Robbins Settlement. Is that true? Please provide describe in detail what you knew of the settlement before your office approved it. As part of your answer, please state whether or not you read the actual settlement before your office approved it. If you did not read the settlement before your office approved it, please explain why.

Response: I had brief discussions with Mr. Comer several times during the course of the settlement negotiations to the effect that he was still negotiating. He did not brief me on the substance of the negotiations or any terms of the settlement. I did not know the details of the settlement prior to its approval. I did not read the settlement before it was signed by the client agency because the Solicitor's Manual expressly permits Associate Solicitors to settle administrative litigation. I had no information prior to its execution to suggest that there were problems with the terms of the settlement. I did review the settlement in July 2003 after the media reported on it.

Question 5: At your hearing last week, I asked you about a quotation from an article that you authored, where you wrote, "Interpretivism does not require a timid approach to judging or protecting constitutionally guaranteed rights . . . interpretivism is not synonymous with judicial restraint and may require judicial activism if mandated by the Constitution." I would like to follow up on your answer. Do you understand the Constitution to sometimes "require judicial activism?" If so, please tell me which section or sections of the Constitution you are referring to, and please explain why, in your opinion, that section or those sections of the Constitution require judicial activism.

Response: Thank you for this opportunity to expand on my answer to your question in the hearing. The Judiciary Committee's questionnaire for nominees asked me to discuss my views on "judicial activism." My answer concluded by stating, "Judges must discern the fair meaning and intent of the

Responses of William Myers
Nominee to the U.S. Court of Appeals for the Ninth Circuit
to the Written Questions of Senator Russ Feingold

ROBBINS SETTLEMENT

1. As you know, the Inspector General of the Department of Interior recently released a report about its 15-month investigation into a settlement with the Department and Harvey Frank Robbins, a Wyoming rancher who failed to comply with federal grazing laws. In your testimony before this committee in February 2004, you testified that you authorized Associate Solicitor Robert Comer, a Bush Administration political appointee who reported to you directly, to negotiate the settlement of the Robbins matter.

You told the Inspector General that you were not accurately informed of what was going on in the Robbins settlement, and that you were unaware that local BLM officials and the Department of Justice were concerned about the settlement. The Inspector General, in a recent press release, stated that "Myers was, in fact, victimized when he was given a distorted explanation by one of his senior associate solicitors."

However, Rule 5.1(b) of the Model Rules of Professional Conduct states that a supervising attorney "shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Furthermore, The Solicitor's Manual allows you to delegate authority to associate Solicitors to execute settlement agreements, but with limited exception, including:

The delegated authority of Associate and Regional Solicitors is limited by the following requirements:

1. Controversial Matters. Associate and Regional Solicitors must notify the Special Assistant to the Solicitor, the Staff Assistant to the Solicitor, and other affected Associate and Regional Solicitors when any matter is likely to generate significant controversy or attention from the public, press, interest groups, state or tribal governments, or Congress. When possible, this notification will take place prior to any potentially controversial action.

a) Wouldn't this settlement be "likely to generate significant controversy or attention" given the fact that Mr. Robbins filed a RICO claim against BLM employees, and that two congressional offices were involved in the initial settlement meeting?

Response: During the time of the negotiations, I was not informed that RICO claims were pending or that congressional offices were involved. Certainly, under the provisions of the Solicitor's Manual cited in your question, these issues should have been brought to my attention.

b) Were you briefed on this settlement agreement before it was entered into? If yes, by whom and when?

Response: I had brief discussions with Mr. Comer several times during the course of the settlement negotiations to the effect that he continued to be involved in the negotiating process. He did not brief me on the terms of the draft settlement.

c) Did Mr. Comer brief you? If yes, how many times, during the course of the negotiations, did Mr. Comer provide you with a briefing on the agreement? What did Mr. Comer tell you during these updates about the status of the negotiations?

Response: Yes, Mr. Comer had brief discussions with me several times. He did not brief me on the terms of the draft settlement. He told me he was continuing to work on the settlement in the hope of resolving the disputes between the rancher and the BLM.

d) Did you ever ask Mr. Comer whether anyone at BLM had expressed concern about the terms of the settlement agreement?

Response: Not that I recall. As far as I was aware, the BLM had asked Mr. Comer to help settle the case and was working with him to do so.

e) After you reviewed the Robbins settlement agreement, did you have any concerns about the terms of the agreement? Specifically, were you concerned about the alternative dispute process that only allowed the Washington DC Bureau of Land Management Director or her designee to cite Robbins for grazing violations, a provision that is unique to this politically well-connected rancher?

Response: I did not review the settlement agreement until after it was signed. In conformity with the Solicitor's Manual, I authorized Mr. Comer, as an Associate Solicitor, to negotiate the settlement. When I did review the agreement, shortly after media reports were published, I was primarily concerned about the existence of RICO claims against BLM employees and a failure of the agreement to dismiss those claims. As to the specific clause you reference, I read the BLM Director's "designee" to mean that any BLM employee so designated was authorized to cite Robbins for grazing violations, including appropriate field office staff. This reading is reinforced by the clause that the Director's Office was not at any time foregoing its authority to enforce BLM regulations or protect public land resources.

f) Do you believe that Mr. Comer lied to you or misled you about the course of these negotiations during his updates to you?

Response: Based on the Inspector General's redacted report, I believe there was additional information about the course of the negotiations that should have been brought to my attention by Mr. Comer.