IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

GLAMIS GOLD LTD.,	)
Claimant/Investor,	)
and	)
UNITED STATES OF AMERICA,	)
Respondent/Party.	)

RESPONSE OF GLAMIS GOLD LTD. TO APPLICATION OF THE QUECHAN INDIAN NATION FOR LEAVE TO FILE A NON-PARTY SUBMISSION

Claimant Glamis Gold Ltd. ("Glamis") files this response to the Application for Leave to File a Non-Party Submission filed by the Quechan Indian Nation, dated August 19, 2005, and the Submission filed therewith. Subject to the qualifications and understandings set forth below, Claimant defers to the Tribunal whether it considers that the Application meets the applicable standards and the Submission would be helpful to its deliberations in this matter representing views not already advanced by the parties. We do take issue with a number of statements of fact and law set out therein. Claimant will of course provide its own comprehensive statements of fact and law in its Memorial, which is scheduled to be filed on November 2, 2005.

As a threshold matter, Glamis notes that the Quechan Tribe was an active participant in the various administrative processes that comprise the factual background of this case. Indeed, as discussed below, the Quechan Tribe actively sought many of the governmental measures that

gave rise to Glamis's causes of action as described in its Notice of Complaint. The Quechan submission notes that the "Quechan were active in the administrative permitting process for the mining operation promoted by the Claimant . . ." Quechan Submission at 1. Given its role as a fact witness to predicate issues in this proceeding, we would certainly oppose allowing the Quechan tribe to make factual submissions to the Tribunal without being subjected to discovery and production requests and requirements that generally govern party participation. Given the potential for unfairness associated with such a result, Glamis submits that the Quechan tribe's participation, if any, should be limited to this submissions setting forth the Tribe's position, consistent with the Tribunal's letter to the Tribe's counsel, dated July 28, 2005.

This issue aside, the Quechan Application makes several assertions which merit a preliminary response and clarification at this time. First, the opening paragraph of the Application is subject to misinterpretation, stating that:

> [The Quechan Nation] … occupies a reservation of approximately 45,000 acres total in the southeast corner of California and the southwest corner of Arizona. The Tribe remains on a portion of its ancestral lands; the location of the proposed [Glamis] mine was on the Tribe's ancestral lands.

Application at 1. In fact, the proposed Glamis Imperial Mine was located over ten miles away from the designated boundaries of the Quechan reservation (*i.e.*, the Fort Yuma Reservation) on lands owned by the United States and managed by the U.S. Department of the Interior, Bureau of Land Management ("BLM"), subject to the mining claim location and development authorized by the U.S. General Mining Law, 30 U.S.C. § 22 *et seq*. The Quechan "ancestral lands" mentioned in the Application refers to a vast and ill-defined land area which encompasses substantial portions of southern California, Arizona, and northern Mexico. This larger Quechan "ancestral" area at times has been described by Quechan representatives as encompassing well over a million acres.

Second, the Application (at 4) paraphrases certain findings regarding the Indian Pass area rendered in 1999 by the Advisory Council on Historic Preservation ("ACHP") which the Application describes as an "independent" arm of the United States. The paraphrased (not quoted) findings regarding the proposed mine's claimed impact on the Tribal members' "ability to practice their sacred traditions as a living part of their community life" were made pursuant to a process that ACHP itself conceded was highly "unusual," and it was heavily politicized by both opponents of the U.S. mining laws generally as well as opponents of Glamis's proposed mine in particular (including the Quechan). Notably, shortly before Glamis carried out mineral exploration and then proposed a mine near Indian Pass, Interior's Bureau of Land Management ("BLM") explicitly found that: "There is *no evidence* that the [Indian Pass] area is used today by contemporary Native Americans." BLM, *Indian Pass Management Plan* at 8 (1987) (emphasis added).

Third, the Quechan Application (at 4) states that the proposed Glamis mine "lies within the Tribe's aboriginal territory." However, the Quechan Application fails to acknowledge that the Tribe's aboriginal title claims (to lands beyond the reservation lands) were held to be extinguished by rulings of the U.S. Indian Claims Commission and the Tribe was compensated by the United States for those aboriginal claims. *See Quechan Tribe v. United States,* 8 Ind. Cl. Comm. 111, 130 (1959) (findings of fact); 8 Ind. Cl. Comm. 138 (1959) (opinion); 15 Ind. Cl. Comm. 489(a) (1965) (final judgment).

Fourth, the Quechan has no legitimate interest in issues relating to the potential "cost to United States or California taxpayers …" associated with a decision by the Tribunal "requiring the United States to compensate Claimant…." Quechan Application at 3. Nor does the Quechan Tribe have any legitimate interest in preventing what it seeks perjoratively to characterize as an

"ill-deserved windfall to the Claimant." *Id.* The Quechan Tribe has no expertise with mining investments, mineral property valuations, or the monetary damages suffered by Claimant, and its Submission should not be accorded any weight on such issues.

Fifth, the Tribe is incorrect when it speculates that "[t]his NAFTA claim … could affect the integrity of the sacred area [at Indian Pass] and the Tribe's relation to it." Application at 2. Claimant in this NAFTA proceeding is not seeking some sort of "specific performance" with respect to approval of the mining plan of operations and elimination of the California backfilling mandate. Rather, Claimant is only requesting the just compensation to which it is entitled under NAFTA's investor protections for its significant financial losses stemming from the expropriation of its valuable gold mining property, and the inequitable and unlawful treatment afforded Glamis by the United States, as described in the Notice of Arbitration, dated December 9, 2003 – compensation to which it would also be entitled under U.S. Constitutional law albeit through the much lengthier and riskier (for a foreign investor) state court process.

Finally, we observe that the Tribe has mischaracterized prior federal court litigation initiated by Glamis in 2000 and 2001. *See* Application at 4-5. The Application refers to "Glamis' *unsuccessful* challenge to the 2000 Opinion issued by Respondent's [former] DOI Solicitor, John Leshy…." *Id.* (emphasis added). The cited 2000 Leshy Opinion,[1] which divined a novel and unprecedented discretionary authority to deny the Glamis mine, was subsequently repudiated and rescinded by Interior Solicitor William Myers and Interior Secretary Gale Norton following the commencement of a federal court action by Glamis in early 2001. Glamis voluntarily abandoned its legal actions only after: (1) the unlawful Leshy Opinion was rescinded;

[1] The Leshy Solicitor's Opinion was dated December 27, 1999, but publicly released on January 14, 2000.

and (2) former Interior Secretary Babbitt's January 17, 2001 denial of the proposed Glamis mine (implementing the unlawful Leshy Opinion) was likewise rescinded. Further, the fact that a federal court in 2001 found that the Tribe had standing to participate in that action is largely irrelevant to the issues involved in this NAFTA proceeding – the 2000 and 2001 litigation sought to (and effectively did) establish that Secretary Babbitt's denial of the proposed Glamis mine was unlawful, leaving Glamis poised to proceed with its mine development. This proceeding, by contrast, seeks only compensation – as a result, the nature of the Quechan Tribe's interest in the instant proceeding is not analogous to its interest in the prior Federal litigation.

* * *

In conclusion, Glamis defers to the Tribunal the question of whether to accept the Quechan Application to file a Submission subject, however, to the foregoing clarifications, and with the understanding that Glamis would have the opportunity to more fully respond to the Quechan Submission in its Memorial, should the Tribunal accept the Submission.

Respectfully submitted,

//s//

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