

**IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN
GLAMIS GOLD LIMITED AND THE UNITED STATES OF AMERICA**

Application of Non-Disputing Parties for Leave to File a Written Submission

On behalf of **Sierra Club** and **Earthworks** (jointly, Applicants), **Earthjustice** and the **Western Mining Action Project** hereby apply for leave to file a non-disputing party submission in the arbitration between **Glamis Gold Ltd.** (Claimant) and the United States of America under NAFTA's Chapter 11 and the UNCITRAL arbitration rules.

Applicants¹

Applicants are both nonprofit, nongovernmental organizations registered as charitable organizations under Section 501(c)(3) of the US Internal Revenue Code. Both Applicants are based in the United States. Neither Applicant has any parent organization.

Sierra Club is the oldest and largest environmental membership organization in the United States, consisting of over 750,000 concerned individuals working to protect the environment throughout the United States and elsewhere. For over 10 years, the Sierra Club has participated extensively in the state and federal decision-making processes involving the Glamis Imperial Project. Further, the Sierra Club appeared before the California Mining and Geology Board (Mining Board) in the numerous hearings held by the Board prior to its adoption of the mining regulations that are at the heart of Glamis's case.

Earthworks is a non-profit organization dedicated to protecting communities and the environment from the destructive impacts of mineral development in the United States and worldwide. Earthworks works with communities and grassroots groups to reform government policies, improve corporate practices, influence investment decisions and encourage responsible materials sourcing and consumption. Among other efforts, Earthworks uses sound scientific analysis to assess and expose the health, environmental, economic, social and cultural impacts of mining. Like the Sierra Club, Earthworks participated extensively in all of the federal and state decision-making processes related to, and appeared before the Mining Board in support of, the backfill regulations.

¹ Applicants have attempted to conserve the Tribunal's and disputing parties' resources by applying to file one joint non-disputing party submission. Because of the need to describe two different organizations in the allotted five pages, Applicants have included only the most salient information. Counsel will gladly provide additional information on request. Further information is also available on the Applicants' websites: <http://www.sierraclub.org/>, and <http://www.earthworksaaction.org/>.

Earthjustice, co-counsel for Applicants, is a public interest law firm dedicated to protecting the environment. Earthjustice's International Program works to ensure that environmental and health protections withstand the pressures of international economic policies, and to empower citizens to defend their right to a healthy environment. Earthjustice represents individuals and nongovernmental organizations in international and US federal and state tribunals, and promotes citizen enforcement of environmental standards worldwide. Earthjustice has no members.

The *Western Mining Action Project* (WMAP), co-counsel for Applicants, is a nonprofit environmental law center providing free legal counsel to environmental and community organizations and Native American tribes on a wide range of environmental and mining issues. WMAP is the nation's only nonprofit firm specializing in hardrock mining issues. WMAP is the national environmental community's recognized legal expert on hardrock mining issues. WMAP has represented the Sierra Club and Earthworks/Mineral Policy Center in issues involving the Glamis Imperial Project for over 10 years. The Western Mining Action Project has no members.

Affiliation with a Disputing Party

None of the applicants has any direct or indirect affiliation with a disputing party.

Financial or Other Assistance in Preparing the Submission

Earthjustice and the Western Mining Action Project provided Applicants all services related to the preparation of this submission free of charge. Earthjustice's work on this submission is part of its program on international trade and investment, which is funded by grants from the Charles Stewart Mott Foundation (www.mott.org), the CS Fund (www.csfund.org), and general support funds donated by Earthjustice's individual supporters. WMAP is supported by a variety of foundation grants. Other than staff of Applicants and of Earthjustice, undersigned counsel has not collaborated with or received assistance from anyone in preparing the submission.

Applicants' Interest in the Arbitration

This arbitration may affect California's measures requiring backfilling of certain open-pit mines, as well as the willingness and ability of the US and other governments to implement measures to protect the environment or health in the future. A decision requiring the United States to compensate Glamis could create pressure for California to rescind the backfilling measures or force US and California taxpayers to pay to maintain them. Such a decision could also create pressure for the US federal government to ignore its valid concerns about the cultural and environmental impacts of the Imperial Project that are the subject of this dispute. Because the Tribunal's decision in this case will be considered by tribunals in future investment arbitrations, its decision will also affect the rights and obligations of governments in implementing future health and environmental measures.

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These are matters of direct interest to Applicants, both of which are dedicated to strengthening health and environmental protections and to ensuring the unfettered ability of governments to regulate to protect these important public values. In particular, the Sierra Club's San Diego Chapter works to protect the environment in Imperial County, where Claimant's mining claims are located. To that end, members of the San Diego Chapter have submitted extensive and detailed comments related to the proposed mining project and participated in many meetings with US government officials related to the environmental impacts of the open-pit, cyanide heap leach, low-grade ore gold mines on public lands proposed by Claimant. The Sierra Club's Trade and Environment Program works to ensure that international trade laws promote a higher quality of life for all and are not used to attack valid environmental and public health laws and regulations.

Applicants' interest in the subject of this dispute has been recognized by the US District Court for the District of Columbia, which granted a motion by the Sierra Club and Earthworks (then called the Mineral Policy Center) to intervene in Claimant's federal lawsuit challenging the environmental reviews conducted by US federal agencies. *Glamis Imperial Corporation v. US Dept. of Interior and Bureau of Land Management*, Case No. 1:01CV00530 RMU, 2001 WL 1704305 (D.D.C. Nov. 13, 2001). The court's grant of permissive intervention means that it found that Applicants' defense of the actions of the US government had a question of law or fact in common with Claimant's challenge.² Applicants' interest is equally strong with respect to this dispute.

In addition to the foregoing, the Sierra Club, Earthworks and Earthjustice each have a long history of working to achieve an environmentally sustainable global economy by addressing the relationship between the environment and global economic institutions and policies. These efforts have included research, writing and public advocacy concerning the intersection of investment rules and environmental regulation, as well as promoting the right of civil society organizations to have access to dispute resolution processes in international trade and investment disputes. As this brief description indicates, the outcome of this dispute will directly affect the interests of all Applicants.

The Issues of Fact or Law Addressed by Applicants

Applicants' submission addresses the legitimacy, under NAFTA's Chapter 11, of the actions of the US government taken pursuant to US laws related to mining claims, as well as California's mining measures, both of which the Claimant considers to be a basis for its claim.³

² See Federal Rule of Civil Procedure 24(b) (permissive intervention allowed "when an applicant's claim or defense and the main action have a question of law or fact in common").

³ See Response of Claimant Glamis Gold Ltd. to Request for Bifurcation of Respondent United States of America, Apr. 21, 2005, p. 2 (noting that the US government's "definitive adverse action" in this dispute was an "illegal and arbitrary denial" of a plan of operation for Claimant's proposed mine); Glamis Notice of Arbitration, Dec. 9, 2003, para. 21 (California measures "discriminatory and expropriatory").

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In particular, Applicants address issues of US and California mining law and international law that are relevant to this Tribunal's determination of the legitimacy of California's measures. These issues include Glamis' lack of a property right under federal Mining Law that could be subject to expropriation, and the appropriateness of the Interior Department's and California's actions under federal and state environmental, public lands and mining laws.

Why the Tribunal Should Accept this Submission

This arbitration raises issues of broad public concern, including questions related to the particular mining measures at issue here and the larger question of governmental capacity to regulate to protect health, culture and the environment. It is thus appropriate and useful for the Tribunal to accept input from nongovernmental organizations with substantial interest and expertise in the subject matter of the dispute.

The issues raised by Glamis will affect millions of acres of public land in the Western United States. Glamis is challenging the Interior Department's authority to regulate, through the Bureau of Land Management (BLM), the destructive aspects of industrial mining operations on public land. "BLM is responsible for 260 million acres of land in the western states. Ninety percent of such lands are open to hardrock mining." *Mineral Policy Center v. Norton*, 292 F.Supp.2d 30, 33, n. 6 (D.D.C. 2003). Thus, a ruling by this Tribunal against the federal government may have an undue chilling effect on BLM's ability to protect public land under federal law.

In addition, there has been public speculation that Respondent could be constrained from fully defending actions of the federal government upon which Claimant bases its claims.⁴ Because the present US administration has taken the position that the US Department of Interior violated US law in denying Claimant's plan of operation, it may be constrained from fully defending the actions that form the basis of Claimant's claim. This concern is strengthened by positions taken by the United States in recent litigation in US courts. *See, e.g., Mineral Policy Center*, 292 F. Supp. 2d at 41 (rejecting US Secretary of Interior argument that Department of Interior has no authority to regulate necessary mining activities that cause undue degradation of public lands).⁵

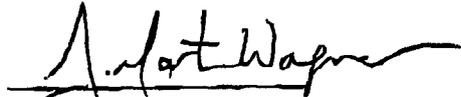
⁴ *See, e.g., NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005* (Public Citizen 2005) at 54 (expressing concern that the government will not be able to adequately defend a policy it opposes), available at <http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf> (last visited Oct. 12, 2006).

⁵ Although the US Federal Rules of Civil Procedure are not binding upon this Tribunal, the rule governing intervention is instructive. Under Rule 24(a), any party has a right to intervene "if the applicant shows that representation of its interests 'may be' inadequate and that the burden of making this showing is minimal." *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)).

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For these reasons, accepting Applicants' submission would not only help legitimize the Tribunal's decisions in this dispute in the eyes of the public by providing an opportunity for input from representatives of organizations concerned with protecting the public interest in health and the environment and, but would ensure that the Tribunal receives a complete analysis of relevant US mining law.

Respectfully submitted,



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