

**NON-PARTY SUPPLEMENTAL SUBMISSION**

**GLAMIS GOLD LTD.**

v.

**UNITED STATES OF AMERICA**

**Submission of the Quechan Indian Nation**

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**Introduction**

Extensive consideration must be accorded by the Respondent to both the domestic and international legal and policy frameworks safeguarding cultural heritage and sacred places in respect of any mining activity permitting process. A failure to consider the domestic framework could result in an arbitrary and capricious decision that would be vulnerable to judicial, or other, review. A failure to consider the applicable international framework could result in an arbitrary or discriminatory decision that would be invalid under international law.

In its notice of arbitration, the Claimant has identified two provisions of the NAFTA upon which it hopes to rely: Articles 1105(1) (the “minimum standard of treatment”) and 1110 (requiring compensation for expropriation). It is submitted that, in its interpretation of these provisions, the Tribunal should be guided by at least two considerations:

- That the preservation and protection of indigenous rights in ancestral land is an obligation of customary international law which must be observed, by both the NAFTA Parties and any treaty interpreter, in accordance with the principle of good faith; and
- That an investor seeking compensation for an alleged taking of property cannot rely upon a claim to acquired rights in which no legitimate expectation to enjoy such rights existed.

**Neither Party's Brief Sufficiently Outlined the International and Domestic Legal and Policy Frameworks That Support Indigenous Cultural Resource Protection**

***International Framework of Customary Law***

The Claimant's Memorial was silent on the applicable international standards for the protection of cultural heritage and sacred places; Respondent's Counter-Memorial addressed them, but not fully. (See, for example, Counter-Memorial at pp 33-35).

This submission describes the established and emerging customary international law principles that impose extensive obligations on States to respect and protect indigenous peoples' sacred sites; their rights to access and use these sites; and their cultural, spiritual, and religious practices. These principles derive from well-established rules related to religious freedom, cultural heritage, land rights, and self-determination, which are each outlined below. This body of law supports and should require positive legal action to protect the Quechan Indian Nation's sacred sites and their cultural, spiritual, and religious practices.<sup>1</sup>

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<sup>1</sup> See Vienna Convention on the Law of Treaties, entered into force on 27 June 1980 (requiring that states perform treaty obligations they undertake); see also Inter-American Court of Human Rights, *Case of Garrido and Baigorria v. Argentina*, Reparations, Judgment of 27 August 1998, para. 42 (holding that “[t]he case law, which has stood unchanged for more than a century, holds that a State cannot plead its

As recalled in Article 38(1) of the Statute of the Court of International Justice, sources of international law include international conventions and international custom, as well as general principles and, and as a subsidiary means of interpretation, judicial decisions and the teachings of the most highly qualified publicists of international law.

In addition to ratifying or acceding to treaties and conventions, States often support, approve, or adopt declarations in international fora, such the United Nations or the Organization of American States, expressing their understanding of international legal standards. While such declarations may not bind the parties in the same manner as treaties, they may nonetheless constitute international practice that contributes to the generation of custom and which is expressive of international law principles.<sup>2</sup>

Applicable rules of custom and general international principles establishing the rights of indigenous peoples to their sacred sites and their cultural, spiritual and religious practices are demonstrated in the numerous human rights instruments and authorities discussed below.

#### *Sacred Sites*

Article 12 of the United Nations Declaration on the Rights of Indigenous Peoples<sup>3</sup> states that: “indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies... [and] the right to maintain, protect, and have access in privacy to their religious and cultural sites” and requires that “[s]tates shall seek to enable the access” to such sites. The draft American Declaration on the Rights of Indigenous Peoples contains similar protections for indigenous peoples’ access to sacred sites.<sup>4</sup>

ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries requires that: “measures shall be taken in appropriate cases to safeguard the right of the peoples

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federal structure to avoid complying with an international obligation”).

<sup>2</sup> D. Weissbrodt, J. Fitzpatrick, and F. Newman, *International Human Rights: Law, Policy, and Practice* 22 (3<sup>rd</sup> Ed. 2001).

<sup>3</sup> UN Human Rights Council, “Implementation of General Assembly Resolution 60/251 of 15 March 2006”, Annex: “United Nations Declaration on the Rights of Indigenous peoples”, A/HRC/1/L.3, 21 June 2006. The draft Declaration was approved by the Sub-Commission on Prevention of Discrimination and Protection of Minorities (now known as the Sub-Commission on the Promotion and Protection of Human Rights) in 1994, see E/CN.4/Sub.2/1994/2/Add.1, and approved by the United Nations Human Rights Council on June 21, 2006.

<sup>4</sup> The draft American Declaration on the Rights of Indigenous Peoples was approved by the Inter-American Commission on Human Rights on February 26, 1997, OEA/Ser.L/V.II.95 Doc.6 (1997), and has been under consideration by the members of the Organization of American States since that time. Article XIX (formerly XIV) provides that: “Indigenous peoples have the right to assemble on their sacred and ceremonial sites and areas, and for this purpose, they shall have free reasonable access, use and administration of these sites and areas.” Article XV (formerly X) provides that: “The States shall adopt the necessary measures, in consultation with the indigenous peoples, to preserve, respect, and protect their sacred sites and objects, including their burial grounds, human remains, and relics.” See Proposed American Declaration on the Rights of Indigenous Peoples; OAS Working Group, “Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples as of 25 March 2006 (Results of the Seven Negotiation Meetings held by the Working Group)”, GT/DADIN/doc.260/06, 25 March 2006.

*concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their... traditional activities.”<sup>5</sup>*

A UN Special Rapporteur has recommended that: “*states must respect and protect the special relationships that indigenous peoples have to lands, territories, and resources, particularly sacred sites, culturally significant areas, and uses of resources that are tied to indigenous cultures and religious practices.*”<sup>6</sup>

In 1991, the World Bank enacted a safeguard policy respecting Indigenous Peoples.<sup>7</sup> That policy cited “close attachment to ancestral territories”<sup>8</sup> as a leading characteristic of indigenous peoples and aimed to ensure that development projects “foster [ ] full respect for [indigenous peoples’] dignity, human rights, and cultural uniqueness.”<sup>9</sup> The policy required heightened scrutiny of mining projects financed by the Bank,<sup>10</sup> and incorporated by reference Bank requirements for projects with major environmental impacts.<sup>11</sup>

The World Bank has also recognized the particular importance of sacred sites to indigenous peoples, and specifies in its lending that: “*involuntary restrictions on Indigenous Peoples access to legally designated parks and protected areas, in particular access to their sacred sites, should be avoided.*”<sup>12</sup> The International Finance Corporation and the Equator Banks also recognize the importance of sacred sites and impose special prohibitions against development of sacred sites regardless of whether such sites may be protected by positive law.<sup>13</sup>

### *Cultural and Religious Rights*

As demonstrated below, freedom of religion and culture is a foundational principle of contemporary international human rights law. Further, international law recognizes that the effective exercise of indigenous peoples’ cultural and religious rights requires the protection of sacred sites, including rivers, lakes, trails, mountains, and other features of the natural world.

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<sup>5</sup> International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples, 27 June 1989, art. 14. The Convention has been ratified by 17 countries.

<sup>6</sup> UN Commission on Human Rights, “*Indigenous Peoples and their relationship to lands*”, Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes, E/CN.4/Sub.2/2001/21, 11 June 2001, page 41.

<sup>7</sup> World Bank Operational Directive 4.20, “*Indigenous Peoples*,” September 1991.

<sup>8</sup> *Id.* at para. 5(a).

<sup>9</sup> *Id.* at para. 6.

<sup>10</sup> *Id.* at para. 10.

<sup>11</sup> *Id.* (incorporating by reference provisions of World Bank Operational Directive 4.01, “Environmental Assessment,” 1989, which prohibits borrower countries from seeking financing for projects that would violate their obligations with respect to international environmental law).

<sup>12</sup> World Bank Operational Policy 4.10, “*Indigenous Peoples*,” May 2005, para. 21.

<sup>13</sup> IFC Performance Standard 8, “Cultural Heritage,” April 2006, paras. 2, 8 & 9; International Finance Corporation Performance Standard 7, “*Indigenous Peoples*,” April 2006, paras. 7, 12, 13; Equator Principles, Principle 3, “Applicable Social and Environmental Standards.” Since 2003, forty private project finance institutions have made voluntary commitments to abide by a set of principles designed to “ensure that the projects [they] finance are developed in a manner that is socially responsible and reflect sound environmental management practices.” The Equator Banks represent approximately 80 percent of the world’s project finance capital. See <http://www.equator-principles.com/index.html>.

The Universal Declaration of Human Rights, which binds all members of the United Nations, provides that: "*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*"<sup>14</sup>

Article 18 of the International Covenant on Civil and Political Rights reaffirms the rights and freedoms protected by the Universal Declaration, including the freedom to practice one's religion in community with others, and further provides that: "*Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*"<sup>15</sup>

Article 27 of the International Covenant on Civil and Political Rights provides that: "*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.*"<sup>16</sup> Article 27 has been interpreted to protect the rights of indigenous peoples to conduct land-based traditional cultural and spiritual activities.<sup>17</sup>

Article 11 of the UN Declaration on the Rights of Indigenous Peoples provides that: "*indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies...and visual and performing arts...*"<sup>18</sup> The draft American Declaration on the Rights of Indigenous Peoples contains comparable provisions.<sup>19</sup>

Article 5 of the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries provides that: "*In applying the provisions of this Convention: (a) The social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and*

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<sup>14</sup> Universal Declaration of Human Rights, 10 December 1948, art. 18.

<sup>15</sup> International Covenant on Civil and Political Rights, 16 December 1966, art. 18. The ICCPR has been ratified by 157 countries, including the United States.

<sup>16</sup> Id., at art. 27.

<sup>17</sup> U.N. Human Rights Committee, General Comment No. 23 on Art. 27, Aug. 4, 1994, CCPR/C/21/Rev.1/Add.5, paras. 7, 9.

<sup>18</sup> UN Human Rights Council, "Implementation of General Assembly Resolution 60/251 of 15 March 2006", Annex: "United Nations Declaration on the Rights of Indigenous peoples", A/HRC/1/L.3, 21 June 2006, art. 11.

<sup>19</sup> Article XII (formerly VII) of the draft American Declaration on the Rights of Indigenous Peoples provides that: "*Indigenous peoples have the right to their cultural integrity and to their historical and ancestral heritage, which are important for their collective continuity, and for their identity and that of their members and their States... The States shall guarantee respect for and non-discrimination against the indigenous ways of life, world views, usages and customs, traditions, forms of social organization, institutions, practices, beliefs, values, dress, and languages.*" See OAS Working Group, "Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples as of 25 March 2006 (Results of the Seven Negotiation Meetings held by the Working Group)", GT/DADIN/doc.260/06, 25 March 2006.

*as individuals; (b) The integrity of the values, practices and institutions of these peoples shall be respected.*<sup>20</sup>

According to principles developed by the U.N. Special Rapporteur on the Cultural Heritage of Indigenous Peoples, Erica-Irene Daes, “[T]he heritage of indigenous peoples includes... immovable cultural property such as sacred sites, sites of historical significance, and burials,” and “international recognition and respect for indigenous peoples’ own customs, rules and practices for the transmission of their heritage to future generations is essential to these peoples’ enjoyment of human rights and human dignity.” Further, pursuant to these principles, “Governments should take immediate steps, in cooperation with the indigenous peoples concerned, to identify sacred and ceremonial sites, including burials, healing places, and traditional places of teaching, and to protect them from unauthorized entry or use.”<sup>21</sup>

The UN Special Rapporteur on the Cultural Heritage of Indigenous Peoples has also found that: “Indigenous peoples’ ownership and custody of their heritage must continue to be collective, permanent and inalienable, as prescribed by the customs, rules and practices of each people” and that: “[t]he discovery, use and teaching of indigenous peoples’ knowledge, arts and cultures is inextricably connected with the traditional lands and territories of each people. Control over traditional territories and resources is essential to the continued transmission of indigenous peoples’ heritage to future generations and its full protection.”<sup>22</sup>

Article 6 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief provides that: “the right to freedom of thought, conscience, religion or belief shall include...[the freedom] [t]o worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;... and to celebrate holidays and ceremonies in accordance with the precepts of one’s religion or belief.”<sup>23</sup>

Extractive industry projects negatively affecting indigenous peoples have drawn rebuke from the UN Committee on Economic Social and Cultural Rights. The Committee has expressed “deep[] concern[] that natural extracting concessions have been granted to international companies without the full consent of the concerned communities... [and] at the expense of the exercise of land and culture rights.”<sup>24</sup>

The Convention Concerning the Protection of the World Cultural and Natural Heritage, which has been ratified by 182 countries, including the United States, provides that: “To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party... shall endeavor, in so far

<sup>20</sup> International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples, 27 June 1989, art. 5.

<sup>21</sup> UN Commission on Human Rights, “Protection of the heritage of indigenous peoples”, Final report of the Special Rapporteur Ms. Erica-Irene Daes, E/CN.4/Sub.2/1995/26, 21 June 1995, Annex: Revised texts of principles and guidelines, Guidelines on Definition of Heritage of Indigenous Peoples, paras. 12, 4, 31.

<sup>22</sup> Id. at paras. 5, 6.

<sup>23</sup> Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981).

<sup>24</sup> UN Committee on Economic Social and Cultural Rights, *General Comments*, Ecuador, E/C.12/1/Add. 100, 07/06/2004, para 12.

*as possible... to take the appropriate legal... [and] administrative...measures necessary for the... protection, conservation,... and rehabilitation of this heritage.*<sup>25</sup> UNESCO has also adopted strong recommendations based on the protection of cultural resources when monitoring the fulfillment of States' obligations under the Convention. (See, Quechan Initial Submission, pp 8-9).

The Inter-American Commission on Human Rights has concluded that physical expulsion from areas of religious practice constitutes a violation of religious freedoms protected by the American Convention on Human Rights, including the right to associate freely for religious purposes.<sup>26</sup>

The policies of major international financial institutions explicitly recognize the special cultural and spiritual relationship indigenous peoples have with lands, territories, and resources. The World Bank requires that borrowers proposing projects that would affect Indigenous People's special ties to land and resources must conduct a social assessment and prepare a plan that "pays particular attention to ... the cultural and spiritual values that the Indigenous Peoples attribute to such lands and resources."<sup>27</sup>

### *Land Rights*

International law also recognizes the rights of indigenous peoples to the lands and territories they have traditionally used and occupied.<sup>28</sup>

Even where indigenous peoples do not claim, or have not been granted, formal domestic legal title to such lands, their rights to maintain traditional use may remain protected, as demonstrated below. Where indigenous peoples have used sacred sites but not claimed title to them, States are bound under international law to protect such sites and indigenous peoples' access to them.

Article 25 of the UN Declaration on the Rights of Indigenous Peoples provides that: "*Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and cultural relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.*"

In addition, Article 26 of the UN Declaration on the Rights of Indigenous Peoples provides that: "*Indigenous peoples have the right to the lands, territories and resources which they have*

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<sup>25</sup> UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, Art. 5(d).

<sup>26</sup> See Inter-American Commission on Human Rights, *Loren Laroye Riebe Star, Jorge Alberto Baron Gutilein and Rodolfo Izal Elorza v. Mexico*, Case 11.610, Report 49/99, 13 April 1999, para. 102-105; Inter-American Commission on Human Rights, *Dianna Ortiz v. Guatemala*, Case 10.526, Report 31/96, 16 October 1996, para. 119.

<sup>27</sup> World Bank Operational Policy 4.10 para. 16; see also IFC Performance Standard 7 (recommending avoidance of adverse project impacts on the cultural heritage of indigenous peoples).

<sup>28</sup> See ILO Convention 169, art. 14, which requires that "the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized."

*traditionally owned, occupied or otherwise used or acquired.*<sup>29</sup> The draft American Declaration on the Rights of Indigenous Peoples contains a similar provision.<sup>30</sup>

In the *Case of Awas Tingni (Sumo) Mayagna Community v. Nicaragua*, when applying Article 21 of the American Convention on Human Rights, the Inter-American Court concluded that: “[...] Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.”<sup>31</sup> This view has been reaffirmed by the court in *Case of Sawhoyamaxa Indigenous Community v. Paraguay*.<sup>32</sup>

The Inter-American Commission on Human Rights has interpreted the American Declaration on the Rights and Duties of Man<sup>33</sup> to require special measures to protect the land-based rights of indigenous peoples. In the *Case of Mary and Carrie Dann v. United States*, the Commission found it “necessary to consider [the case] in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom, and other sources of international law.”<sup>34</sup>

The Commission found that: “*the basic principles reflected in many of the provisions of the [draft American Declaration on the Rights of Indigenous Peoples]...reflect general international legal principles developing out of and applicable inside and outside of the Inter-American System and to this extent are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples.*”<sup>35</sup> Having reviewed this developing international law, the Commission identified “*a particular connection between communities of indigenous peoples and the lands and resources that they have traditionally occupied and used, the preservation of which is fundamental to the effective realization of the human rights of indigenous peoples more generally and therefore warrants special measures of protection.*”<sup>36</sup>

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<sup>29</sup> UN Human Rights Council, “Implementation of General Assembly Resolution 60/251 of 15 March 2006”, Annex: “United Nations Declaration on the Rights of Indigenous peoples,” A/HRC/1/L.3, 21 June 2006.

<sup>30</sup> Article XXIV reads: “[I]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual, cultural, and material relationship to their lands, territories, and resources ... Indigenous peoples have the right to the recognition of their property rights and ownership rights with respect to the lands and territories that they historically occupy, as well as the use of the lands to which they have traditionally had access for carrying out their traditional activities and for sustenance, respecting the principles of the legal system of each State.” See OAS Working Group, “Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples as of 25 March 2006 (Results of the Seven Negotiation Meetings held by the Working Group)”, GT/DADIN/doc.260/06, 25 March 2006.

<sup>31</sup> Inter-American Court of Human Rights, *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, para. 149.

<sup>32</sup> Inter-American Court of Human Rights, *Case of Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, para. 128.

<sup>33</sup> The American Declaration was adopted by the member states of the OAS, including the United States, at the time of the founding of the OAS in 1948.

<sup>34</sup> Inter-American Commission on Human Rights, *Mary and Carrie Dann v. United States*, Report 75/02, Case 11140, Report of 27 December 2002, para. 124.

<sup>35</sup> Id. at para. 129.

<sup>36</sup> Id. at para. 128.

*Relevance of These Norms to a NAFTA Chapter 11 Proceeding*

NAFTA Article 1131(1) provides that a tribunal adjudicating a claim under Chapter 11 “shall decide the issues in dispute in accordance with [the NAFTA] and applicable rules of international law.” Similarly, NAFTA Article 102(2) states that NAFTA provisions are to be interpreted by the Parties in light of its objectives and “in accordance with applicable rules of international law.”

In any dispute that directly involves the rights and/or interests of indigenous peoples, it is patent that international law norms establishing or otherwise concerning indigenous peoples should be considered as being included in the “rules of international law” that are “applicable” with respect to that dispute. This is true regardless of whether indigenous peoples serve as parties to an international dispute; or the dispute is between two States; or the dispute involves the claim of an investor brought pursuant to an agreement between two States providing for the adjudication of its claim. In all circumstances, if a dispute directly involves the rights and/or interests of indigenous peoples, a body of international law exists that must be considered in resolution of that dispute.

In other words, under NAFTA Article 1131(1), the Tribunal is required to be mindful of how it construes the provisions at issue in this claim, Articles 1105 and 1110, so that they do not require or authorize State conduct of the kind that would conflict with international norms protecting indigenous people generally, and the citizens of the Quechan Tribe in particular. Such an approach is the only way to ensure consistency in wider public international law and is also mandated in the customary international law rules on treaty interpretation, as restated in Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*.<sup>37</sup>

This approach to the interpretation of economic treaty provisions has also been established and consistently maintained by the WTO Appellate Body, which has noted how: “... [the provision of an international economic treaty such as the GATT] is not to be read in clinical isolation from public international law.”<sup>38</sup> It is submitted that the approach adopted by the WTO Appellate Body for interpretation of the GATT and other WTO instruments is equally of the Tribunal’s interpretation of the NAFTA in this case.

Moreover, it should be recalled that Glamis has brought its claim under the UNCITRAL Arbitration Rules. NAFTA Article 1136(6) provides for enforcement of a NAFTA/UNCITRAL award under the New York Convention or the InterAmerican Convention, both of which recognize the concept of international public policy. As fundamental expressions of international custom, principles and conventions, norms requiring States to safeguard the rights and interests of indigenous peoples in their governmental conduct form a part of the *ordre publique*. Any award that requires a State to pay compensation for conduct that would be violative of international

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<sup>37</sup> Which provides: “These shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties.”

<sup>38</sup> *United States – Standards for Conventional and Reformulated Gasoline*, WT/DS2/AB/R, 29 April 1996, at 17; see, also: *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R 12 October 1998, at 48-51, where the AB referred to various international environmental conventions and instruments in consideration of GATT Article XX(g), concerning measures aimed at the protection of natural resources.

norms protecting indigenous peoples and their sacred lands could violate international public policy in so doing. Accordingly, it is essential that this Tribunal take into account the ways in which the Respondent was indeed obliged under international law to safeguard the rights and interests of the Quechan people, both in conducting a review of Glamis' Imperial Proposal and in regulating preconditions subject to such approval, at both the federal and state levels.

#### *Timeliness of the Obligations Owed*

As demonstrated above, international law thus formally recognizes the existence of a positive obligation upon States to respect and protect indigenous peoples' sacred sites and indigenous peoples' rights to access and use these sites as a part of their cultural, spiritual, and religious practices. These established and emerging rules and principles of international law support the results obtained by the measures and decision-making processes of both the United States and the State of California in respect of the proposed Glamis Imperial Project.

The development of these principles predates the actions that are the subject of Glamis's complaint. The foundational treaties on human rights, religious freedom, and cultural heritage became part of the law international law, and thereby United States law, years or even decades before the disputed actions arose. For example, the Universal Declaration on Human Rights and the American Declaration on the Rights and Duties of Man were approved by the United States and entered into force in 1948,<sup>39</sup> while the Convention Concerning the Protection of the World Cultural and Natural Heritage was ratified by the United States in 1973 – prior even to Glamis acquiring mining claims in the sacred Indian Pass area.<sup>40</sup>

Further, the UN Sub-Commission approved the Declaration on the Rights of Indigenous Peoples in 1994<sup>41</sup> and the Inter-American Commission on Human Rights approved the draft American Declaration on the Rights of Indigenous Peoples in 1997.<sup>42</sup> The International Covenant on Civil and Political Rights was ratified by the United States in 1977 and interpreted by the UN Human Rights Committee to require state protection of indigenous peoples' land-based traditional cultural and spiritual activities in 1994.<sup>43</sup> ILO Convention No. 169 entered into force in 1989,<sup>44</sup> and by 1991 the World Bank Board of Directors, of which the United States is a leading member, had resolved to require special measures to protect the human rights of indigenous peoples from the possible adverse impacts of mining and other projects.<sup>45</sup> By 1995, a Special Rapporteur had been commissioned by the UN Commission on Human Rights and had recommended that, in keeping with principles of international law, governments take "immediate steps" to protect sacred sites from uses not consented to by indigenous peoples.<sup>46</sup>

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<sup>39</sup> See note 14, *supra*.

<sup>40</sup> The UN Declaration on the Rights of Indigenous Peoples was first approved by the UN Sub-Commission on the Promotion and Protection of Human Rights in 1994 in substantially the same form as adopted by the UN Human Rights Council in 2006 as regards the relevant provisions. The American Declaration on the Rights of Indigenous Peoples was approved by the Inter-American Commission on Human Rights in 1997. Although the American Declaration is still under negotiation, the provisions concerning indigenous lands, sacred sites, cultural rights and religious rights have not materially changed.

<sup>41</sup> See note 3, *supra*.

<sup>42</sup> See note 4, *supra*.

<sup>43</sup> See note 15, *supra*.

<sup>44</sup> See note 5, *supra*.

<sup>45</sup> See note 7, *supra*.

<sup>46</sup> See note 21, *supra*.

### *Summary and Application*

The Glamis NAFTA claim involves two international obligations owed on the part of the United States of America to all of the investments made by NAFTA investors: (1) the obligation to provide “treatment in accordance with international law” to an investment in its territory; and (2) the obligation to pay fair market value compensation for the taking of an investment in its territory. Both of these obligations can, and should, be interpreted in accordance with the applicable international law rules concerning indigenous peoples.

NAFTA Article 1110 constitutes a conventional formulation of the customary international law prohibition against uncompensated takings. It is understood in the international law jurisprudence of expropriation that only vested rights, for which a legitimate expectation of the enjoyment of property exists, are capable of expropriation, whether direct or indirect. An expectation to enjoy the profits of a mining development that endangers or destroys sacred indigenous land controlled by a State – where that State is obligated under international law to safeguard that land for the benefit of the indigenous peoples – is not *per se* “reasonable” under international law. Sacred lands, and the right of access by indigenous peoples to them, are protected under international law, regardless of whether the host State has failed to fully recognize such rights as a matter of domestic law.

In other words, a tribunal cannot award compensation for the alleged taking of an interest that could not legitimately be enjoyed by a non-indigenous investor, because to do so would be apposite to the object of the international law norms that exist specifically to protect the rights and/or interests of indigenous peoples.

Glamis had ample notice of the presence of sacred sites in and around the area through the pre-existing ethnographic literature and cultural surveys. It then commissioned its own cultural surveys, which confirmed the sacred character of this land. Glamis accordingly knew, or should have known, of Quechan religious practices related to those sites through the ethnographic literature, cultural surveys and later through government-to-government and other consultations, (See, e.g., Counter-Memorial, pp 41-71, 189-190, 254-257). It is therefore impossible for Glamis to have been entitled to enjoy a reasonable expectation, as a matter of international law, to have been able to carry out its plans in the manner proposed.

On its face, NAFTA Article 1105(1) requires treatment in accordance with “international law.” As the NAFTA Tribunal in *ADF v. USA* noted, “any general requirement to accord ‘fair and equitable treatment’ and ‘full protection and security’ must be disciplined by being based on State practice and judicial or arbitral caselaw or other sources of customary or general international law.”<sup>47</sup> As such, in a case where indigenous rights and interests in sacred lands are at issue, it is simply not possible for a NAFTA Party to accord treatment to an investment that is “in accordance with international law” if such treatment would be contrary to international norms protecting indigenous peoples.

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<sup>47</sup> *ADF Group Inc. v. United States of America*, Award of 9 January 2003, 6 ICSID Reports 470, at ¶ 184.

Thus, a measure cannot be impugned as “arbitrary” within the meaning of the customary international law minimum standard of treatment, or NAFTA Article 1105, if it is rationally connected with compliance by a State with its international obligations concerning the rights and/or interests of indigenous peoples. Similarly, the measure cannot be said to have violated any sort of legitimate expectation under customary international law, if the expectation in question was for the State to act in a manner contrary to its international obligations with respect to indigenous peoples.

The manifest array of international law sources described above demonstrate how Glamis could not possibly have enjoyed a legitimate expectation – under international law – that it would be able to destroy or damage those sites; deny the Quechan Nation access to them; or prohibit the Quechan Nation from engaging in its longstanding cultural, spiritual or religious practices related to those sites.

In preventing Glamis from going forward with its Imperial Project in a manner that would have impinged upon the rights and interests of the Quechan in this sacred land, the Respondent has acted in accordance with international law.

#### *Continuing Increased Domestic Protections: California*

Another aspect undeveloped in both Parties' briefs is the increased statutory protection for, and policy consideration of, indigenous cultural resources and sacred places that has occurred in California since the adoption of the California measures challenged by Claimant and since the filing of the Tribe's initial submission.<sup>48</sup>

*SB 18 (Sacred Places and Planning, 2004)* requires local governments to consult with tribal entities during the adoption or amendment of general and specific plans; allows tribes to hold conservation easements; and requires local governments to consult with tribes when adopting or amending open space or similar plans. SB 18's intent language declared that many cultural places are not located on tribal land and that such places nonetheless are essential elements in tribal cultural traditions, heritages and identities.<sup>49</sup> It was the continuation of SB 1828, which did not become law.<sup>50</sup>

*SB 922 (Confidentiality of Sacred Places, 2005)* requires that information obtained through government-to-government consultations and cultural site records remain confidential by all state governmental entities from a Public Records Acts request. This measure encourages candid communications between state, local and tribal governments regarding sacred place protection

<sup>48</sup> Many of these bills also enjoyed bipartisan authorship and broad support, including from the environmental and religious communities.

<sup>49</sup> See, California Civil Code Section 815.3; California Government Code Sections 65040.2, 65092, 65351, 65352, 65352.3, 65352.4, 65560 and 65562.5. The Quechan were a bill sponsor. See also, State of California's Governor's Office of Planning and Research, "Tribal Consultation Guidelines: Supplement to General Plan Guidelines," April 15, 2005, [www.opr.ca.gov/SB182004.html](http://www.opr.ca.gov/SB182004.html).

<sup>50</sup> Contrary to Glamis's implication that SB 1828 was designed solely to stop its mine (Memorial, page 203), SB 1828 and its predecessor SB 18 were in fact efforts to approach conflicts between development and sacred place protection more comprehensively and not on an ad hoc basis. Hon. Barry Goode, *A Legislative Approach to the Protection of Sacred Sites*, Hastings West-Northwest Journal of Environmental Law and Policy, Vol. 10, Number 2, Spring 2004, page 173 (the author was a member of Governor Davis's administration and involved with the development of SB 18; the views in the article are his own).

and ensures that information regarding the location and use of such places is kept confidential to protect against vandalism or desecration.<sup>51</sup>

*AB 2641 (Native Burials Bill, 2006)* enhances culturally appropriate treatment for ancestral burials found on private land. It extends the time for Native American descendants to make recommendations for treatment and requires that the landowner, upon discovery of human remains, ensure that the immediate vicinity is not disturbed until specific conditions are met, including consultations with the descendants. The bill also requires reinterment on the property to require protection in perpetuity through specified methods including: confidential site recordation, open space easements or county property recordation.<sup>52</sup>

*SB 1395 (Emergency Exemptions and Sacred Places, 2006)* would have added a section to the California Public Resource Code (the California Environmental Quality Act (CEQA)) requiring notification to and consultation with tribal governments when state and local governments adopt emergency and other exemptions from CEQA. This bill passed the legislature but was vetoed by the Governor. His veto message stated that while he agreed with the measure's intent to enhance environmental protections for Native American sacred sites, he felt the bill as written, could hinder completion of important public safety projects.

#### *Summary*

These efforts: 1) demonstrate how legislation, such as the earlier SB 1828, clearly had legitimate general applicability goals; 2) indicate that the State of California takes sacred place protection seriously and continues to adopt general legislation to advance those principles; and 3) evidence that Glamis, or other companies, could not have any expectation, under international law, that California would not legislate to accommodate Native Americans' free exercise of religion or legislate or regulate to protect Native American heritage resources.

#### **Neither Party's Brief Outlined the Legal and Policy Frameworks Supporting Corporate Social Responsibility and Sustainability**

In the past decade, an emerging corporate social responsibility (CSR) movement has articulated new values and defined new norms for corporate good practice in relation to environmental and social performance on issues ranging from toxic emissions to human rights.<sup>53</sup> The movement – made up of responsible investors, NGOs, faith-based groups, unions, business magazines, opinion makers, international environmental and human rights organizations and companies themselves – is particularly active in the extractives industry largely because of its legacy of substantial environmental and social harms.<sup>54</sup> A number of extractive companies have embraced corporate social responsibility and found it gives them a competitive advantage. Still, many companies lag far behind in terms of what it takes to obtain a social "license to operate."<sup>55</sup>

Corporate social responsibility is an evolving concept. While it may lack a uniform definition or practice, a CSR template is emerging at the global level that entails seven norms of good

<sup>51</sup> See, California Government Code Sections 6254, 6254.10, 65352.3, 65560 and 65562.5. The Quechan were a bill sponsor.

<sup>52</sup> See, California Public Resources Code Sections 5097.91 and 5097.98.

<sup>53</sup> "Is Nothing Sacred? Corporate Responsibility for the Protection of Native American Sacred Sites," Earth Island Institute's Sacred Land Film Project, 2006, page 13 (will be available online October 27, 2006, at [www.sacredland.org/PDFs/CSR.pdf](http://www.sacredland.org/PDFs/CSR.pdf)).

<sup>54</sup> Id.

<sup>55</sup> Id.

practice.<sup>56</sup> These include: 1) a mission commitment to social responsibility; 2) articulating fundamental principles to guide its mission, endorsing or borrowing from existing codes;<sup>57</sup> 3) adopting substantive company environmental, social and good governance policies; 4) voluntary public disclosure about its performance in these areas available on the internet; and 5) monitoring and verification of performance.<sup>58</sup>

The goals of these emerging norms are four-fold: 1) early, ongoing consultation before seeking entitlements; 2) free, prior and informed consent, i.e., the right to say "no" to projects that would devastate sacred areas; 3) respect for "bio-integrity" or the cultural landscape attributes of some sacred places (such as the Indian Pass area); and 4) respect for indigenous knowledge systems.<sup>59</sup>

The Claimant asserts in current annual reports and Securities and Exchange Commission filings dating to as early as 1996 that Glamis and its operating subsidiaries are dedicated to providing environmental stewardship, while maintaining sound business practices.<sup>60</sup> However, the truth is otherwise.

Unlike other mining and multi-national companies, Glamis has never made public an environmental audit or sustainability report.<sup>61</sup> No environmental, social or human rights policy is posted on the company's website, and none of the corporation's press releases or other public information relate to social or environmental issues.<sup>62</sup> Moreover, Glamis does not belong to either the Mining Association of Canada or the International Council on Mining and Metals, both of which have developed principles for sustainable mining, including relationships with indigenous peoples.<sup>63</sup> Glamis's operations in Central America have been the recent target of intense community criticisms on both environmental and human rights grounds.<sup>64</sup> This track record compares poorly, for example, to the guidance and standards adopted by the mining company Suncor Energy Inc. of Canada, which has developed an Aboriginal Affairs Policy.<sup>65</sup>

Thus, it comes as no surprise to the Quechan people that the Claimant brings out old arguments in its Memorial, implying that the area is not really sacred or that the Tribe has made up the sacredness, to try and advance its NAFTA claim. (See, e.g., Memorial, pp 182-183, 251-253). Yet, after so many meetings and communications between the Tribe and Glamis, the Tribe thought that Glamis, while it may not share the Tribe's beliefs, would at least respect them.<sup>66</sup> The Claimant's brief, and that of its cultural expert, sadly prove its continued cultural insensitivity and show that Glamis has apparently learned nothing from the Tribe over the years.<sup>67</sup> Any positive

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<sup>56</sup> Id. at 60.

<sup>57</sup> These codes include: the Global Compact, Global Sullivan Principles and the Environmental Principles of the Coalition of Environmentally Responsible Economies (CERES).

<sup>58</sup> Id. at 61.

<sup>59</sup> Id. at 66.

<sup>60</sup> See, Glamis website: [www.glamis.com/corporate/index.html](http://www.glamis.com/corporate/index.html).

<sup>61</sup> *"Is Nothing Sacred? Corporate Responsibility for the Protection of Native American Sacred Sites."* Earth Island Institute's Sacred Land Film Project, 2006, pp 22-23 (will be available online October 27, 2006, at [www.sacredland.org/PDFs/CSR.pdf](http://www.sacredland.org/PDFs/CSR.pdf)).

<sup>62</sup> Id.

<sup>63</sup> Id.

<sup>64</sup> Id.

<sup>65</sup> See, Suncor website: [www.suncor.com](http://www.suncor.com).

<sup>66</sup> "The key to social - and corporate - acceptance of the legitimacy of Indian claims to protect sacred sites is respect." Id. at 15.

<sup>67</sup> To further this insensitivity, Claimant's frequent references to the glory of gold mining in California are an insult to all the Native populations that were decimated by actions taken during the Gold Rush period of

general statements Glamis may make regarding respect for indigenous communities is nothing more than green washing.

### **Glamis's Expert Cultural Report is Fatally Flawed and Cannot Be Replied Upon By the Tribunal**

Because the area around Indian Pass is so important to the Tribe, it is very important to the Tribe for the record in this proceeding to be clear.

On behalf of Glamis, archaeologists Lynne Sebastian and David Cushman provided a paper to the Tribunal entitled *Cultural Resource Issues, Compliance, and Decisions Relative to the Glamis Imperial Project* (Glamis Memorial Attachment, Sebastian and Cushman 2006). This paper is highly critical of the roles played and actions taken by the Bureau of Land Management (BLM), Advisory Council on Historic Preservation (ACHP), and Quechan Tribe in review of the Glamis Imperial Project under Section 106 of the National Historic Preservation Act (NHPA). This report, however, is inaccurate and misleading.

While the State Department's brief responds to most of the Claimant's assertions regarding the matter's cultural resource management (See, e.g., Counter-Memorial, pp 41-71, 189-190, 254-257), it does not provide all of the necessary and relevant arguments.

Accordingly, attached to this Submission is a report by Dr. Thomas F. King in response to the Sebastian report.<sup>68</sup> Dr. King's report summarizes and rebuts the report's three core assertions and the eleven additional specific allegations. He finds that Sebastian ignored relevant contexts in the evolution of national practice under Section 106 of the National Historic Preservation Act. Based on his forty years of experience with the Section 106 process, he sees no grievous deviations in the Glamis case on the part of either BLM or the ACHP.

Sebastian and Cushman make three core assertions, loosely derived from eleven more specific allegations (A through K), and some 57 pages of data and arguments that purportedly support their contentions. One important assertion is that BLM applied "different Section 106 procedures" to the Imperial Project than it did to other projects in the area. What Sebastian and Cushman fail to note is that the standards they describe as applied to other projects were clearly deficient and substandard by the time the Imperial Project was reviewed.

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California history. See, Kimberly Johnston-Dodds, *Early California Laws and Policies Related to California Indians*, California Research Bureau, CRB-02-014, September 2002, <<http://www.library.ca.gov/crb/02/14/02-014.pdf>>. To this day, these communities continue to suffer a disproportionately high adverse health and environmental impacts of hard rock mining. See, *Gold, Greed and Genocide: unmasking the myth of the '49ers*, Project Underground, 1998, pp 22-23, <http://www.1849.org/>.

<sup>68</sup> Because the Tribunal may not accept attachments from non-parties, the major points of Dr. King's report are summarized in the Tribe's supplemental submission below. Dr. King is a well-known and widely respected cultural resource management practitioner. He is also the co-author (with P.L. Parker) of National Register Bulletin 38, the National Park Service guidance on the evaluation and documentation of "traditional cultural properties" (TCPs) like the Trail of Dreams landscape. He is also the author of *Places That Count* (AltaMira Press 2003; ISBN 0-7591-0070-5), the only textbook on the identification, evaluation, and management of TCPs, and four other textbooks on aspects of cultural resource management. He also advised the Tribe regarding the Imperial Project during the late 1990s and early 2000s.

The standards that Sebastian and Cushman describe as applied to other projects in the area in two cases involved only archaeological surveys either with no tribal consultation at all<sup>69</sup>, or with some tribal consultation, the results of which were then ignored.<sup>70</sup> While this sort of near-exclusive focus on archaeology, and unconcern for tribal interests, may indeed have been standard BLM operating procedure in the years prior to the Glamis Imperial case, and may now be so again (under the current and different administration), it is hardly consistent with domestic law or widely understood good practice in Section 106 review and it is certainly not consistent with the practice required under international law.

By the time BLM undertook review of the Imperial Project, changes in law<sup>71</sup> and regulation,<sup>72</sup> the issuance of presidential executive orders,<sup>73</sup> and the promulgation of official guidance, notably National Register Bulletin 38 (1990),<sup>74</sup> had caused agencies across the federal government to rethink their review procedures. The result was: (a) better and more honest consultation with Indian tribes and (b) more attention to historic properties other than archaeological sites, notably traditional cultural properties. Far from being a strange new set of Section 106 procedures imposed selectively by BLM on Glamis, the procedures applied to the Imperial Project represented an effort by BLM to catch up with standards already being used by other agencies in other parts of the country, grounded solidly in law and government-wide regulation.

If BLM and Glamis's "cultural resource" consultants in the California Desert were not aware of this evolution, the Tribe was. At the first opportunity – the opportunity to comment on the DEIS – the Tribe made its concerns known. When BLM responsibly required further study, including actual consultation with the Tribe, the Tribe elaborated on its concerns, and on the significance of the landscape.<sup>75</sup>

Another core assertion contained within the Sebastian and Cushman Report is that the Section 106 process applied to the Imperial Project was inconsistent with the Advisory Council on Historic Preservation's Section 106 regulations (36 CFR 800) and BLM programmatic agreements and protocols. Unfortunately, in making this assertion Sebastian and Cushman exhibit a selective blindness toward the actual regulatory requirements.

First they allege that the area of potential effect (APE) in the Imperial case was defined without reference to the scale of the historic properties involved – failing to mention that the regulations call for the APE to be defined before historic properties are identified.<sup>76</sup> If the APE is determined

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<sup>69</sup> VCR Mine, Sebastian and Cushman 2006:36-37; Mesquite Landfill, Sebastian and Cushman 2006:37-38.

<sup>70</sup> Mesquite Mine Expansion, Sebastian and Cushman 2006:39, 50; North Baja Pipeline, Sebastian and Cushman 2006:39-41, 50-52.

<sup>71</sup> American Indian Religious Freedom Act, 42 USC 1996.

<sup>72</sup> The 1985 iteration of the Advisory Council on Historic Preservation's Section 106 regulations (36 CFR 800), which included enhanced provision for consideration of tribal concerns.

<sup>73</sup> Executive Order 12898 in 1994, with accompanying guidance from the Department of Justice and Executive Office of the President, making it clear that addressing environmental justice concerns in agency decision making includes consulting with low-income and minority groups such as Indian tribes regarding all their environmental concerns.

<sup>74</sup> P.L. Parker & T.F. King, *Guidelines for Identifying and Documenting Traditional Cultural Properties*, National Register Bulletin 38, National Park Service 1990. See King, *Places That Count*, pp. 21-44 for discussion of Bulletin 38's background.

<sup>75</sup> Note that the Tribe marshaled its resources and actively and comprehensively established an administrative record that supported and acknowledged the manifest impacts of the proposed mine on the Tribe's cultural interests.

<sup>76</sup> 36 CFR 800.4(a)(1), 36 CFR 800.16(d).

in the way the regulations require, it is impossible to consider the scale of such (by definition unidentified) historic properties in its formulation. They go on to allege that the APE did not take potential indirect effects into account; in this they may be correct, but this failure if anything worked in favor of Glamis, to minimize the scope of the apparent effects.

Sebastian and Cushman also allege that the BLM's focus on an arbitrarily defined "area of traditional cultural concern" (ATCC) rather than on "actual historic properties" places its prosecution of the case at odds with the regulations. But by "actual historic property" they appear to mean "narrowly defined archaeological site" – which does not describe the nature of the phenomenon with which BLM had to deal in the Imperial case. At least since 1990, when National Register Bulletin 38 was issued, knowledgeable Section 106 practitioners have understood that traditional cultural properties and landscapes can be "actual historic properties." Bulletin 38 explicitly comments on the fact that in some cases it is necessary and appropriate to define the boundaries of such properties arbitrarily.<sup>77</sup>

Further, while one might debate the practicality of focusing on "administratively defined" areas such as BLM's ATCC, as opposed to entire "enormous" landscapes such as the one in which the Imperial Project was proposed, this issue has nothing to do with regulatory requirements. The consulting parties under the Section 106 regulations decide what they will focus upon in their consultation; the regulations provide no metric that participants are supposed to apply.

Sebastian and Cushman express dismay that the Advisory Council staff developed an opinion about the case during the course of consultations. In fact, it is common practice for the staff to reach conclusions and offer opinions, which are advisory to the Council members and executive director; that is precisely what a staff is for. It is the members of the Advisory Council and its executive director who actually speak for the Advisory Council.

Suffice to say that based upon his forty years of experience with the Section 106 process, Dr. King sees no grievous deviations in the Glamis case on the part of either BLM or the ACHP. He thinks it is unfortunate that Glamis and its consultants, presumably with BLM's approval, persisted in defining elements of the landscape in archaeological terms. This practice may have misled some into thinking that archaeological-type mitigation (through bare physical avoidance, documentation, etc.) was a sensible thing to consider. These errors probably made the consultation more complicated and contentious than it needed to be. Nonetheless, these actions were not inconsistent with the regulatory requirements.

In their discussion of points subsidiary to their core assertions, Sebastian and Cushman repeatedly return to the allegation that the Quechan Tribe was provided with several opportunities to come forward with information about the special significance of the Imperial Project vicinity long

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<sup>77</sup> "Defining the boundaries of a traditional cultural property can present considerable problems. In the case of the Helkau Historic District in northern California, for example, much of the significance of the property in the eyes of its traditional users is related to the fact that it is quiet, and that it presents extensive views of natural landscape without modern intrusions. These factors are crucial to the medicine making done by traditional religious practitioners in the district. If the boundaries of the district were defined on the basis of these factors, however, the district would take in a substantial portion of California's North coast Range. Practically speaking, the boundaries of a property like the Helkau District must be defined more narrowly, even though this may involve making some rather arbitrary decisions. In the case of the Helkau District, the boundary was finally drawn along topographic lines that included all the locations at which traditional practitioners carry out medicine-making and similar activities, the travel routes between such locations, and the immediate viewshed surrounding this complex of locations and routes." National Register Bulletin 38.

before they did so, and that they failed to take advantage of such opportunities. While they appeared unwilling to make the assertion more bluntly, the clear implication of the Sebastian and Cushman report is that the land in question actually has no such significance – that it has all been fabricated by the Quechan Tribe over the last decade or so, and perhaps only by a few Quechan Tribal members.

Sebastian and Cushman ignore the likelihood, alluded to in National Register Bulletin 38 and discussed in professional literature with which Sebastian and Cushman should have been familiar,<sup>78</sup> that the Quechan Tribe regards the area of the proposed mine as *so significant* and *so sensitive*, that it is culturally inappropriate to even discuss it. Such a thought does not appear to have crossed their minds, even though such discretion would certainly have been practiced particularly in contexts such as general planning (when no threat is posed to the area) or of an archaeological survey (where the Tribe may well not trust the archaeologists involved).

Sebastian and Cushman castigate Tribal historian Lorey Cachora for allegedly not advising archaeologists earlier about the Trail of Dreams.<sup>79</sup> There are many reasons why Mr. Cachora may not have told the archaeologists about the Trail of Dreams – or that the archaeologists did not understand what they were being told. Among these is that Mr. Cachora may have thought it inappropriate to share information about such a powerful cultural resource. He may not have trusted the archaeologists. He may not have been asked. His story about the runner and the ant people to which Sebastian and Cushman allude may have been a parable designed to initiate a discussion that the archaeologists failed to notice. It may have had metaphorical meanings in a Quechan context that escaped the understanding of the archaeologists. For example, University of New Mexico anthropologist Keith Basso provides many examples of such metaphorical

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<sup>78</sup> National Register Bulletin 38: "It is important to understand the role that the information being solicited may play in the culture of those from whom it is being solicited, and the kinds of rules that may surround its transmittal. In some societies traditional information is regarded as powerful, even dangerous. It is often believed that such information should be transmitted only under particular circumstances or to particular kinds of people. In some cases information is regarded as a valued commodity for which payment is in order, in other cases offering payment may be offensive. Sometimes information may be regarded as a gift, whose acceptance obligates the receiver to reciprocate in some way, in some cases by carrying out the activity to which the information pertains.... Some kinds of traditional cultural properties are regarded by those who value them as the loci of supernatural or other power, or as having other attributes that make people reluctant to talk about them. Such properties are not likely to be recorded unless someone makes a very deliberate effort to do so, or unless those who value them have a special reason for revealing the information--for example, a perception that the property is in some kind of danger. ....Particularly because properties of traditional cultural significance are often kept secret, it is not uncommon for them to be "discovered" only when something threatens them--for example, when a change in land-use is proposed in their vicinity. The sudden revelation by representatives of a cultural group which may also have other economic or political interests in the proposed change can lead quickly to charges that the cultural significance of a property has been invented only to obstruct or otherwise influence those planning the change. This may be true, and the possibility that traditional cultural significance is attributed to a property only to advance other, unrelated interests should be carefully considered. However, it also may be that until the change was proposed, there simply was no reason for those who value the property to reveal its existence or the significance they ascribe to it." The Tenth Circuit Court of Appeals cited Bulletin 38's admonitions in its opinion in *Pueblo of Sandia v. United States*, saying that based on the bulletin, the Forest Service should have understood that the tribe might be reluctant to share detailed information on the significance of Las Huertas Canyon, the area of concern in the case. See also, *Traditional Cultural Properties: What You Do and How We Think*; P.L. Parker, ed., CRM Special Issue, National Park Service, Washington DC, 1993, which includes articles by Sebastian and Cushman demonstrating full knowledge of these issues. See also, *Places That Count*, pp 107-114.

<sup>79</sup> Sebastian and Cushman pp 26-27.

discourse among the Cibicue Apache in his 1996 book *Wisdom Sits in Places*<sup>80</sup> – a study with which Sebastian and Cushman, as New Mexico anthropologists, surely must have been familiar.

All of Sebastian's and Cushman's arguments lead up to their first core assertion, that: "Glamis had a reasonable expectation that their plan of operations for the Imperial Project would be approved, based on the standard Section 106 process for such projects and on the results of other Section 106 reviews in the California Desert region." It is apparent that Glamis could have had such an expectation only if its representatives, and its "cultural resource" consultants, had failed to become aware of, or give credence to, the evolution of practice under Section 106 over the decade or so preceding, and continuing during, the surveys of the Glamis Imperial APE.

Glamis may have had an expectation that because Tribal interests had been ignored by BLM in the past, the Quechan's interests would again be ignored here. However, it can never be reasonable for a company to expect that the domestic law will not be applied properly or that international obligations would be ignored on a wholesale basis.

Further, Glamis was not without experts to alert them to the fact that such an expectation might not be so reasonable. At BLM's direction, Glamis contracted for several "cultural resource" identification efforts – archaeological surveys and ethnographic studies – by many different and qualified consultants. These consultants, being "experts" in BLM policy and procedure, should surely have been alert to what had been going on in Section 106 practice over the preceding decade: the growing concern about traditional cultural properties; the increasing participation by tribes; the issuance of National Register Bulletin 38; and the subsequent congressional action, litigation, and issuance of guidance by NPS and the ACHP. If one knowingly hires advisors who are "asleep at the switch," or who only report to the Claimant that which it wants to hear, can expectations based on their advice be said to be "reasonable?" No, they cannot.

Furthermore, one must simply ask just why it was Glamis thought BLM was causing it to fund all of these surveys and studies. Did Glamis assume it was all a pro forma exercise? Were these requirements considered to be little more than mere window-dressing, to generate the pretense of responsibility toward the cultural environment before routinely winking, nodding, and approving the plan of operation? There would surely be no point in having laws such as the NHPA and NEPA if there was not at least some possibility that they would occasionally cause a federal agency to revise or reject a project. Is it "reasonable" for Glamis and its experts not to have recognized this about BLM's legal responsibilities?

#### *Summary*

For the reasons stated above and expanded on in the attached report, the Sebastian report cannot be relied upon by the Tribunal to form a basis for any award.

#### **Continued Concern that Award Could Result in Cultural and Environmental Harms**

We remind the Tribunal that it remains of significant concern to the Tribe whether a decision in favor of the Claimant would directly or indirectly result in the extinguishment of Glamis's claims to mine the area. If it does not, then it is possible that Glamis could both receive a monetary award and then also have the benefit of its allegedly valueless claims, meaning it could then presumably use or sell them, once again placing the Tribe's sacred lands at risk.

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<sup>80</sup> Keith Basso, *Wisdom Sits in Places*, Albuquerque, University of New Mexico Press 1996.

The Tribe was pleased to see Glamis' statement that, "Claimant agrees with the Quechan Tribe that the formal transfer and extinguishment of these mining claims and mill sites to the United States would be an appropriate condition of this Tribunal's award of fair and just compensation to Glamis for the expropriation of the Imperial Project." (Memorial, page 318). However, Glamis goes on to state that, "After more than a decade of conflict over this subject matter, the Tribunal's award of *full* compensation should bring this controversy to a final and complete conclusion." (Id.) The Claimant's pledge, therefore, is incomplete, at best, as fair and just compensation may not be full compensation.

Only if the Tribunal makes a finding, to which the Claimant is bound, that the mining claims have been rendered valueless or extinguished, can there be an expropriation for which the Tribunal may then proceed to determine whether that expropriation is compensable. In any case, should the Tribunal grant an award in any amount, it should be conditioned that Glamis extinguishes all its claims.

### **Conclusion**

There is no debate about the value to the nation of the cultural and religious resources located within the Indian Pass area, the site of the proposed Glamis Imperial Mine. Therefore, both the United States federal and state governments acted with legitimate governmental purposes, under all applicable international norms, when they adopted reasonable environmental measures to protect these irreplaceable and nonrenewable resources.

We agree with the United States that Glamis does not have – and never had – a right to have any particular plan of operations or reclamation plan approved. (See, e.g., Counter-Memorial, page 4). We also agree with Respondent that Glamis's claims are subject to pre-existing principles of religious accommodation enshrined in the U.S. and California Constitutions, as well as pre-existing cultural, environmental, and health and safety limitations under California law. (Id. at pages 120, 135-147).<sup>81</sup>

Glamis knew, or should have known, that any right granted to it to exploit ancestral Quechan lands, could only be enjoyed upon satisfaction of the concomitant domestic and international obligations owed by the Respondent to the Quechan people, to take whatever positive steps were necessary to protect and promote their interests in such land. Failure to do so vitiates any entitlement Glamis might have otherwise had, under international law, to derive benefits from the Imperial proposal which it abandoned.

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<sup>81</sup> Accordingly, the Tribe believes that the 2001 denial of the plan of operations was legally and morally correct and asked DOI for it to be reinstated.

We respectfully request the Tribunal consider the facts, law and contexts provided by the Tribe in both its initial and supplemental submissions in assessing Glamis' claim.

*Respectfully submitted,*

/Signed/

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