The hearing in the above-entitled matter came on, pursuant to notice, at 9:07 a.m. before:

MR. MICHAEL K. YOUNG, President
PROF. DAVID D. CARON, Arbitrator
MR. KENNETH D. HUBBARD, Arbitrator

Also Present:

MS. ELOÏSE OBADIA,
Secretary to the Tribunal

MS. LEAH D. HARHAY
Court Reporter:

MR. DAVID A. KASDAN, RDR-CRR
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P R O C E E D I N G S

PRESIDENT YOUNG: Good morning. We are ready to start this morning. We appreciate everybody's willingness to join us early on a Sunday morning, as we commence this arbitral hearing on Glamis Gold, Limited, versus the United States of America.

We welcome both Claimant and Respondent and their representatives, as well as the public, who are viewing this in an off-site location to which this is being broadcast.

Let me start with just a few small logistical issues.

First, as we commence these proceedings, as we've discussed before, there will be some testimony that the parties have asked be considered confidential. In that regard, there are, in particular, three witnesses whose testimony we anticipate will be, largely at the request of the parties, kept confidential, as the testimony of Dr. Sebastian, Mr. Kaldenberg, and Dr. Cleland, all three of whom we will anticipate will probably be testifying tomorrow afternoon or at least sometime tomorrow.
Is that largely correct?

MR. GOURLEY: That is correct.

PRESIDENT YOUNG: Okay. Thank you.

During the testimony of those three witnesses, we will—for the information of the public to let everyone know, we will be turning off the live feed during the testimony of those three witnesses. Otherwise, at least at the moment, we are not aware of other major portions of the hearings that will go off-line, but we anticipate that, at least with respect to those three witnesses.

There may be other brief occasions when references are made, again, to particular elements of the case that the parties asked to be kept confidential, but we will try to give everyone as much notice as we can prior to any references, but at the moment we are not really anticipating very much of that.

But as we start today, we will start with opening arguments today. Our schedule, as you know, runs from nine in the morning until 10:30, at which point we will take a break from 10:30 to 11:00; and then run from 11:00 to 12:15, and then commence again at 2:00, I think.

But, in light of the—to keep the flow of opening arguments as seamless as possible, what we would like to do today is Claimant will start and allow you to continue your opening statement and take
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the break after your opening statement. We anticipate
that will be just a little over two hours, and we will
take the break after the opening statement and then
turn to Respondent.

So with that, as we commence, we do have
additional people with us today, as well as some from
the general public who are viewing this, so we thought
we would start with, as we did last time, with just
brief introductions and allow people to go around the
table to introduce themselves.

I'm Michael Young, Chairman of the Tribunal,
and I will turn to my two co-arbitrators.

ARBTRATOR CARON: I'm David Caron, Member of
the Tribunal.

ARBTRATOR HUBBARD: I'm Ken Hubbard,
technologically challenged. I'm a Member of the
Tribunal.

SECRETARY OBADI A: Elöise Obadi a from ICSID,
Secretary of the Tribunal.

MS. HARHAY: Leah Harhay, Assistant to the
Tribunal.

COURT REPORTER: David Kasdan, from B&B
Reporters.

PRESIDENT YOUNG: Thank you.

Mr. Gourley.

MR. GOURLEY: Alan Gourley from Crowell &
Moring, representing the Claimant Glamis Gold,
Limited.

MR. SCHAEFER:  Alexander Schaefer, also representing Glamis Gold, Limited.

MR. ROSS:  David Ross, also representing the Claimant.

MS. HALL:  Jessica Hall, also with Claimant, Glamis Gold.

MS. HAQUE:  Sylvia Haque, also with Crowell & Moring.

MR. FRANK:  Wil Frank, technology consultant from Crowell & Moring.

MR. JEANNES:  Chuck Jeannes with Goldcorp, Inc.

MR. McARTHUR:  Kevin McArthur, Goldcorp, Inc.

MR. PURVANCE:  Dan Purvance with Goldcorp.

MS. MCKEON:  Jessica McKeon, Assistant, Crowell & Moring.

MR. LESHENDOK:  Tom Leshendok, consultant to Glamis.

MR. JENNINGS:  Bill Jennings, consultant to Glamis.

MR. GUARNERA:  Bernard Guarnera, consultant to Glamis.

DR. SEBASTIAN:  Good morning. I'm Lynne Sebastian, consultant to Glamis.

PRESIDENT YOUNG:  Mr. Bettauer.

MR. RONALD BETTAUER:  Ron Bettauer from the
State Department, Respondent.

MR. CLODFELTER: Mark Clodfelter also from the State Department, Respondent.

MS. MENAKER: Andrea Menaker also representing Respondent United States.


MR. FELDMAN: Mark Feldman, representing the Respondent.

MR. SHARPE: Jeremy Sharpe, also with the Respondent.

MR. BENES: Keith Benes, representing the Respondent.

MS. THORNTON: Jennifer Thornton, representing the Respondent.

(Introductions off the microphone.)

MS. GREENBERG: Sara Greenberg with the State Department.

MR. KACZMAREK: Brent Kaczmarek, Navigant Consulting.

MR. HOUSER: Conrad Houser with Norwest on mining consulting.

MR. HARRIS: Jim Harris with the Department of the Interior.

MS. HAWBECKER: Karen Hawbecker with the
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09:10:32 1  Department of the Interior.
2           MS. SEQUEIRA: Kiran Sequeira with Navigant
3  Consulting.
4           PRESIDENT YOUNG: Thank you very much.
5           I do apologize to those who are listening to
6  this via video feed. We will have microphones
7  available for everyone at the table, but not--we do
8  have some additional people around the perimeter of
9  the room who do not have microphones. I apologize if
10  you couldn't hear some of those.
11           Let me review the schedule now that I have
12  been educated and updated on the schedule. As I say,
13  the break is traditionally scheduled every day from
14  10:30 to 11:00. Lunch will be from 1:00 to 2:15, and
15  then there will be what the World Bank wonderfully
16  calls "a healthy break" from 3:30 to 4:00, ending at
17  6:00 every day. That schedule will be modified
18  slightly today in light of--in light of opening
19  arguments with our anticipation giving each party an
20  opportunity to give its opening argument prior to the
21  break, unless they anticipate it will well go over two
22  hours, in which case we will take the break in

09:11:37 1  between.
2           So, with that, I will first ask if either
3  party has any issues they would like to raise with us
4  before we commence opening statements.
5           Mr. Gourley?
MR. GOURLEY: Claimant has no issues at this point.

PRESIDENT YOUNG: Thank you.

Mr. Clodfelter?

Nothing?

Thank you.

With that, we will turn the time over to Mr. Gourley, reminding everybody that we are recording time that each party takes, and that will be attributed against the number of hours that each party has been allocated for this hearing.

Thank you.

OPENING STATEMENT BY COUNSEL FOR CLAIMANT

MR. GOURLEY: Good morning, Mr. President and Members of the Tribunal.

Glamis Gold, Limited, comes to you today having merged with Goldcorp, another Canadian company, to present its claims against the United States under NAFTA Chapter Eleven. Its claims are for compensation for the damages that actions and inactions by the United States of America and its subordinate entity, the State of California, have visited upon Glamis's Imperial Project in the Southern California Desert.

Glamis's claims are straightforward. It has real property interests in 187 mining claims with associated mill sites located in Imperial County, California, in the Southern California Desert. Glamis came to the desert experienced. It operated the Rand
Mine in California, and it operated the Picacho Mine, a mere eight miles away from the Imperial Project Site. It followed all the rules. It undertook extensive cultural resource surveys at the site. It filed a plan of operation that met all of the requirements of the applicable regulation. It did not ask for any special treatment or waivers, and yet, as you will hear over the next few days, very special and discriminatory treatment was visited upon it.

Under political pressure, first the Federal Government cavalierly and illegally changed the rules. They literally changed the standard and applied a new standard for mine approvals that was neither contemplated nor authorized under the existing law. And then, before that action could be completely corrected, the State of California stepped in, targeted the Imperial Project, and selectively imposed new requirements that were intended to, and did, make any beneficial use of Glamis property rights impossible—a complete and full deprivation of its mining claims after a significant investment of over $15 million.

Respondent prefers to ignore the facts, even though they're largely uncontested. It relies primarily on legal defenses, seeking to excuse its behavior and avoid liability to compensate Glamis for its loss. When it does describe Claimant's case, it
presents an exaggerated caricature and often distorts
the record and the documents to which it cites.

We urge the Tribunal to examine closely the
admittedly very large record and listen closely to the
witnesses we will be putting forward today and over
the next few days. The evidence will show that
Respondent's measures were tantamount to an
expropriation under Article 1110 of NAFTA and
Claimant's real property interest, and it constituted
an expropriation of Claimant's real property interest
in the mining claims.

It will also show that those measures
violated the fundamental principles of fairness,
stable and predictable business environment, and
legitimate expectations for investors protected under
the "fair and equitable treatment" standard in Article
1105.

My purpose this morning is to briefly review
with you the basic legal standards and some of the
specific facts on which our claims are based.
To start first with the legal standards, with
the--under Article 1110. Article 1110 provides that
no party may directly or indirectly--no party to NAFTA
may directly or indirectly expropriate an investment
of an investor of another party, in this case Canada,
in its territory or take a measure tantamount to
expropriation of such an investment except if it's for
a public purpose, it's on a nondiscriminatory basis in accordance with due process of law, and with the payment of compensation.

Now, there are a number of issues where the parties do agree. We both agree that this is not a direct expropriation. The United States has not taken the mineral claims themselves. Rather, the pertinent question is whether the Government, whether the United States and its subentities have, through their actions and inactions, undertaken measures that are tantamount to an expropriation or would otherwise constitute an indirect expropriation.

In that regard, the parties also agree that under Article 1110, you apply the customary international law standard as to what constitutes indirect expropriation and measures tantamount to expropriation for which compensation is owing.

And the parties also agree that that international law is informed, as the Restatement, Foreign Relations 3rd Councils, that the--is informed by U.S. Fifth Amendment takings law. As the Restatement says, "In general, the line in international law is similar to that drawn in United States jurisprudence for purposes of Fifth and Fourteenth Amendments to the Constitution in
determining whether there has been a taking requiring compensation."

Now, under both customary international law and the Fifth Amendment jurisprudence, regulatory takings are distinguished or divided between those that are fully confiscatory and those that are of a more general nature applying to the public at large.

In this case--actually both of our experts, Solicitor General Olson and Professor Wälde--Solicitor General Olson has opined on the United States takings analysis, and Professor Wälde on the expropriation analysis under customary international law—they agree, we don't think it's seriously contested here that a full confiscatory measure that deprives the owner of the full use and benefit of their property has to be compensated, and that's what we allege occurred in this case.

Now, Respondent and its expert, Professor Sax, in trying to avoid this principle of full compensation for a confiscatory regulatory measure, have relied on the principal expressed by the Supreme Court in Lucas on background principles, and it cites two that it says apply and constrict the bundle of rights that Glamis had in its mineral claims. The two that it cites are a 1975 California statute, 1975 Sacred Sites Act, and the 1975 Surface Mining and Reclamation Act known as SMARA.

Solicitor General Olson's expert opinion
makes clear that neither of these preexisting statutes meet the requirements under Lucas for a background principle. And to do that, we need to look at Lucas. Lucas made very clear that any confiscatory regulation, "cannot be newly legislated or decreed." In essence, the principle must inhere in the background principle. But "inhere" here doesn't mean closely associated with or similar to, as Respondent's argument would suggest; rather, the Supreme Court made clear it has to be an express manifestation of something that was always implicit in the preexisting law.

So, what the Supreme Court has said—and I'd show it to you—"The use of these properties for what are now expressly prohibited purposes was"—and this is their emphasis—"always unlawful and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit."

Now, interestingly, Respondent does quote that section of the Lucas Opinion in its Rejoinder at 38, and its Note 108 notes that it has removed the emphasis on the word "always," which is, in fact, the key point of the passage.

So, if you go on, then, to—the Supreme Court follows up with that statement, saying, "When, however, a regulation that declares 'off-limits' all..."
16 economically productive or beneficial uses of the land
goes beyond what the relevant background principles
would dictate, compensation must be paid to sustain
it."

And this point was further underscored when
the Supreme Court in Lucas explained background
principles. They had to be, "existing rules or
understandings," and counseled that the law or decree
with confiscatory effect, "must, in other words, do no
more than duplicate the result that could have been
achieved in the Courts."

In short, for these two California statutes
to be background principles restricting Claimant's
rights in its mining claims, they would have had
to--the State of California would have had to have
been able to go into Court and impose those
requirements under the existing law without the need
of the regulation.

What Respondent would have you believe is
that instead of saying, as it did, objectively
reasonable application of the preexisting principles,
that what they really meant to say was an objectively
reasonable extension, and that's not what the Supreme
Court said.

So, what does this mean to the--to the
Respondent's argument? This is a debate between
Solicitor General Olson and Professor Sax. What
Mr. Olson makes clear in his rebuttal statement is
that--focusing again on the key word that these are already preexisting requirements, is that a grandfather clause is wholly inconsistent with that notion. It's wholly inconsistent because if it's already unlawful, you can't grandfather that which is unlawful. You grandfather existing circumstances from new requirements and, indeed, Professor Sax's expert report refers to them as "new requirements." You do not grandfather preexisting circumstances. I mean, you do not grandfather from preexisting obligations. And nor does Professor Sax's reliance on the Federal Circuit decision in American Pelagic save it. That case involved a fishing vessel in which the claim was, quite simply, that among the bundle of rights in the fishing vessel was the right to fish in a particular location in the North Atlantic, and the Court found that, no, in fact, there was, by statute, complete unfettered discretion for the United States either to grant a fishing permit to fish those waters or not. And there was no such right without that grant to fish in those waters; and, therefore, it could not be within the bundle of rights of an owner of the fishing vessel.

So, the preexisting--the background principle
there was the preexisting absolute discretion to give or withhold the fishing permit, and there was no such absolute discretion in the Department of Interior or the Bureau of Land Management to deny the plan of operation for Glamis until Solicitor Leshy unlawfully provided that discretionary veto to himself.

So, when viewed under the correct Lucas standard, neither statute relied on by Respondent gives rise to an ex ante enforceable prohibition that would limit Glamis's beneficial use.

And it's underscored further when you look at the statutes themselves. The first one, the 1976 Sacred Sites Act, the short answer to Respondent's arguments there is it does not—despite their best efforts, they've provided nothing that proves that California—that it does, in fact, apply to Federal lands or that California ever intended it to. And the proof of that is really the Lyng Case that's discussed in the--in our Memorials and their Counter-Memorial and Rejoinder.

Lyng involved the very agency that the United States says is charged with enforcement of the Sacred Sites Act, and it brought suit against the Federal Government to block a road which it alleged, "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of the Northwest California Peoples."

09:26:23
They lost.

Most telling is they didn't even try to bring it, and they couldn't have brought a claim against the United States under the Sacred Sites Act for a project on U.S. Federal lands. What they tried to raise was a First Amendment argument, and they lost that.

Moreover, the evidence of the application of the sacred sites to Federal projects on Federal land can be seen by what the State of California actually does. In this process—and you will hear a lot about this and hopefully you've read a lot about it already--part of the review is the valuation from an environmental perspective of the Project, and it results in these areas in a joint Federal-State Environmental Impact Statement on the Federal side and environmental impact report on the State side. And during that, they cite all of the applicable statutes.

Yet, for all of the final EIS/EIR reports that are in the record here, including the final one denying or recommending denial of the Imperial Project, not a one cites the Sacred Sites Act.

Nor has Respondent produced any other guidance or opinion of the Attorney General of the State of California suggesting that California thought they could enforce the Sacred Sites Act in--on Federal lands, on Federal projects and Federal lands.

And then finally, and most basically, if the Sacred Sites Act provided the protection that
Respondent asserts, then none of the measures would have been necessary because California could have gone into Court to enforce that limitation directly.

Similarly, with respect to the Surface Mining and Reclamation Act, SMARA, you had a statute by the State of California that--Respondent's contention is that it created a background principle that prohibited hardrock/metallic mining, open-pit mining, but not other types and without--unless there was complete and mandatory backfilling and site recontouring. But this argument, too, fails, because neither SMARA nor its implementing regulation implicitly included any such limitation or prohibition. SMARA empowered the State Mining and Geology Board to issue regulations, and they did, and those regulations at the time that Glamis came to the California Desert to prospect for the Imperial Project site permitted--did not require full and mandatory backfilling or site recontouring. Rather, they suggested only reasonable reclamation standards.

And again, had those existing regulations and the statute already implicitly banned hardrock open-pit mining without complete backfilling and site recontouring, then the answer to Governor Davis's direction in September 2002, when he told his resource division to stop the Glamis mine, the answer would have been simple. They could have simply used the existing regulations and done so. But they didn't.
They enact new, unique, and unprecedented complete backfilling requirements.

So, in short, Respondent's background principles defends to the confiscatory taking under either Fifth Amendment jurisprudence or international customary law is unavailing. Neither creates an enforceable preexisting limitation that could have been objectively reasonably applied through the courts to impose complete backfilling and site recontouring obligations on the Imperial Project.

Now, the parties also agree that where the expropriation—where the regulation is less than fully confiscatory, it has a severe impact but not a full deprivation of the beneficial use, then a more balanced approach needs to be undertaken between the rationale for the measure and its economic impact on the investor. And as we have shown in our memorial, under customary international law, this is expressed in the extent to which the investor's reasonable investment-backed expectations have been frustrated versus the character of the measure. Now, I won't spend a lot of time on this because we don't believe this test applies, but even if it does, we say we would prevail, and that's because you still have to look at the character in
terms of proportionality of the measure to its goals, discrimination, did it impose an undue burden on a small segment of society to achieve a larger good? With respect to reasonable expectations, there's any number of ways to look at that. One thing that is not required is specific assurances. It is not mandatory that you show that you have a promise or a contract from the host Government to engage in the activity. Rather, as the Tecmed versus Mexico Tribunal suggested, you give careful weight to what the circumstances that the investor finds in the host country, that legal and regulatory regime, and you balance that against your expectation of an expected return. So, while specific assurance is a factor—we don't deny that to consider—its absence is not fatal. And this is why the Thunderbird Gaming case is not supportive of the Respondent's position. That case involves an investor going to Mexico and seeking to have gaming machines without following the regulations within the laws within Mexico, believing that they would not be applied.

So, there, the Tribunal finds that the absence of an assurance is fatal, but it's only fatal because they were looking for an assurance that the preexisting legal regime would not be applied to them. They were, in essence, looking for a waiver.
Glamis isn't looking for a waiver. It didn't look for any special treatment. It was trying to be of a--it wanted only that its Imperial Project would be evaluated according to the preexisting legal regime.

Now, furthermore, as we put forth in our Memorial and in the Reply, there are--other types of international law will look to other types of assurances, including statements of officials charged with implementing the legal regime, as well as the legal regime itself. And the bottom line is that you look at all the circumstances to determine whether Glamis reasonably expected, based on the existing legal and regulatory regime, its experience with mining and particularly mining in the Southern California Desert, and its interactions with the California and Federal Government to show--to determine whether it was reasonable--and we will show that it is--that they would be permitted to mine at the Imperial site without complete backfilling or site recontouring requirements.

So, some of the things—to elaborate on some of the elements of this balancing test, one is the character of the measures. Again, it does not apply if it is a full deprivation. Character is only important if it is something less than fully confiscatory.

One thing that is clear in the international
law, as well as domestic U.S. law, is that there's no blanket exception for regulatory activity. So, in both Tecmed and Santa Elena, the tribunals clarified this point; and the Santa Elena case is instructive, where it specifically stated, "Expropriatory environmental measure, no matter how laudable and beneficial to society as a whole, are, in this respect, similar to any other expropriatory measures that a State may take in order to implement its policies. Where property is expropriated, even for environmental purposes, whether domestic or international, the State's obligation to pay compensation remains."

Nor is there any basis, as Respondent has suggested in its Rejoinder, to foreclose your inquiry into its motivations. Again, as Tecmed instructs, such situation does not prevent the arbitral tribunal without thereby questioning such due deference from examining the actions of the State to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights, and the legitimate expectations of who suffered such deprivation.

So, it is perfectly appropriate, and we invite this Tribunal to examine the motivations what was try--what was the Department of Interior trying to accomplish when it stopped all work on processing the Imperial Project plan of operation in 1998 and work
Now, with regard to disproportionate benefit, again you look at does the burden of this regulation fall--it doesn't have to fall exclusively on the Claimant, but is it falling disproportionately on a very small universe in which the Claimant is a part who are bearing the cost of the--of the public benefit in their entirety. And this, again, the Supreme Court in Locke 471 U.S. 84 said this again: "The burdens...are not so wholly disproportionate to the burdens other individuals face in a highly regulated society that some people are being forced alone to bear public burdens which, in all fairness and justice, must be borne by the public as a whole."

Related to this burden and disproportionality concept is discrimination. Is it, in fact, targeted at a specific circumstance, or is it intended to apply in a more general--across a general segment of the economy or society? And the cases also made clear, again citing to some U.S. cases, that it's not--it's not just that the case is facially neutral--the statute or the regulation is facially neutral. You have to look behind what it was designed and intended to do, and, thus, in the Whitney Benefits case, which we say is identical to our situation in that there the Federal Government, the U.S. here was required to pay compensation to Whitney Benefits, not because they
09:40:22 took the coal that Whitney Benefits wanted, and not because they banned them from mining it. Rather, they prohibited, as the State of California has done here, the only economical way to get the mine, which was surface mining, not underground mining.

In other cases outside of the mining area, you have Sunset View Cemetery, a California case, where again the California Court of Appeals looks at an Emergency Ordinance prohibiting all commercial uses of a cemetery and determined it had no factual relation to the public health and welfare rationale that it cited, and it struck that down, as it did in Vilenti with an Emergency Ordinance that was expressly designed to stop a particular project. California Court of Appeals there said, finding it clearly discriminatory and citing back to its earlier decision in Sunset Views said, "As in Sunset View, the only emergency was the pending action which the legislative body wanted to prevent." And, indeed, as we have pointed out in our Memorial, the only emergency cited by the State Mining and Geology Board in promulgating the emergency regulation mandating complete backfilling and site regrading was the Imperial Project. That's what they wanted to get. That's what they did get, and they wanted to do it with as limited
impact on anyone else as possible.

In short, as we will see when I move next to the various strands of the fair and equitable treatment standard protected under Article 1105, should the Tribunal determine that the measures here did not entirely extinguish Glamis Gold's beneficial use of its mineral claims, such as what happened in Whitney Benefits, then it must balance Claimant's property rights and its reasonable expectations of being able to extract that mine in accordance with environmentally sound and safe practices proposed by its plan of operation against the discriminatory character of the measures that were visited upon it.

Now, the parties contest the scope and reach of Article 1105 and the fair and equitable treatment standard accorded. It's useful here to start with the language of Article 1105 itself. "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

Now, seeking to constrain, if not eliminate, the protection afforded by fair and equitable treatment, Respondent attacks our 1105 claims largely on legal grounds. First, it advances the proposition that the customary international law minimum standard of treatment embodied in Article 1105 is idiosyncratic, one that is somehow unique and divorced
from "fair and equitable treatment" standard afforded under thousands of similar investment treaties, multilateral and bilateral, including bilateral investment treaties to which the United States is a party, and using similar language, tying fair and equitable treatment to international law.

Second, Respondent implicitly suggests that "fair and equitable treatment" standard has no independent content in customary international law; rather, in each case, it's incumbent to survey State practice to show State acceptance of the precise legal consequences of each act that the Claimant complains of.

Neither contention is correct. Fair and equitable treatment is well-known in customary international law, which is, in fact, as the Mondev Tribunal in another NAFTA case found, why it's included in so many multilateral and bilateral treaties. It is not the empty vessel the Respondent would have it to be. The question in each case for the Tribunal--and for this Tribunal here--is to determine whether the facts of a particular case violated those established and commonly accepted legal principles that comprise the fair and equitable standard of treatment under customary international law.

So, looking first at their--the argument that it's unique or idiosyncratic, we agree that Article
1105 places fair and equitable treatment firmly within the minimum standard of treatment to be accorded under customary international law. In fact, that's what the note from the Free Trade Commission, the FTC, in 2000, that's what it does. It ties the two together.

But it doesn't erase the words. It doesn't make the words "fair and equitable treatment" meaningless. And again, citing the Mondev, quoting to Mondev, in holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law whose content is shaped by the conclusion of more than 2,000 bilateral investment treaties and many treaties of friendship and commerce.

The Mondev Tribunal also found that BITs, through their incorporation of the "fair and equitable treatment" standard, reflected both the State practice, as well as the sense of obligation, legal obligation, opinio juris required under customary international law. Indeed, the Mondev Tribunal faced the same arguments Respondent is raising here. The Respondent raised them there, and it answered them.

What Respondent would have you do is avoid any of the non-NAFTA tribunals and, indeed, it rejects many of the NAFTA tribunals as not meeting its burden, what it considers to be a burden of proof, on the grounds that "fair and equitable treatment" has no meaning of itself, and, therefore, in treaties, it's
applied to that particular BIT. But rather, the
Tribunal's--what it ignores or it dismisses is that
the Tribunals that have addressed this issue have
almost uniformly determined, at least in most of the
cases, that--and with respect to the particular
strands of the "fair and equitable treatment"
principle that we rely on, that there is no difference
between customary international law, what is required,
and what would be required under, if you consider that
an autonomous BIT standard.
Indeed, Respondent's argument, if taken
literally, would render fair and equitable treatment
simply an empty promise to investors of the United
States, Canada, and Mexico. It's little wonder that
they take this position because, as we have detailed
in our Memorial and reply, there are numerous arbitral
tribunals interpreting similar standards of "fair and
equitable treatment" standard under BITs that also
reference international law that have found the host
States liable for breach of the minimum standard of
treatment for actions that are very similar to those
that Respondent has taken here.

Indeed, I would say that the Respondent's
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attempt to carve out a special place for itself is a dangerous position that the Tribunal should not readily fall into, as it would destroy the very international investment regime that the United States was the one to foster. Essentially, it would be asking the Tribunal to absolve the U.S. of violating "fair and equitable treatment" standard under customary international law under circumstances where numerous other countries have been found liable.

Now, their second argument, which is what do you have to do to prove under customary international law, is they essentially are saying that you would have to go—we would have the obligation to go and point to each act about which we complain and show that that violated State practice around the globe. But Claimant doesn't have that obligation. As Judge Schwebel opined, "The meaning of what is fair and equitable is defined when that standard is applied to a specific set of facts." You have to—closed quote. You have to look at the whole set of circumstances. It is universally recognized to incorporate a number of fundamental principles that are common to legal systems throughout the world. These principles are so basic that they're required, regardless of whether the standard is viewed through the lens of customary international law or the so-called autonomous Treaty standard. And these principles are the duty to act in good faith, due process, transparency and candor, and
Now, in assessing whether these general obligations have been satisfied, tribunals have elucidated a number of types of protections that must be provided. They phrase it in terms of a stable or predictable framework or legitimate expectations and protections from arbitrariness, but the fact is that all of these strands are interrelated, which is why tribunals don’t try to parse them separately.

Nor should you, looking at the Federal and State measures here, try to individually seriatim look at one individually. Rather, the obligation is to look at the whole and determine what the whole set of circumstances, the harm they cause to Claimant.

As the Saluka Tribunal noted, you consider the totality which includes, "assessment of the State law and the totality of the business environment at the time of the investment."

And you should look--consider the aggregate effects of the measures on Claimant's investment and whether the host State's actions, in essence, undermined and destroyed those reasonable expectations.

Now, these interrelated strands of the fair and equitable treatment provide protection both for arbitrariness and your legitimate expectations. These are analytical tools or lenses by which you assess did they provide due process, did the host Government act...
in good faith, has justice been satisfied by the host State? You can ask these questions rhetorically:

What is a denial of justice? What is good faith? Were the actions of the Government so--host country--so arbitrary as to result in a denial of justice? They all boil down to assessment of the same things, same types of things that you assess under the relative standard for expropriation when you have a nonconfiscatory expropriation. It's a balance between

what could the investor, coming to the host country, reasonably rely on, given the nature and circumstances of that country, versus what were the powers of the Government and what was its rationale in changing it. Was it proportional? Was it nondiscriminatory? Did they accord due process?

Now, we don't argue, as Respondent has suggested, that the fair and equitable treatment is some sort of expropriation LITE. Now, there are overlaps, as I've just alluded to, but the expropriation 1110 really focuses primarily on the effect, the impact on the property interest, whereas fair and equitable treatment acknowledges and, indeed, is buttressed when there's a--there are valid existing rights, as were here, but it focuses more on the process, what did the host country do and how did it go about doing it? Did it accord the Claimant justice? Did it act in good faith?

Now, this point also answers Respondent's
false assertion that complaint--Claimant is somehow arguing that it's a relative standard across the globe. We do not. The standard is fixed. But,

obviously, the application depends on the circumstances faced by the investor in a particular host country. That informs what were the reasonable expectations.

Now, what Respondent ignores in its analysis is that the legality of the host State's measures under domestic law doesn't answer the question of whether that conduct violates the fair and equitable treatment standard under customary international law. This was made clear by the Azurix v. Argentine Tribunal, again, a U.S.-Argentine BIT. The analysis is distinct. International claims can't simply be reduced to, as I said, "civil or administrative law claims concerning so many individual acts alleged to violate." Rather, you take them together and determine whether together they amount to a breach.

And a number of other tribunals have employed a similar approach to finding whether a host State's arbitrary actions and/or its failure to provide a stable and predictable framework infringes on the promises and legitimate expectations that the investor has, and, therefore, violated the fair and equitable
Now, Respondent takes particular issue with claims that fair and equitable treatment protects against arbitrary treatment or involves legitimate expectations. Again, they do so by saying you'd have to go and prove what those terms, those standards mean based on State practice. In the most recent ICSID review, in fact, Elizabeth Snodgrass has done that with respect to legitimate expectations and shows that, indeed, that concept is a principle common to many legal systems, but we needn't go there.

The NAFTA Treaty itself in its preamble, resolved, “that it was to ensure a predictable commercial framework for business planning and investment.” So, you can't leave the host State free arbitrarily to alter that investment, alter those expectations and that environment after the investor has committed significant legal resources without at least compensation.

Now, their view of reading 1105 by itself without even reference to the NAFTA Treaty’s own preamble is in stark contrast to what Article 31 of the Vienna Convention requires, which is you have to read the provisions together.

Finally, let's focus a little on some of the strands and some of the cases in which the tribunals have focused. The principles that they have found
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under customary international law are part of fair and equitable treatment.

All the Members of the Tribunal in the Thunderbird Gaming v. Mexico NAFTA case accepted the notion that legitimate expectations was part of fair and equitable treatment under customary international law. In paragraph 147 of that decision, they state, "Having considered recent investment case law and the good-faith principle of international customary law, the concept of legitimate expectations relates within the context of the NAFTA framework to a situation where a contracting party's conduct creates reasonable and justifiable expectations on the part of an investor or investment to act in reliance on said conduct."

Similarly in Tecmed, they also interpreted the fair and equitable treatment there in a

Mexican-Spanish BIT in light of this universal good-faith principle, and found that it did protect the investor from arbitrary actions: "The arbitral tribunal considers that this provision of the agreement, in light of the good-faith principle established by international law, requires the contracting parties to provide to international investment treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment." They further clarified that this--that the host State is,
"to act in a consistent manner free from ambiguity and totally transparently in its relations with the foreign investor."

And the purpose is so that the investor, who is coming to that host State, investing in our case millions of dollars, can rely and know what the legal regime is that governs their investment before they put $15 million into the host country's economy.

Now, the Tecmed Tribunal also went on to say, the foreign investor expects the host State to act consistently without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments. Again, the same notion, there's a reliance notion, which again is common principle in State practice throughout the world of good-faith reliance on existing regimes.

And this is again common. I won't belabor all these cases because they are in the memorials, but the LG&E versus Argentine case, again stating--analyzed whether State conduct could be construed as arbitrary and found that it could if what this Respondent did was without engaging in a rational decision-making process, not dissimilar to U.S. law, that to be saved from arbitrary, there has to be a rational basis for the Rule or regulation.

And the Saluka v. Czech Republic case. Azurix talked about Occidental Exploration and
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Production Company v. Ecuador, PSEG-Turkey, CMS v. Argentina. There's a host--Enron v. Argentina more recently--host of which have found that stability of the legal and business framework is an essential or dominant element of fair and equitable treatment, and

10:02:04 that they recognize that frustration of those expectations is proof of the failure to provide fair and equitable treatment.

So, those are the legal standards both under 1110 and 1105, and I would like to spend the second part of my opening on how they apply in this case because weighed against those standards there is little doubt that the United States has breached its obligations to Glamis Gold, Limited, under both Articles 1110 and 1105.

Now, I first want to highlight the evidence that demonstrates Glamis Gold, Limited, had a legitimate expectation, both subjectively and objectively, that its plan of operation for the Imperial Project was fully consistent with the law that should have been applied to it, that existed at the time, and would have allowed it to enjoy the beneficial use of its property, the gold located in the 187 mining claims located at the Imperial Project Site.

This is grounded in the unique property interest that's granted for mining claims under
domestic United States property law, and again the
parties agree that you look to the domestic law to
determine the property interests of the Claimant.

Now, it's because these are unique vested
rights--and you will hear the phrase throughout this
proceeding of valid existing rights--that Claimant was
entitled to rely on, the preexisting legal regime for
the operation and reclamation of mining activities on
Federal lands. Under that regime, if Claimant met the
standards of a prudent operator--we will talk about
that in just a minute--in taking reasonable, which
meant economically feasible, measures to mitigate as
best it could cultural impacts, it was entitled to
approval of its plan of operation, even if it resulted
in destruction of sacred sites and without having to
incur the prohibitive cost of complete backfilling and
site recontouring.

This is not like the Methanex case. It is
nothing like Methanex, which the Respondent relies on
so heavily. There were regulatory measures of general
applicability issued after scientific study to protect
the population generally of safety not targeting any

specific individual or company.

Here, we have a statutorily granted real
property interest in mineral extraction that
Respondent specifically provided to induce investors to incur the significant costs of mineral exploration subject only to compliance with environmental safety regulation and such reasonable and economically practical reclamation measures as available to mitigate the identified harms.

So, let's talk a moment about the unique property interest in mining claims. The Mining Law of 1872 embodies 130 years' statutory promise that prospectors may enter Federal lands, locate valuable mineral deposits, and return--and in return the Government grants them a vested property interest in those mineral deposits upon their, quote, discovery.

Now, the whole purpose of this statute is to encourage prospectors to go out to Federal lands and find the mineral resources and develop it, and that's exactly what Glamis Gold did through its U.S. subsidiary Glamis Imperial, Inc.

Now, the Ninth Circuit has further elaborated on the nature of the property interest, which is not, as its name implies, merely a claim. As the Ninth Circuit says, "The phrase 'mining claim' represents a federally recognized right in real property." This is not personal property. The Supreme Court has established that a mining claim is not a claim in the ordinary sense, so the word a mere assertion of a right, but rather a property interest which is itself real property in every sense, and not merely an
assertion of the right. And that's the Shumway case at 199 F.3d 1093.

Shumway also teaches that it's a possessory interest. The Government cannot--having granted that interest, it can't exclude the claim holder from the surface of the property under which their minerals lie.

In short, it's Glamis's vested real property rights in the mining claims and mill sites that's at the core of both Hunter--the Article 1110 expropriation claim and its Article 1105 fair and equitable treatment claim. This well and long established legal regime defined the property interest and provided the basis on which Glamis came to the California Desert to mine the Imperial Project with the expectation that it would be permitted, having discovered real and valuable gold reserves, to extract that gold and be free from extraordinary and targeted measures that were designed and intended exclusively to make that extraction cost-prohibitive.

Now, what were Glamis's expectations based on that preexisting legal regime? I will walk you through. Again, notwithstanding Respondent's arguments to the contrary, Claimant does not make the--any argument that its property right at issue was not subject to reasonable regulation. It was. Our argument is that, given a federally granted property right provided as the inducement for Glamis to
prospect for and locate valuable gold mineral deposits, neither the United States nor its subgovernmental agencies/entities can suddenly change in a discriminatory and targeted manner the preexisting legal regime whether by lawful, as the State of California's measures were, or unlawful, as what Secretary Babbitt and Solicitor Leshy did at the Department of Interior during the Clinton Administration, to effectively prohibit the extraction of the gold resources after Glamis had made its $15 million investment and proven the gold deposits prepared and submitted a fully acceptable plan of operation for the mine.

Now, it was the clear expectation of Glamis—and you will hear the testimony of Mr. McArthur and Mr. Jeannes on these points—that when it came to the California Desert, it was comforted by the status of the law. It understood what the law required. It relied on the 1994 California Desert Protection Act, which we will talk about in a moment, which promised—which withdrew certain lands and promised to hold others open for multiple uses without buffer zones, thereby meaning you could not, merely because of the—how close it was to a protected area restrict the multiple uses that were allowed; and that it was objectively reasonable for Glamis to have these beliefs based on what had happened in the California Desert since 1980, all the
mires that had been approved with similar size,

circumstances, and cultural resources.

Now, that legal regime--and I'm going to walk you through this carefully--was premised on the Federal Land Policy and Management Act of 1976, which lots of people called FLPMA, but I have to say it all out or I won't remember what the acronym stands for. But what it did was in 1976 was gave the Secretary of Interior authority to prevent, "unnecessary or undue degradation," in approving projects on Federal lands. That statute also established the California Desert Conservation Area which required two things important to this dispute: First, it launched a significant land planning exercise, which was designed specifically to balance between preservation and exploitation of the areas mineral's wealth. Now, that land exercise resulted in the passage of a 1994 Act, the California Desert Protection Act, which formally withdrew millions of acres of Federal land from any development based on what had been identified in this 20-year process, and you will hear some about how extensive that process was, of wilderness cultural values.

The-- in doing so, Congress in the 1994 Act
expressly stated that there could be no buffer zones, 
that neither BLM nor the State could use the withdrawn 
areas--Indian Pass, which we will hear about a lot 
about here as one of those withdrawn areas--as an 
excuse to impose further limitations on a multiple use 
area that was left open to development, such as the 
Class L land, in which the Imperial Project Site is 
located.

Now, second important aspect was sections of 
the 1976 Federal Land Policy Management Act was 
Section 601, which provided the Secretary authority 
through regulation--and this is an important point I 
will come back to--to create measures as may be 
reasonable--and this is a quote--"measures as may be 
reasonable to protect the scenic, scientific, and 
environmental values of the public lands of the 
California Desert Conservation Area against undue 
impairment." No such regulations have been adopted.

It was up to BLM to implement the Federal 
Land Policy and Management Act, which it did in 1980, 
and it did so through something we shorthand and 
called the 3908 regulations, which are in the Code of 
Federal Regs 43, subpart 3809. And in doing so, the 
Bureau of Land Management, BLM deliberately tread 
carefully in light of the property rights granted to 
existing mine holders, mining claim holders, under the 
Mining Law of 1872. BLM specifically put new mining 
claim investors on notice of the standard that they
would be required to meet in order to extract gold and
other minerals, a standard that's long known as the
prudent operator standard.

Specifically, under the 3809 regulation, a
mine operator was required to take, "such reasonable
measures as will prevent unnecessary or undue
degradation of Federal lands." That's what the
statute said. But then the regulation goes further
and defines it. It never defined it as all measures
to avoid any kind of harm. It was always those
reasonable measures to effect--to prevent unnecessary
or undue degradation.

So, what did "unnecessary or undue
degradation" mean? It was defined in the 1980
regulation to mean surface disturbance greater than

what would normally result when an activity is being
accomplished by a prudent operator in usual,
customary, and proficient operation of similar
class and taking into consideration the effects of
the operation on other resources and land use.

So, it was a reasonableness test.

What would a reasonably prudent operator
extracting mines do? If a reasonable prudent operator
couldn't do it because it was cost-prohibitive, it was
not required under standard.

Now, BLM chose not to define or issue regs
implementing Section 601 of FLPMA, the undue
impairment standard for lands located in the
California Desert Conservation Area, but rather chose to subsume and equate undue impairment with the unnecessary or undue degradation, which for those of us who are not mining lawyers like Mr. McCrum would find eminently reasonable since they do sound and mean the same thing.

But let's take a look at how they got there. Robert Anderson, one of the BLM individuals we invited the United States to produce to this hearing, he was actually the person on the point, one of the two listed in the Federal Register Notice in 1980 as involved with the creation of the original 3809 regulation. And then he was also involved 20-some years later with the restoration of this principle after the Solicitor Leshy Opinion had been revoked; and what he told Ms. Hawbouwer then--Hawbecker then was we purposely did not define undue impairment in 1980 because we all concluded it meant the same as undue degradation.

Having declined to bring Mr. Anderson here or, in fact, any BLM witness who can comment on what the standard was at the time, it must be deemed to be admitted.

Now, BLM made this approach clear also in 1980, when it established the actual California Desert Conservation area plan, which referenced the 3809 regulations and stated that potential impacts on sensitive resources in Class L lands, such as where
the Imperial Project is located, would be identified, but it created the mitigation standard, "Mitigation subject to technical and economic feasibility will be required." Subject to technical and economic feasibility; that's the prudent operator standard. That's what Glamis relied on when it came to the California Desert to mine at the Imperial Project Site.

Now, the State of California also had regulations--we don't contend that they could not regulate the operation of mining, even on Federal land. They also sought the Surface--the SMARA, Surface Mining and Reclamation Act, also had the same sort of balancing as FLPMA did between the essential, as it said, need to provide for the extraction of minerals with a desire to prevent or minimize adverse effects. Projects were to be reclaimed consistent with planned or actual subsequent use at the site. And in the Southern California Desert, as we would see from each of the various mines, other that have been approved there, it was inevitably for future mining--you don't want to fill in a pit where there is the ability with further technological advance to mine further--or open space. You leave it open for use by wildlife and habitat.
There was no mandatory backfilling requirement in the statute or in the implementing regulations. So, what expectation did this preexisting legal regime provide an investor such as Glamis? Well, it was well settled that any plan of operation meeting the prudent operator standard could not be denied. Thus, while Glamis has presented substantial evidence that it did not know—and Dr. Sebastian will opine it really could not have known—of the nature and extent of the Native American cultural sites at the Glamis site, at the Imperial Project Site, would be considered any differently from those present at many previously approved mining projects and other projects, the basic fact remains that the preexisting legal regime that formed Glamis's reasonable investment-backed expectation, it wouldn't have mattered if a wholly new culturally significant cultural resource were found at that site under the law as applied Imperial Project was entitled to approval. And this is made clear in a number of things. I'll walk you through some.

We will go to the preamble of the 1980 version of the 3809 regulation. It expressly addresses this point. If there is an unavoidable conflict with an endangered species habitat, a plan could be rejected based not on Section 302 of the
Federal Land Policy and Management Act, the reclamation standard, but on Section 7 of the Endangered Species Act. So, there was an existing statute that said, if there is a protected wildlife protected species, endangered species, you can stop any development there. But if upon compliance with the National Historic Preservation Act the cultural resources cannot be salvaged or damage to them mitigated, the plan must be approved.

And that the lands were in the California Desert Conservation Area did not change that result. So, too, in a 1998 national resource bulletin which evaluating cultural properties which is co-authored by the expert proffered by the Quechan Tribe, Mr. King, and a document included by Respondent in its Rejoinder, it makes the point again. One more point that should be remembered in evaluating traditional cultural properties is that establishing that a property is eligible for inclusion in the National Register does not necessarily mean that the property must be protected from disturbance or damage. Establishing that a property is eligible means that it must be considered in planning federally assisted and federally licensed undertakings, but it does not mean that such an undertaking cannot be allowed to damage or destroy it.

That's a 1998 document. That was the state of the law.
In short, discovery of significant cultural resources at the site of the mine was never, under this preexisting legal regime that was applicable to the Imperial Project, a lawful basis to deny a plan of operation.

Now, furthermore, as our Memorial demonstrates, this principle of vested rights, of valid existing rights, was repeatedly acknowledged during the review of Glamis's plan of operation. Thus, in a meeting with the Quechan Tribe in December 1997, the state BLM director, Ed Hastey, says, "BLM is kind of hamstrung when it comes to 1872 Mining Law rights, and doesn't have the same discretion as oil and gas leasing," et cetera. He said he had instructed Field Manager Terry Reed to take another look at the ACEC designations and the need for further mineral withdrawals, but added that would not resolve this situation since claims already exist.

That's Exhibit 96 to our Memorial.

Dr. Cleland prepared a letter--another of Respondent's witnesses--prepared a letter to the Tribe in September of 1997. Has: "The same proposed project is a nondiscretionary action. That is, the BLM cannot stop or prevent the Project from being implemented, pursuant to the 1872 Mining Act, provided that compliance with other Federal, state, and local laws and regulations is fulfilled. As a consequence, there
is a strong possibility the proposed mining project may be approved."

It's Exhibit 89 to our memorial.

Similarly, in May of 1998, an internal BLM option paper acknowledged the legitimacy of Claimant's plan of operation and that failing to approve it could constitute a taking under the Fifth Amendment. This is Exhibit 112 to our Memorial.

It states: "The mining proposal appears to have merit under the 1872 Mining Law, the mining claims were properly recorded, a Practical POO, a plan of operation, was submitted consistent with 3809 regulations. Thus, denial of the POO could constitute a taking of rights granted to a claimant under the Mining Law. If such finding is made, compensation would be required under this option."

And similarly, BLM officials, like State Director Ed Hastey, assured Glamis, as you will hear in the testimony, that while consideration of the cultural resources found at the site might result in extra time, approval would come. These written and oral statements all reflect that the understanding both on Respondent's side and Glamis's side that there was no lawful basis to deny the plan of operation. Indeed, Respondent's contemporaneous acknowledgement of a mining claim holder such as Glamis's legitimate expectations can be seen when you
look at the treatment of plans and operation when they rewrote the 3809 regulations in 2000. That was a rewrite of the regulations undertaken at Solicitor Leshy's direction to provide the unbridled discretionary veto power that Congress had refused to provide the Department of Interior.

Nonetheless, even then, the proposed regulations specifically exempted pending plans of operations from new performance requirements. So, the reg states: If your unapproved plan of operation is pending on January 20, 2001, which was the effective date of the reg, then the plan content requirements and performance standards that were in effect immediately before that date apply to your pending Plan of Operations.

In sum, consistent with the unique form of real property interest conveyed under the 1872 Mining Law, Respondent has long acknowledged the legitimate expectations of mine claim holders and having their plans of operations approved when they meet the requirements, the pre-existing requirements, of the 3809 regulation. And that's the conclusion of our expert, Thomas Leshendok, who you will hear from in the next few days. Mr. Leshendok has 30-plus years of experience in regulatory management of hardrock and
other mineral mining developments on public lands. He was the Deputy State Director for BLM in their Nevada office for 20 years, and he served on the task force charged with rewriting the 3809 regulations that resulted in the 2000 rewrite.

And having closely examined the Glamis Imperial Project and compared it to numerous other projects, including Picacho, Mesquite, American Girl Mines, all in the Imperial County, he concluded that the Glamis Imperial Project met the applicable 3809 regulations, as well as the requirements of the joint Federal and state environmental assessments. Accordingly, Glamis's expectation that its plan of operation would be approved is objectively reasonable.

But if there were any doubt on this point, it's answered again by the Respondent itself, when, in the September 2002, it issues a Mineral Report signed by no fewer than 11 certified mineral examiners, supervisors, and geologists in which it officially concludes, "Within the scope and limitations of this investigation, we conclude that Glamis could mine the Imperial Project as proposed and process gold from mineralized rock on the property at a profit as a surface mine, but not as an underground mine."

"We also analyzed the possibility of backfilling these pits at the end of operations and determined that it was not economically feasible. We conclude that Glamis has found minerals within the..."
boundaries of the 187 lode mining claims and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine."

Again, not a single one of the authors of that report will come before this Tribunal and deny what Respondent found in that official document. In short, wholly apart from the significant questions that surround the nature and extent of cultural resources at the Imperial Project Site or the significance of that particular tract of land, as opposed to the vast area claimed as sacred ancestral lands by the Quechan Tribe, the regulatory regime, in its consistent past practice, the assurances provided by the CDCA Plan, California Desert Conservation Area plan, the assurances of the California Desert Protection Act, the assurances of the BLM officials all provide indisputable support for the reasonableness of Claimant’s investment-backed expectation that it could enjoy the only use of the real property it had to extract gold in an environmentally sound and safe method, as its Plan of Operations proposed.

But, even if the Tribunal were to employ the balancing approach to expropriation, which we contend would not apply to this confiscatory expropriation, the balance of the measure to the public goods sought
to be achieved, then you would be dealing with the
same facts as those that establish a violation of the
fair and equitable treatment standard under 1105.

The primary focus of Glamis's claim of 1105 or the actions by the Federal and State Government, which we say you have to look at together, that deliberately delayed the Project, denied Glamis

justice and due process, and arbitrarily refused to permit a project that everyone, including the United States, knew to be in full conformance with preexisting law and regulation. The actions of the State, while lawful, State of California were lawful, were designed specifically to injure Glamis in a discriminatory fashion by stopping, as Governor Davis had directed, the Imperial Project. In so doing, Respondent has demonstrated both the Federal and state levels the kinds of lack of good faith, denial of justice, and discriminatory treatment that entitled Glamis to compensation under Article 1105, as well as the lesser nonconfiscatory regulatory expropriation standard under Article 1110.

Now, the facts have been laid out extensively in the Memorial, the Reply, the Counter-Memorial, the Rejoinder. What I want to do is focus you at the start of this hearing on a few key facts that demonstrate the fundamentally unjust way in which Glamis was treated at both the Federal and State level in trying to commence mining operations at the
Now, in doing so I want to pause for a moment and again reemphasize that it's not our obligation, as Respondent argues, to prove each act by the Federal and State Government as a violation of a specific legal prohibition. Rather, it's for the Tribunal to assess the totality of the circumstances in determining whether those measures deprived Glamis of fair and equitable treatment and/or expropriated its property even under the balancing standard.

In this process, Respondent's actions and measures are not immune from close examination, as Respondent would have the Tribunal believe. It's true that it's not for this Tribunal to judge or second-guess the wisdom of particular Government action. The action is what it is, but that's not the same, and numerous tribunals have so found, as evaluating the State's motives and actions in determining whether its measures, lawful and rational as they may claim to be, deprived Claimant of the protections that customary international law provides.

Again, a few examples, the Saluka versus Czech Republic case, Respondent quotes from the decision, "clearly not for this Tribunal to
second-guess the Czech Government's privatization policies." What it doesn't go on to then tell you, however, is that immediately following that statement, the Saluka Tribunal added that that prohibition doesn't relieve the Czech Government from complying with its international obligations. As the Tribunal stated, "The host State must never disregard the principles of procedural propriety--propriety and due process."

And in the Thunderbird decision at paragraph 127, that NAFTA Tribunal noted, "The role of Chapter 11 in this case is therefore to measure the conduct--there Mexico--"of [the host State] towards [the foreign investor] against the international law standards set up by Chapter 11 of the NAFTA. The perspective is of an international law obligation examining the national conduct as a fact." That's all the Tribunal is asked to do. What were the facts? What did, in fact, they do? Is it reasonable? Was it proportional? Did they act in good faith?

Respondent may wish to avoid these facts, but there is no basis under international law for the Tribunal to turn a blind eye to what are largely undisputed facts that demonstrate Respondent did not deal with the Imperial Project in good faith and in accordance with applicable customary international law standards of justice, protection of limited--legitimate expectations, and
nondiscriminations.

So, now I want to walk you through some of these facts. Again, not all of them but enough to give you the underlying basis for our claims.

First of all, there is no real dispute that the Respondent deliberate delayed approval of the Project which, by all accounts, was ready for approval, at least by early 1999. To revisit the chronology, in December 1994, it files a-- its plan of operation, having proven the re-- that there were valuable gold resources there, that it had gotten the protection of the 1994 Desert Protection Act that its claim-- its site would not be withdrawn.

Two years later, which was not that abnormal, in 1996, a Draft EIS/EIR recommends the Imperial Project as the preferred alternative, the equivalent of recommending approval. They go back and do some more study of the cultural resources at the site resulting in a November 1997 Draft EIS/EIR, again, recommending the plan of operation as the preferred alternative or in essence recommending approval.

Everyone expected there would be consultations under the National Environmental Policy Act, the NEPA process. That would be required, but all understood that those consultations, as I have just been through, couldn't stop the Project. The-- I'm sorry, the National Historic Preservation Act-- and that they provided for only economically...
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14 feasible mitigation.
15 Now, Solicitor Leshy directed, at least by
16 October of '98, we have this document--there are other
17 documents that suggested occurred earlier, to stop
18 working on the final EIS/EIR, but nonetheless, we
19 also--from the Respondent's own documents, we can
20 verify that the Mineral Report was virtually done by
21 late 1998. So, in Exhibit 156, we have an E-mail from
22 Mr. Waywood, who was the principal drafter of the

10:38:41 Mineral Report, stating that he finished all the
1 fieldwork and acquired all pertinent data from the
2 company, and analytical work on the assays had been
3 completed.
4 Exhibit 167, we have a fax to Bob Anderson,
5 again the Bob Anderson that the Government declined to
6 bring, in which it's reported to him--he's the Deputy
7 State Director in California--that the VER, the valid
8 existing rights report, was progressing and could be
9 completed by January 1999 to March 1999 time frame.
10 At this point in time, there were no
11 California measures that would have blocked the
12 Project--we are four years away from any such
13 measures--and so had BLM done what it was supposed to
14 do, approved the Project by early 1999, the mine would
15 be operating today and enjoying the extraordinary spot
16 prices.
17 Indeed, the fact that it was likely to
18 approve--you can also look that at this point in time,
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20 Glamis had a very favorable reputation in the
21 California Legislature, a-Exhibit 114--an assembly
22 resolution by member Jim Battin specifically commends

10:40:25 1 Glamis on the reclamation that it performed at the
2 Picacho Mine. That it takes great pleasure in
3 commending the Glamis Gold Corporation for its
4 environmentally sensitive treatment of the environment
5 at the Picacho Mine and for its groundbreaking
6 reclamation techniques that have earned it the 1997
7 Excellence in Reclamation Award from the California
8 Mining Association.
9 Now, Respondent doesn't want the Tribunal to
10 hear from BLM witnesses about the delay. Rather, they
11 choose to make generalized assertions about delay,
12 permitting in the United States being longer on
13 average than elsewhere in the world. But those
14 generalities cannot undermine the specific proof of
15 deliberate delay in the Imperial Project case at the
16 BLM level and the specific expert analysis of
17 Mr. Leshendok, who has compared the approval times
18 that occurred at similar sized and located projects in
19 the California Desert, and has shown that those are
20 significant--Glamis was subjected to significantly
21 greater delays even up to the denial, putting aside
22 the next four years, and that's at Mr. Leshendok's
April report at 34, Table 1, and you will see that Glamis, the third one down, six years and nine months, whereas the others are all in the less than three years.

Now, second: While we wouldn’t contend that deliberate delay by itself would be enough to violate customary and international law, but it does inform what transpired and support our claim of a denial of justice.

It can’t be seriously disputed that Solicitor Leshy deliberately and unlawfully changed the standards for operations applicable to the Imperial Project with the intended purpose and effect of halting the Project and denying Glamis its legitimate expectation of being able to extract the gold. This action, by elevating the quote-unquote undue impairment standard to a new discretionary veto over mines otherwise proposed in accordance with the 3809 regulations, was no mere mistake or interpretive Rule, as Respondent suggests. Rather, Section 601 of FLPMA, Federal Land Management Policy Act, specifically stated that the invocation of the undue impairment standard had to be by regulation, not by solicitor interpretation, and that was what BLM had done when it equated the two, as Mr. Anderson said, in the 3809 regulation with unnecessary and undue degradation.

And it was this defect, this gross violation
of the statutory basis for undue impairment, that formed the grounds of Solicitor Myers in the next administration revoking the Leshy Opinion as unlawful. And that opinion, Solicitor Myers, remains Respondent's legal interpretation today. It has never been revoked itself.

Now, if the undue impairment standard had been so vague and discretionary as Leshy suggested, it is quite clear that investors such as Glamis would have never invested in projects within the California Desert Conservation Area. They would simply invest millions of dollars to be held up at the last moment on a wholly unfettered discretion. And that is, in fact, exactly what the mining industry told Congress in the mid-nineties when the Clinton Administration had proposed a change to the Mining Law to permit such unfettered discretion. Congress refused.

And without the Leshy rationale, this new discretionary veto power that he found, Secretary Babbitt would have had no basis to issue the Record of Decision that he did on the eve of leaving office in January 2001.

Now, the third set of facts demonstrate that Imperial Project was subjected to discriminatory treatment in a variety of ways, as set forth in our Memorial and our reply. For example, both before and after the denial of the Imperial Project, significant projects with similar cultural characteristics were
approved without complete backfilling and despite severe impacts to cultural resources and areas of cultural concern. Indeed, the Quechan Tribe for years had maintained that the entire area between Pilot Knob, which is down on the U.S.-Mexican border, and Avikwaame, which is north of Blythe by about a hundred miles north, were sacred. And you can see in today’s New York Times an extensive article documenting again the Quechan claims of all sites, in this vast area of the southern desert on both the California and Arizona side, as sacred.

Now, as Dr. Sebastian has testified, and you will hear further from her this week, there is nothing found at the Imperial Project Site that would distinguish it from other areas of this part of the California Desert, including areas impacted by various project sites. Before the Imperial Project, BLM had approved mining operations at the American Girl Mine, and just--

MR. GOURLEY: You have the American Girl Mine down here about eight miles away. It’s in an area of very high cultural concern. You have got Picacho right next to Picacho Peak in an area of high cultural concern. You can see the Mesquite Mine land--Mesquite Mine, the original proposal, right next to the Singer area of cultural--Critical Environmental Concern, ACEC.
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Those had already been approved. Those were already in mining operations at the time that Imperial—the time that Glamis came to the Imperial Project Site. In fact, one of the benefits since Glamis was responsible for the Picacho, was mining the Picacho Mine, they had hoped to be able to transition that mining team too.

Now, we also know because of the recent production of Boma Johnson’s map of the Xam Kwatcan Trail that other projects directly and significantly damaged the very Trail of Dreams that was proffered as the factual basis for the denial in this case, and these include, and again you will hear more about this in the testimony, the Mesquite Mine expansion in 2002, again a mine about 10 miles away from the Imperial Site directly abutting the Singer Geoglyph ACEC, one of the region’s most significant prehistoric resources; the North Baja Pipeline in 2002, which had a final EIS/EIR for a new expansion just this past June of 2007, is an underground pipeline intersects and scars multiple segments of the Xam Kwatcan trail network. The Mesquite Landfill, which is next to the Mesquite Mine, it required a redrawing of the Singer Geoglyph ACEC, so a preexisting area of critical environmental concern was redrafted to avoid—to truncate—to allow the landfill to go forward, and that landfill property would truncate prehistoric
segments that follow the general alignment of the Xam Kwatcan Trail as depicted by Boma Johnson's map. It would also create mountains of garbage that would be significantly higher than any of the remaining piles projected at the Imperial Project.

Now, Mr. Leshendok, in his expert opinion, has already addressed the approval processes for these and the inconsistency of approving those and denying the Imperial Project, and Dr. Sebastian will testify similarly about the impact of these projects on the Xam Kwatcan Trail.

But this disparate treatment of similarly situated projects is not only evidence of arbitrary and discriminatory treatment of the Imperial Project, there is other evidence. As Dr. Sebastian has testified, the NHPA process followed by the BLM and the American Council for Historic Preservation in this case deviated significantly in a discriminatory manner from that employed in other cases. Dr. Sebastian teaches this, the process, to Government officials.

Indeed, the arbitrary and novel identification of an area of traditional cultural concern—you will hear more about this from Dr. Sebastian and Dr. Cleland—they in essence draw arbitrarily draw something called an ATCC, a novel
concept, around the Project, to define it as "the
Project site," and that turns the process on its head
because, as Dr. Sebastian will testify, you are to
identify traditional areas of traditional cultural
concern by ethnographic study. Dr. Baksh performs
such a study at the Imperial Project Site and found no
such area of traditional cultural concern. Couldn't
verify one.

And by tying, what it did was take the
Running Man to the south of the project and tie it to
the Indian Pass withdrawal area, the petroglyphs at
Indian Pass, it did exactly what the 1994 California
Desert Protection Act said you couldn't do, which was
use an existing withdrawn area as a ground for
restricting operations at a site left open for
multiple uses. Yet again, that's exactly what
Secretary Babbitt's Record of Decision did.

Turning then--continuing on to the California
measure, they, too, are clearly discriminatory and

10:52:48 targeted at this mine. Again, Respondent will make
the best case it can that these are general, but they
cannot deny and avoid the overwhelming evidence that
each measure was motivated by this mine and this mine
only.

They will try to hide behind the deference
that it says you should give. Again that goes to--we
don't challenge the lawfulness of the reg. What we
challenge is that we bore the brunt of this
extraordinary change in reclamation standards.

So what does that evidence include?

Exhibit 257, start in September. Governor Davis vetoes a bill that would have stopped, but because he had to veto it, he directs the resource division to pursue all possible legal and administrative remedies that will assist in stopping the development of the Glamis Gold Mine. That is the start of the regulations. Mr. Parrish can argue what he wants as to the rationale, but they can't deny this is what started the process.

Exhibit 258: This is an E-mail between someone in the--between the allies in the California Legislature and the resource agency in the legal office, actually in the California Executive Branch, stating what the Senator complaining that--the Senator's aide complaining, I thought Allison Harvey and I were working with the resources agency/DOC on an informal and collegial basis to help stop the Glamis Mine, something that has been significantly complicated by the Governor's veto of S.B. 1828, the prior bill that Governor Davis had vetoed and vetoed because it would have burdened the State of California. It's okay to burden the private investor.

Exhibit 273: And this document confirms that Senate Bill 483, which is what--what Senate Bill 22 would authorize after the veto of the earlier bill, two points: These changes to the statute are urgently
needed to stop the Glamis Imperial Mining project in Imperial County, proposed by Glamis Gold, Limited, a Canadian-based company, targeted against its Canadian heritage.

And furthermore, saying the author believes the backfilling requirements established by S.B. 483 make the Glamis Imperial Project infeasible. They knew what they were doing was to make it cost-prohibitive.

Exhibit 276: Some more of the legislative history of S.B. 22, confirming that—here that it was the only one that would qualify. In California, one site would qualify: Glamis Imperial Mining project. They wanted to get this one.

Exhibit 284. Governor Davis, press release after the passage of S.B. 22, and linking it to the emergency regulations which had just become final, that he had commissioned.

Three things. The measure sends a message that California sacred sites are more precious than gold. The notion that the purpose was to make it cost-prohibitive. The reclamation and backfilling requirements of this legislation would make the operating the Glamis gold mine cost-prohibitive.

And then finally, looking at the regs noting that it had been drafted narrowly. State Mining and Geology Board will require backfilling of all metallic mines in the future. The regulation will apply
only 3 percent of the industry. Again, carved out to
impose the burden on Glamis and at most a few other.

Now, Respondent hasn't even attempted to
argue that S.B. 22 has affected any other mine. It
doesn't. They can't show that it affected any other
project in California.

Now, with respect to the new emergency regs
that became final, so-called regulation 3704.1, they
argue, well, that is a general—-a regulation of
general applicability such that no expropriation
should be found under the less restrictive balancing
test for regulations not resulting in total loss of
real property use.

Now, it presents the testimony of
Mr. Parrish, a former Executive Director of the Board,
purportedly to provide a rationale for why mandatory
metallic—mandatory backfilling and site recontouring
is necessary for new metallic open-pit mines, but not
for existing ones, and not for the many other kinds of
open-pit mineral mines that exist in California.
Neither point is persuasive. First, as Governor
Davis's press release documented the regulation,
the industry.

Putting aside for a moment what you will hear about the unusual Golden Queen Mine proposal and whether that's really comparable to the Imperial Project--and we will show that it's not--even assuming the regulation has a rational basis, it unjustifiably invested the entire burden of this new policy on a very small universe, a universe that to date has really only affected Glamis.

And the significance of this point can be found to--to the test can be found in Justice Kennedy's concurring opinion in the Lucas case, where he wrote, "The State did not act until after the property had been zoned for individual lot developments and most other parcels had been approved--had been improved throwing the whole burden of the regulation on the remaining lots. This, too, must be measured in the balance."

As I have suggested, the burden of this regulation has been predominantly, if not exclusively borne, as it was intended to, on Claimant.

And Respondent can't just hide from the fact that the Imperial Project was specifically targeted, treated like none other and uniquely burdened with the cost of this new policy.

In any event, we expect the cross-examination of Mr. Parrish to show that at least with respect to the measures of mandatory complete backfilling and
site recontouring, there is no rational basis to
distinguish metallic open-pit mines from other large
open-pit mines, whether for safety or for restoration
to future unspecified uses.

Unlike Methanex, again, Respondent cannot
show that California has engaged in any scientific
study to support the distinctions its regulation was
making. None was performed, and none was needed
because Governor Davis had issued the directive: Stop
the Glamis mine.

In short, the actions at both the Federal and
state level were designed to, and did, destroy
Glamis's real property interest in the mining claims
and Imperial Project.

And that leaves us, then, to damages, and we

will expect you will hear a lot of testimony on this
very contested point.

There are two issues to consider: First,
there is the expropriation under Article 1110, and
this goes to the value of the mining claims on the
date of expropriation. We find that date to be
December 12, 2002, based as in Whitney Benefits, on
the fact that where you have a new statute that
without possibility of waiver or a way out imposes a
standard that you cannot meet, that that's when the
taking occurs.

Under Article 1105, under customary
international law, the Tribunal has much more
discretion to fashion a remedy, ranging anywhere from
Claimant's restitution interests, which exceeds
$15 million today; it continues to rise because each
year to maintain its property interest, it pays
Respondent now $100,000.

And it certainly includes--can go up to the
value of the mine at the date of expropriation,
expropriation, which is $49.1 million. And it could
even, if you were to accept Navigant's extraordinary

projection of the current value, you could fashion a
remedy that would be based on what Claimant would be
earning today had Respondent approved the mine, as it
should, no later than early 1999.

Now, we are not asking for that. We are
asking for the value of the mine. And Respondent
hasn't challenged the amount incurred by Glamis in
seeking to permit the restitution interest of
$15 million. It has contested the valuation of the
mine both as of December 12, 2002, and later, as
proffered this absurdly $150 million current value
based on recent spot price.

You will hear in the testimony that the
market denies there is no any such value to this
stigmatized property. The Tribunal would have to
believe that every mining company in the world is
irrational, including Glamis, not to immediately take
this property, submit for a complete backfilling plan
and site regrading to obtain even just the
20 $110 million differential between Glamis’s claim and
21 this alleged 159 million value.
22 As of the valuation at the time of

11:04:10 1 expropriation, which is really the only valid time to
2 assess the value—you don’t look at the present—the
3 experts disagree on a number of issues about which you
4 will hear. Our expert is Bernard Guarnera, President
5 of Behre Dolbear. He is a certified mineral appraiser
6 of with some 40 years of experience. Behre Dolbear is
7 relying on its standard and long proven mineral
8 property valuation methods which it has employed for
9 Government and private owners, for buyers and sellers
10 and has determined that the mining claims were worth
11 49.1 million just before the expropriation and a minus
12 8.9 million immediately thereafter.

13 Respondent’s experts, Navigant and Norwest,
14 on the other hand, have virtually no experience on
15 valuing metallic mineral deposits and as you will hear
16 have made numerous unsupported assumptions and relied
17 on flawed engineering and geological analysis in their
18 effort to demonstrate that California was wrong; that
19 in despite of imposing the mandatory backfilling, it
20 unsuccessfully made it cost-prohibitive. According to
21 them the Imperial Project retains significant value
22 even after imposition of the complete backfilling at
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11:05:34 1 the end of the Project and site recontouring to
2 achieve the strict height limitations.
3 Norwest and Navigant are wrong, and we
4 respectfully request that the Tribunal award the full
5 49.1 million plus interest requested.
6 Thank you very much.
7 PRESIDENT YOUNG: Thank you very much.
8 We will now take a half-hour break. It's
9 11:00, approximately 11:10. We will meet back here at
10 11:40.
11 If you give us a moment here while we confer.
12 (Tribunal conferring.)
13 PRESIDENT YOUNG: I have been overruled. My
14 first decision overruled already.
15 I think what we will do, in light of the hour
16 to make sure that Respondent can continue its argument
17 uninterrupted, we will actually take the lunch break
18 now, have just a slightly longer lunch break and come
19 back at 1:00, if that works for everyone. We had
20 planned to take lunch at 12:00, and if we give a
21 half-hour break now, that only leaves you 20 minutes
22 to get started and then we break again. So we

11:07:33 1 would you--would Respondent prefer that we
2 structure this differently?
3 MR. CLODFELTER: Mr. President, we think that
4 with the break that you have scheduled for this
5 morning we could finish before lunch or thereabouts,
so we would think we would take the break now.

MS. MENAKER: What time was the lunch? Was it--

PRESIDENT YOUNG: Well, we'd anticipated 12:00.

MR. CLODFELTER: Oh, at 12:00. Oh, I'm sorry. I thought it was 1:00 you announced earlier.

PRESIDENT YOUNG: Well, no. What we had imagined was actually breaking now until 1:00 and then starting your argument at 1:00, instead of taking a half-hour break now, coming back for 20 minutes and then breaking, that we would start to break, and we would just start the lunch break now and end at 1:00. The alternative, I suppose, is we--we could move lunch, take a break now and then come back and allow to you go until one and then take the lunch break, if you prefer to do that.

MR. CLODFELTER: Mr. President, if you're going to resume at 1:00 after the lunch break, that would be sufficient.

PRESIDENT YOUNG: Thank you. Then we will do that. Then we'll resume back here at 1:00.

Thank you.

(Whereupon, at 11:09 a.m., the hearing was adjourned until 1:00 p.m., the same day.)
11:09:19 1        AFTERNOON SESSION
2            PRESIDENT YOUNG:  Good afternoon.
3            We are ready to commence again, and at this
4            point we will turn the time over to Respondent for
5            their opening statement.
6            OPENING STATEMENT BY COUNSEL FOR RESPONDENT
7            MR. RONALD BETTAUER:  Mr. President, Members
8            of the Tribunal, it is my privilege to begin the
9            United States's presentation at this hearing. John
10            Ballinger, the Secretary of State's legal advisor,
11            asked me to tell you that he would have been honored
12            to assume this role himself had he not been away. But
13            I can say that I and the entire U.S. team are pleased
14            to be here today, and we will do all we can to fully
15            explain our positions and answer your questions.
16            This afternoon I will make some general
17            remarks. Then Mr. Clodfelter will highlight some of
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18 the key points that we believe it will be useful to
19 have in mind as you hear testimony to be presented
20 during Glamis’s presentation.
21
22 Ms. Menaker will conclude our opening
statement by providing a summary outline of the

12:59:01 1 arguments we will make during the presentation of our
2 case-in-chief later in the week.
3 Mr. President, Members of the Tribunal, by
4 now you know full well what this case is about. The
5 United States and California Governments have
6 important responsibilities both to protect the
7 environment, historical and cultural values, and to
8 provide appropriate regulation of mining activities.
9 Here, both the U.S. Federal and California State
10 Governments, through their regular and democratic
11 processes, took responsible steps that balanced all
12 the interests involved. The outcome of those
13 processes was a reasonable one, and it did not violate
14 any treaty or customary law or international
15 obligation of the United States.
16 Now, Glamis accepts that it is permissible to
17 take such steps, but argues that when they are taken,
18 they must entail compensation. In our presentation
19 today and this week, we will show why this is neither
20 true nor reasonable. If democratic governments need
21 to pay for every reasonable regulatory measure that
22 they take as part of the process of balancing
important public interests, they would be driven to inaction, no public interest would be served, and they could not govern responsibly.

In our presentation today and throughout the week, the U.S. team will show that no expropriation occurred for multiple reasons. Among them, we will show that the 1975 California Surface Mining and Reclamation Act, or SMARA, and the 1976 California Native American Historical, Cultural, and Sacred Sites Act, or Sacred Sites Act, clearly alerted any potential mining investor in the California Desert Conservation Area that activities there could be subject to stringent regulation.

We will also show that at all times the Federal Government diligently processed Glamis's plan, followed all applicable procedures, and made reasonable and defensible legal determinations. In any event, we will show that Glamis remains free to pursue required Federal and state approvals and that it would be economically viable for Glamis to proceed with its project in compliance with California's reclamation measures; and its investment cannot, therefore, be said to have been taken either directly or indirectly.

We will also show that the United States did
not violate Article 1105, that we did not fail to
provide Glamis's investment the customary
international law minimum standard of treatment.
Glamis, in fact, has not demonstrated that the
purported rules on which it bases its claims are
actually rules of customary international law, that
is, that those rules derive from a general and
consistent practice of nations followed by them out of
a sense of legal obligation.
Glamis essentially charges that both the
Federal and California Government's conduct in this
area was arbitrary, but has not made a case that there
is a relevant rule of international law prohibiting
the conduct in question. In any event, our team will
show that the U.S. conduct was not arbitrary.
Now, this case is quite important. It raises
fundamental issues as to a nation's prerogative to
regulate mining activities and the use of public
lands. As you know, mining is a highly regulated
activity in the United States. We encourage mining,
but we also place greater importance on protection of
public health and safety and the environment,
including historic and cultural values. Glamis's
claim attacks this fundamental prerogative.
Glamis knew when it sought to exploit mining
resources on Federal lands that it would need to
comply with a multitude of Federal and State laws and
regulations. These span the spectrum from the
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Federal Land Policy and Management Act to the National Environmental Policy Act, the California Environmental Quality Act, and SMARA, to name just a few. Entire sections of the U.S. Federal and State--of U.S. Federal and State agencies are devoted to administering these complex regulatory schemes. When processing Glamis’s plan of action, the Federal Government took care in administering this regulatory scheme. California likewise acted lawfully and responsibly when it enacted and later clarified environmental regulations and legislation. While it is well-known that mining is highly regulated in the United States, it is equally well-known that no legal system is more protective of property rights and due process rights than that of the United States. I note this simply to make the point that U.S. administrative processes are protective of property rights, and there are available both administrative and judicial review mechanisms to address any asserted errors. Had Glamis wanted a review of factual determinations made by administrative agencies during the processing of its Plan of Operations and a de novo review of their legal conclusions, it could have gone to U.S. Court, as it has done on numerous past occasions, but it did not do that. Glamis availed itself of its option under the NAFTA to come to this forum. It now seeks to have its grievances decided.
under international law. This is another reason why this case is so important. Glamis's claims implicate two areas of customary international law. One is the area of expropriation law that is codified in NAFTA Article 1110. The other is the customary international law minimum standard of treatment of foreign investments more generally, which is referenced in NAFTA Article 1105. This case is important to establishing the manner in which the rules of customary international law in these two key areas are determined and elucidated.

Article 1110 lays out the most important of the applicable customary international law rules concerning expropriation: Property shall not be expropriated except for a public purpose on a nondiscriminatory basis in accordance with due process of law and on payment without delay of the fully realizable equivalent of the fair market value of the investment.

Article 1110 also makes clear that indirect expropriation or, to state it another way, a measure tantamount to nationalization or expropriation, is governed by the same requirements. These principles reflect customary international law.

What is laid out in Article 1110 or under customary international law is how a tribunal is to determine whether measures constitute an indirect expropriation. It is clear under this Article and
under customary international law that there is a well

established Rule prohibiting indirect expropriation
without compensation, but the situations in which that
Rule applies require elaboration.

Here, the U.S. system has the greatest expert
experience in reasoning through the contending
interests involved in indirect expropriation claims
and has confronted a vast array of different fact
situations. On this point Glamis agrees. In its
Memorial Glamis notes that U.S. jurisprudence
concerning indirect expropriation has had a seminal
influence on expropriation jurisprudence around the
world and that the line for determining whether an
indirect expropriation has occurred in international
law is similar to the line drawn in U.S. Fifth and
Fourteenth Amendment cases. This is stated in
paragraph 417 of Glamis's Memorial, and was stated
this morning when Claimant said that international law
is informed by U.S. law on this issue.

Thus, both parties agree that this Tribunal
can find guidance and the reasoning used by U.S.
Courts with respect to indirect
appropriations—expropriations. This is a crucial

point. We have shown in our written submissions, and
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2 will demonstrate during this week’s hearing, that U.S.
3 law would reject Glamis's claim
4 Let me be clear that I'm not arguing that
5 U.S. law governs this proceeding. Of course, the U.S.
6 recognizes that compliance with domestic law is not a
7 defense to a claim of violation of international law.
8 But in this case, as I have just said, U.S. law
9 provides useful guidance. And, as I just mentioned,
10 no legal system is more protective of property rights
11 than U.S. law. Thus, it would really not be credible
12 to argue that customary international law in this area
13 had developed more stringent protections. To find in
14 favor of Glamis would be a result so incongruous as to
15 invite doubt concerning the process of international
16 adjudication of investor-State claims.
17 Let me now turn briefly to Glamis's Article
18 1105 claim. In making this claim, instead of relying
19 on any well established Rule of customary
20 international law, we pointed out in our pleadings
21 that Glamis asked you to invent new rules.
22 Now, today for the first time, Glamis

13:11:21 1 characterized this case as involving a denial of
2 justice. There is a well established set of customary
3 international law rules concerning denials of justice.
4 So, that Glamis--so Glamis finally seems to realize
5 the importance of bringing its 1105 claim into the
6 framework of an established set of rules, but Glamis
7 has not demonstrated in its pleadings or today how the
measures it complains of violate the specific accepted criteria for application of those rules; rather, it makes broad characterizations with no backup. This is how it proceeds with its other 1105 allegations. It is asking you to adopt new customary international law rules that would have you second-guess every aspect of a State's administrative, regulatory, and legislative processes. It would have this Tribunal engage in de novo review of factual determinations made by agencies and legal conclusions drawn by agencies on issues of first impression. It urges this Tribunal to disagree with those expert determinations to fine-tune those determinations in a way it prefers, and find liability on that basis.

In effect, it would also have this Tribunal scrutinize regulations and legislation and impose liability on the United States should the Tribunal find that those regulations and legislation were less than perfect, but this is not what customary international law provides. Because of the critical importance of this point, I want to focus very briefly on the task before you. By its terms, Article 1105 is grounded in international law standards. As I noted earlier, and as you know, customary international law is the law that is formed from a general and consistent practice of states followed by them out of a sense of legal obligation or opinio juris.
As an international tribunal applying customary international law, your task is not like that of a domestic court applying common law. Unlike those courts which create common law, international tribunals do not create customary international law. Only nations create customary international law. It is your task to identify the content of customary international law and then to apply that law to the facts of this case.

To establish the content of applicable rules of customary international law, the Tribunal must look to the general and consistent practice of States followed by them out of a sense of legal obligation. Glamis has not done this in advancing its claim. Instead, it relies principally on statements made in other arbitral awards, many of which are taken entirely out of context. In some of the cases, those tribunals were not even interpreting customary international law. In other cases, while the Tribunal may have been bound by customary international law, the Award shows no indication that the Tribunal actually considered whether the obligation that it stated was supported by a general and consistent practice of States followed by it or followed by the States out of a sense of legal obligation.

A rigorous approach to the application of customary international law
customary international law is critical to the stability of the international investment protection regime. Adopting the radical approach relied on by Glamis would create rights far broader than those recognized in U.S. law or anywhere else, inviting the same kind of doubts about the process of investor-State adjudication that I mentioned earlier in connection with indirect expropriation.

Mr. President, Members of the Tribunal, thank you for your attention. This concludes my brief presentation. With these points in mind, I invite the Tribunal to call on Mr. Clodfelter, who will continue the U.S. opening remarks.

MR. CLODFELTER: Thank you, Mr. President, Members of the Tribunal.

It's obvious to the Tribunal that the parties see this case in very different ways. Not only do we disagree on the ultimate question whether the United States has violated its international obligations under NAFTA, but we disagree on what issues are fundamental to your deciding that question. This is evidenced by the party's very different approaches to this hearing.

As Mr. Gourley suggested this morning, the United States views this dispute as one that hinges on
legal principles and the application of those principles to the facts. Glamis has indicated that it believes resolving factual issues is key. As a result, while the United States will devote the vast majority of its time to oral argument, Glamis has chosen to present its case largely through witness testimony. In our view, much of this testimony is likely to be irrelevant and unhelpful in assisting the Tribunal in determining whether there has been a breach of NAFTA. Of course, Glamis has the burden of proof on all questions in this case. We believe that they have failed to meet that burden, obviating, in response to Mr. Gourley's comment this morning, any need on our part to summon additional witness testimony on our behalf.

Now, Mr. Bettauer has described for you our views on the appropriate sources for the legal principles to be applied in this case. In addition, what we want to do this morning is give you a summary of the arguments that we will be making and to outline for you in some detail how we will present our defense later in this week.

But before Ms. Menaker does that, what I would like to do is to lay out some of the key considerations we would request that you bear in mind as you hear the testimony and argument presented by...
Claimant during the next few days.

Claimant's counsel has skillfully attempted to paint a picture of a company undertaking a mining project no different from any others which has been the victim of an illegal conspiracy at both the Federal and state levels of Government to thwart its business ambitions under the pretext of protecting important public values, a company beset by political enemies, confronted at every turn by procedural irregularities, targeted because of what it is, and surprised by policies applied to them for allegedly purely political reasons that changed the economics of their project.

But in every respect, this portrayal is false. The conspiracy that Glamis describes is nothing more than the normal functioning of a democratic system. What Glamis sees as enemies were members of the public who advanced competing interests in the public property on which Glamis's project was to be located; and what Glamis sees as co-conspirators were public officials whose job it is to make tough decisions regarding those interests. Those interests were recognized and protected by law long before Glamis ever made its investment. And at every step, at both levels of Government, consideration of Glamis's interest, as well as of these competing interests, was given by authorized officials in strict accordance with procedures set forth in law.
Policy outcomes unfavorable to Glamis emerged, not because of who or what Glamis was, but because of how Glamis planned to use the public property on which its mining claims were located. The results of these developments may have been a business setback for Glamis, but the risk of these developments was always present and always knowable by Glamis. And importantly, while they changed the economics of the Project, these developments were by no means fatal to it. They left Glamis with a still valuable project, which it is still free to pursue.

In processing Glamis's Imperial Project Plan of Operations, two events occurred that forced Federal and state decision makers to reconcile competing public policy objectives relating to mining. First, Glamis proposed to develop its mine in an area that was determined to contain a wealth of archeological features evidencing the area's cultural and religious importance to Native Americans.

And second, it became evident to California officials charged with implementing the Surface Mining and Reclamation Act that the less than full backfilling that local Governments had permitted to date was not achieving compliance with the Act's requirements for reclamation of mine sites to a usable condition.

These two events put the Imperial Project in
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18 direct conflict with interests long protected by
19 Government policies and long reflected in law. That
20 sacred Native American sites not be destroyed; that
21 the practice of Native American religion should not be
22 interfered with; and, as just mentioned, that open-pit

13:22:04 1 metallic mines should be reclaimed to a usable
2 condition that poses no danger to public health or
3 safety.
4 Glamis is disappointed with the resolution of
5 that conflict that emerged, and its disappointment may
6 be understandable, but the risk that Glamis would face
7 Government action to prevent the harms identified was
8 a risk that Glamis took, and international law does
9 not guarantee against such risks. As was stated by
10 the Tribunal in the Azinian Chapter Eleven case
11 against Mexico, and you can see on the screen, it is a
12 fact of life everywhere that individuals may be
13 disappointed in their dealings with public
14 authorities. NAFTA was not intended to provide
15 foreign investors with blanket protection from this
16 kind of disappointment, and nothing in its terms so
17 provides.
18 Now, despite these events and despite the
19 governmental actions taken in response to them, Glamis
20 could, as I mentioned, still have pursued the Imperial
21 Project, albeit with a revised Plan of Operations.
22 Instead, Glamis announced, and Mr. McCrum's July 21,
13:23:20 1 2003 letter to the Department of Interior that, 2 "Glamis Gold believes that the underlying issues have 3 become so intractable that new avenues must be 4 pursued." And those new avenues, of course, included 5 this arbitration.

6 But by doing so, Glamis acted prematurely. 7 By failing to pursue approval of a Plan of Operations 8 with BLM and failing to seek approval of a Reclamation 9 Plan from the State of California, Glamis has suffered 10 the application of no adverse Government Decision 11 against it, except the 2001 Record of Decision that 12 was quickly rescinded.

13 And with respect to the California measures, 14 contrary to Mr. Gourley's statement this morning that 15 Glamis is the only investor affected, in fact, Glamis 16 has not been affected at all by either the regulations 17 or the legislation because there is not softer 18 application. As a result, as we have shown, Glamis 19 has no claim to raise under international law. Its 20 claims simply are not ripe.

21 This is more than just a theoretical issue. 22 This is demonstrated by what is actually happening

13:24:43 1 today. And as we have seen in the latest witness 2 statements and as we will hear more about this week, 3 as Mr. Gourley mentioned, another company proposing to
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mine gold in the California Desert, Golden Queen, believes that it can mine profitably in compliance with California's reclamation requirements, and is seeking approval of a Reclamation Plan under the regulations.

Now, Mr. Leshendok has opined and will no doubt testify this week that he does not believe that Golden Queen's revised Reclamation Plan complies with California law. Of course, the plan's detailed compliance with the regulations is something for California officials ultimately to decide; and it wouldn't be at all unusual if the plan had to undergo further revisions.

But the point is that Glamis cannot simply say that it would have been prevented from mining at the Imperial Project Site where it has not even sought approval to do so.

As a result, Glamis's claim is not ripe for adjudication under the standards of NAFTA Chapter

115

13:25:52 1 Eleven.

2 But even if Glamis's claims were ripe, it still cannot prevail in this arbitration. Glamis claims that by being subjected to the measures at issue, fundamental rights of ownership were taken from it in violation of international law—that Glamis has yet to establish that it enjoyed any rights that were affected by those measures. Exactly what rights does Glamis have?
It certainly has the right to mine gold from publicly owned lands on which it has located its claims, but Glamis holds no right to conduct that Mining Act activity in any manner that it chooses. Its right to mine was always qualified by the need to conform with all Federal and State laws. It has to obtain approval of a plan of operations, an objective that it gave up on in favor of this arbitration, and it has to have a Reclamation Plan approved by State officials.

Now, neither of these processes would have required Glamis to provide any extra benefit to the public. They would not even have required Glamis to pay for the gold that it removed from the public lands. At most, they would have required Glamis to undo some of the damage that it itself would cause through its mining activities. Glamis was never entitled to be free from such a requirement; that is, free from the requirement to undo damage that it caused, because from the time that it obtained rights in its Imperial Project mining claims, it has been the subject of legal principles prohibiting such damage. The very existence of these principles limit the extent of Glamis's extraction rights or, as we have argued, limit the bundle of rights that inhere in its mining claims. As a result, none of the measures Glamis now complains about impacted any property rights that it enjoys in its mining claims.
As we will discuss further later this week, the ability to mine, no matter what damage is caused to important public values was simply not part of the bundle of rights that Glamis acquired and, therefore, could not have been expropriated or denied by the measures at issue in this case.

Instead of being based upon actual rights that it enjoyed, much of Glamis's case is based upon what it asserts were its expectations or, more precisely, based upon the disappointment of its business expectations. Glamis asserts that it has suffered an indirect taking of its mineral claims because the actions of the Federal and State Governments frustrated reasonable investment-backed expectations. And it contends that it meets a test proffered in some recent arbitral tribunals for determining violations of the customary international law minimum standard of treatment because the Government's actions dashed its so-called legitimate expectations.

We will show that what happened with respect to the Imperial Project could not, in the circumstances that arose, have disappointed any investor's reasonable expectations. We will also show that the disappointment of legitimate expectations alone cannot constitute a violation of the minimum standard of treatment.

But for now, what I would like to do is to
note that there are all kinds of expectations, but not all are the kind that affect an indirect expropriation analysis. Glamis itself has been all over the field in its formulation of the test, but by mixing up different kinds of expectations, Glamis has attempted to gloss over the fact that it lacked the kind of expectations that are legally relevant when assessing an indirect expropriation claim. So, it's important as you listen to the testimony offered over the next few days over this issue to discern whether the expectations on which Glamis's witnesses testify are of the kind that are given consideration in the law. Let me review some of the ways in which Glamis has attempted to muddle this issue. For some time, Glamis contends that it had a protected expectation that its investment would not be expropriated. For example, at paragraph 150 of its Reply, as you can see on the screen, Glamis stated: "There was no way for even the most prudent of investors to recognize that so-called cultural-resource protection would yield an expropriation of Glamis's Imperial Mining claims." Of course, this sort of formulation is of no help at all because it begs the very question at issue.
in an indirect takings claim.

Other times, Glamis contends that it had a relevant expectation because it had concluded that it was probable that it would be able to go forward with the project as it had proposed to do. Thus, for example, at paragraph 479 of its Memorial, Glamis states: "Glamis's understanding of and reliance on the CDPA and the process leading up to it, its understanding as to the Quechan Tribe's position on the Imperial Project area, its understanding of the applicable standards governing BLM permitting of mining plans of operations, and its understanding of applicable state reclamation and mitigation requirements all led Glamis to the expectation that the Imperial Project would be viable."

Mr. President, this is merely a statement of probability. It's an assessment of the probability that their project would go forward. That it may have been reasonable for Glamis to conclude that it was probable that it could go forward, as it had proposed, is not the same thing as saying that it was reasonable for Glamis to exclude as possibilities other outcomes, such as those that actually occurred. The mere reasonableness of probability assessments is not what is protected by the law. Results of Government action other than predicted results occur all the time in business.

One last example: At other times, Glamis
invokes the fact that it did not expect the discovery
of variable cultural resources on the Imperial Project
Site. For example, at page--at paragraph 451 of its
Memorial, Glamis stated: "At no point in that lengthy
and detailed evaluation process could Glamis have
suspected that the Quechan Tribe had grave concerns
about the Project area."

But this and other of Glamis's statements are
not references to the risks of adverse Government
Decisions. They are references to external facts. No
liability can attach to Government measures taken in
response to discovery of external facts that are
contary to the public interest. This is seen in the
Hunziker versus Iowa case that we cite in our written
materials, where discovery of an Indian burial ground

after the investment was made was the basis for the
refusal to issue a building permit for a housing
department or development. It was irrelevant that the
investor in that case could not have predicted the
discovery of the burial mound.

It is also seen in the case of Good versus
the United States, another case that we discussed,
where the designation and discovery of endangered
species after the investment was made led to a refusal
to authorize wetlands to be developed. It was
irrelevant whether the investor was reasonable in not
expecting certain species to be added to the
endangered species list after his investment or not to
expect that those species would be found on his property.

The discovery of external facts is simply not a risk—i.e., simply a risk of investing, and the law does not burden the public Treasury with that risk. The real task for determining whether reasonable investment-backed expectations have been frustrated here is whether Glamis could reasonably have expected that if highly valued Native American cultural values were discovered on its site, there was still no real possibility that it would be prevented from mining gold in the manner it had planned to do. Or whether it was reasonable for Glamis to expect that there was no real possibility that additional backfilling would be required, if it was shown, based on experience, that the reclamation techniques employed at existing open-pit metallic mines in the California Desert were not effective in assuring compliance with preexisting law requiring the reclamation of lands to usable condition.

Both of these are the kind of expectations that are to be considered in an indirect takings analysis, and it is our contention that Glamis could not reasonably have had either expectation. This is true for Glamis's expectation with respect to the California measures, but it is also true with respect to its expectation with respect to the Federal measures, including, as we will show, application of
the undue impairment standard.

Glamis's expectations on which were the only expectations discussed in this morning's presentation--odd, since that's--the application of that standard was so short-lived.

Mr. President, contrary to statements in Glamis's Reply Memorial, this is not to accuse Glamis of being blind or foolish or of acting unreasonably. All investment decisions are taken in the face of risks. Whether it was reasonable for Glamis to make its investment here in the face of these particular risks is not for us to say, but it is for us to say that it would have been unreasonable for Glamis not to have figured in its investment calculus the real possibility that the Government would take these actions; that is, actions to protect and ensure access to Native American sacred sites, as well as to ensure that lands are returned to a usable condition.

And that is why Glamis could not have had any reasonable expectation that these risks were not real, and the public cannot be expected to guarantee against any failure by Glamis to do so.

Now, it's hard to escape the conclusion that in the end, what Glamis is really arguing is that it was reasonable for it to expect that the specific
regulatory requirements it faced when it made its investment would not be changed. While Glamis says it doesn't question that Government regulations may change over time, in reality its claim is based upon an assumption that it is entitled to be held harmless from the economic effects of such changes. Nowhere is this more evident than when Glamis contends that the customary international law minimum standard of treatment includes an obligation for States to act transparently. In paragraph 548 of its Memorial, Glamis states, "Glamis could not have fathomed, as it made its nearly $15 million investment, that BLM would reinterpret years of mining and public land law to fashion such a denial authority. Respondent acted in an arbitrary and nontransparent manner, preventing Glamis from knowing, "beforehand any and all rules and regulations that will govern its investments," as required under Tecmed and CMS gas."

In effect, then, according to Glamis here, the right to know, "beforehand any and all rules and regulations that will govern the investment," means that they must be compensated for the effects of any changes made to the existing rules and regulations after the investment is made because it could not have been known in advance. Now, Mr. President, as we will show, neither case cited in their quotation really stands for that
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proposition, but what is important here is to recognize that this proposition is what is at the heart of Glamis's case. Glamis is seeking public indemnification for the economic effects of any and all changes to the regulations governing its activities made after its investment, and that is why Glamis's claims are without merit.

Now, from what I have just described, it is clear that Glamis's claims depend, in large part, on allegedly disappointed expectations relating to the cultural resources sought to be protected, first by the rescinded Record of Decision, and later by Senate Bill 22. It appears that as it did in its written submissions, Glamis intends during this hearing to devote a great deal of attention to cultural resource issues since it's called to testify not only its own expert on cultural resources, but the archaeologist whose firm completed some of the Imperial Project cultural resource surveys and a BLM archaeologist. You will be likely be hearing a lot about archeological features and trail identification over the next few days.

The evidence and testimony that Glamis has proffered and which it intends to proffer on these topics, however, is simply irrelevant. It is a distraction that need not occupy your time. Clearly, it is not this Tribunal's function to definitively determine the course of the Quechan sacred trail
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12 network. This is not an international arbitration
13 concerning a boundary dispute where the Tribunal is
14 asked to make factual findings on disputed questions
15 like that. Nor is it a domestic administrative
16 tribunal. Even a domestic Court wouldn't delve into
17 factual issues such as these.
18
19 So, what is Glamis's point in spending so
20 much time on these issues? Although it doesn't come
21 out and say it directly, Glamis is clearly trying to
discredit the Quechan Tribe. There is really no
22 getting around the fact that a large part of its case

13:42:01 1 is based on having this Tribunal conclude that the
2 Tribe is hypocritical. It wants to leave the
3 impression that the Tribe conjures up claims that
4 areas have spiritual importance when it suits its
5 interest, such as when it would prefer for some other
6 unknown reason not to have a mine developed, but makes
7 no claims when its own interests are at hand, as when
8 it wants to engage in profit-making activities.
9 Glamis has not said this as bluntly. In
10 fact, in her second report, Dr. Sebastian has
11 disavowed any such strategy. But there can't be any
12 mistake about it. That is what Glamis is alleging and
13 that is what they are asking you to determine. What
14 other possible relevance to the case is there to the
15 fact that it had been reported that the Quechan may
16 seek to building a casino on its reservation? This is
17 recent news. It has nothing at all to do with
Glamis's proposed Imperial Project, yet Glamis has gone out of its way to submit recent news reports about this proposal, notwithstanding the fact that those reports also convey the fact that the Tribe itself is torn about the proposed casino and its location, and it does not appear that any final decision has been made.

Glamis claims that the casino is proposed to be built in an area that has been identified by the Quechan as sacred. The only possible reason for Glamis to introduce this fact is its desire to have the Tribunal conclude that the Quechan are not sincere in raising claims that areas have spiritual and religious significance to them.

Why does Glamis spend much time focusing on the North Baja Pipeline project? The cultural resource survey for that project was begun in 2000, well after the cultural resource surveys for the Imperial Project were completed. Yet, Dr. Sebastian devoted considerable attention to that project in all of her reports. She actually traveled to the area before submitting her last statement to take pictures of the pipeline's path in attempt to match that path to a map of trails that is in evidence.

For what purpose was this done? Dr. Sebastian concludes in her statement that the Baja Pipeline project destroyed trails that had been
identified by the Quechan as sacred, but that conclusion is directly contradicted by the cultural resource survey for that project, which showed that the Quechan did not oppose the Project because all ceremonial features and sacred trail segments were avoided. Dr. Sebastian doesn't base her contrary conclusion on information she obtained from the Quechan, nor from the archeological site records of that project. Rather, she bases it on her estimation of where the trail network and pipeline were likely to intersect.

By introducing such hypothetical conclusions, Glamis again seeks to leave the impression that the Quechan are selective when resisting encroachment upon areas of religious, spiritual, or cultural significance to them. The United States has absolutely no reason to believe that the Quechan have acted hypocritically or insincerely when seeking protection for sacred sites. Nor could the Tribunal make any such finding on the evidence before it. But even if this were the case and even if the Tribunal had such evidence before it, what would it prove? Absolutely nothing. The Quechan are not on trial here. The United States is the Respondent in this action, and there is absolutely no
basis whatsoever to conclude, one, that the Quechan lied when informing the United States and cultural resource surveyors that certain sites were sacred to them and two, that the United States knew or should have known about this. To the contrary, there is every reason to believe that the Quechan were and are sincere in their claims, that the area of the proposed Imperial Project retains cultural and religious significance for them. In fact, we have and will demonstrate that undisputed archeological evidence corroborated their claims that the area was used for ceremonial purposes. And even if this conclusion could be called into doubt based on the Quechan's actions in connection with other more recent projects, which we vigorously dispute, it would still be irrelevant because this information postdates the United States's actions taken in connection with the Imperial Project, and this could not have influenced them.

There is simply no evidence that the United States had any reason to doubt the veracity of the information that was conveyed to archeological surveyors and integrated into the cultural resource surveys. It was on the basis of this voluminous archeological and ethnographic information that Federal and State Government decisions were made. In fact, for Glamis's theory to have any relevance, this Tribunal would have to find that a team of
professionaL archaeologists, the BLm, the California State Historic Preservation Office, the Advisory Commission on Historic Preservation, and the entire Department of Interior had reason to believe that the claims made by the Quechan were false, but nevertheless credited those claims. But not even Glamis makes such a far-ranging suggestion.

As we have and will demonstrate, there was ample evidence supporting the conclusions public officials reached with regard to the cultural resources in the proposed project area. If these conclusions were factually incorrect, that is legally irrelevant and cannot provide a basis for holding the United States internationally liable. Likewise, all of the testimony and evidence regarding the Quechan's actions in connection with projects that postdate the actions taken with respect to the Imperial Project are legally irrelevant.

For these reasons, we would suggest that Glamis's focus on the cultural resource issues is misplaced.

Mr. President, the next subject I would like to touch on as we prepare to hear testimony is the issue of valuation. As Mr. Gourley noted earlier, you will hear a lot of testimony on valuation issues this week. Now, we certainly agree that these issues are of utmost importance to this case, not so much for purposes of damages, which is where Mr. Gourley
relegated them, but because they're fundamental to the issue of whether there has been a violation of the NAFTA.

This is a very important issue, but again, in our view, much of the witness testimony in this area will prove to be unnecessary.

Now, typically, in an arbitration of this nature, one of the most difficult tasks presented to a tribunal is to make determinations in highly technical areas where there are dueling experts. But in this case, the Tribunal can be spared that conundrum since there are contemporaneous documents internal to Glamis containing the very information that the two parties' experts have been asked to produce. Glamis itself performed valuations of the Imperial Mining claims that remain the most authoritative representations of Glamis's true view of the economics of the Imperial Project, even with full backfilling taken into account. As it happens, the United States's experts' conclusions corroborate the conclusions that had been reached by Glamis itself. It is only Glamis's expert, retained for purposes of this arbitration, that has reached results that are so far outside the range of results not only of the United States's experts, but of its own client as to render that expert's reports unreliable.

The very existence of Glamis's contemporaneous documents, we submit, renders
extensive witness testimony regarding valuation issues

13:50:48

unnecessary.

Now, Glamis has tried to distance itself from the implications of these internal analysis and will undoubtedly continue to do so this week. Indeed, we heard no mention of them whatsoever this morning. So I would like to make a few points in advance of this testimony.

One way in which Glamis has tried to divert attention from its own internal valuations is to adopt a novel theory first proffered by Professor Wälde, and that is that in accordance with the view that objective measures of value are to be preferred, Glamis's own accounting write-off is the best evidence of economic impact in this case.

Now, there are numerous problems with this theory, not the least of which is that Professor Wälde is neither a valuation expert nor an accounting expert, and he is to be forgiven, therefore, for not understanding that the way the write-down is stated in Glamis's financial reports reserves the possibility of substantial value providing significant latitude to the reporter and thus is far from objective.

13:52:06

In addition, however, the write-down cannot
constitute evidence of the economic impact of the California measures because it was made almost two years before the first of those measures was even adopted. But the meaninglessness of an accounting write-off like the one Glamis made is best demonstrated by the fact that on the same day that it announced its write-off of the Imperial Project, Glamis also announced the write-off of the Cerro Blanco Project in Guatemala, which it has since revived and is actively pursuing as we speak. So, accounting write-offs obviously have their limits as reflections of value.

But most significantly, Professor Wälde does not explain why such an accounting device should be preferred as an objective gauge of value over Glamis's own valuation calculations performed two years later for its own internal use in decision making and specifically in response to the California measures.

The second way in which Glamis tries to establish distance between it and its own confidential calculations is to denigrate them. Later in the week we'll show why they cannot be considered to be mere back-of-the-envelope calculations as Glamis now portrays them to be. Suffice it to say now that until it procured the services of its valuation expert in this case, Glamis never disavowed the data in those analyses. We know, for example, that they were not superseded by any more formal analyses within Glamis.

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because none have been cited by Glamis and none were produced to the United States during discovery. There was no evidence that Glamis independently considered the data in those analyses to be wrong, whether they were back of the envelope or not; and this is crucial because that data completely contradicts the economic impact Glamis has claimed in this arbitration as the basis for its expropriation claim.

Here is what Glamis stated in paragraph 437 of its Memorial: "Operation of the Imperial Project under California's novel reclamation requirement would result in multi-million dollar losses, rendering the value of Glamis's property to be zero, as of adoption of the California measures on December 12, 2002."

But the data set forth in Glamis's internal calculation show that at the price of gold that both Behre Dolbear and Navigant agree should be used, the Project had a substantial value, even with complete backfilling, at least $9.1 million. That's what Glamis's own data shows at the price of gold its own experts say should be used, and $9.1 million is not zero, the value Glamis claimed in its Memorial.

So, how does Glamis try to get around this devastating fact? Very simply. It invented an entirely new theory for the degree of economic impact sufficient to claim an indirect expropriation, the theory of economically strategic profit. But before looking at this new theory, it would be instructive to...
look at how Glamis originally characterized that impact. You recall that in the same paragraph of this Memorial I just quoted, Glamis stated: "Like the property owners in such cases--in cases such as Tecmed, Metalclad, Lucas, and Whitney Benefits, Glamis has been absolutely precluded from any beneficial use or enjoyment of its property--property right as a result of Government measures that render its right to extract gold worthless."

But here is how Glamis attempts to reconcile its zero-value and no beneficial-use assertions with its internal analyses showing a $9.1 million value. Glamis states in paragraph 103 of its Reply Memorial, "A company will not move forward with a 15-year project that involves moving hundreds of millions of tons of material simply to turn an infinitesimal profit. It must turn an economically strategic profit." And Glamis's back-of-the-envelope analysis in January 2003 confirmed that such a result was not possible given the new mandatory backfilling regulation. If the anticipated profit is insufficient to attract a reasonable mining company to proceed with extraction, then the property--the mineral rights--have no value.

So, now, under its new theory of economically strategic profit, the Government measures involved did not preclude all beneficial use and enjoyment as Glamis originally alleged, but only economically...
strategic use and enjoyment. That is, zero value means any value lower than Glamis might obtain through an alternative investment. So, the Imperial Project

wasn't worthless to Glamis. It just wasn't worth as much as Glamis would have liked it to be, given the other possible uses it had for its capital. Now Glamis wants the U.S. public to pay for this claim shortfall.

Mr. President, Members, no testimony you will hear this week will speak more eloquently or pervasively as to the value of Glamis's investment, even taking into account compliance with the challenged regulations, than Glamis's own internal contemporaneous documents. And those documents clearly demonstrate that the impact of the Government measure at issue in this case was insufficient to support a claim of indirect expropriation.

Let me just make one more point concerning valuation. In considering Glamis's claim the Tribunal should not lose sight of a crucial fact. Glamis continues to this date to hold its mining claims and continues to pay annual fees to the U.S. Government to maintain those supposedly worthless claims, as Mr. Gourley confirmed this morning. Why would a company continue to pay $100,000 a year to
maintain worthless mining claims? We will have more
to say about this later in the week, but the point to
be made now is that the Imperial Project is, in fact,
more valuable today, even with complete backfilling,
than it ever was. Today, with gold prices surging to
almost $675 an ounce, Glamis has, as I mentioned,
revised the Cerro Blanco Project and could just as
well revise the Imperial Project. Indeed, as of 2006,
as we have shown, the Imperial Project was worth an
estimated $159 million and can be expected only to
increase in value.

Mr. President, I would respectfully request
that Members of the Tribunal, as you listen to all of
the testimony and argument you are likely to hear
about how Glamis suffered mistreatment, you keep this
fundamental fact in mind.

Finally, Mr. President, I would like to say a
few words about the character of the California
measures that Glamis is challenging. Much as the
Claimant in the Methanex case attempted to do, Glamis
has argued that certain statements in the legislative
and regulatory history of the California measures show

that those measures were targeted at Glamis, and it
claims that the Tribunal should conclude that the
measures were intended to prevent its proposed
Imperial Project from going forward.

Now, we are all familiar with the political
process. We all know that on any issue there are a
range of views, and a range in the intensity with
which those views are held, and this is true for
members of the public, as well as legislators and
administrators. You heard some of those views
portrayed this morning, and you will undoubtedly hear
more about some of the views expressed on the measures
over the next few days, but nothing has been presented
to demonstrate that Glamis was in any way
discriminated against.

The evidence demonstrates that neither the
California regulation nor Senate Bill 22 prevents the
Imperial Project from going forward. They merely
require and were, by their very terms intended to
require, that any company proposing to operate a
metallic open-pit mine in an area where the measures
apply to institute complete backfilling. These
requirements do not apply solely to the Imperial
Project. They apply generally to all similarly
situated proposed mines in California.

Indeed, as I mentioned, the reclamation
requirements of the regulation have been applied to
another mining company, Golden Queen. And Senate Bill
22 would apply to any future open-pit metallic mine
that falls within its coverage. Neither is limited to
Glamis’s project in California Desert.

The fact that Glamis is mentioned in the
legislative history and the administrative record as
being a source of the problem that California sought
to correct does not make the California measures
discriminatory. As it happens, Glamis's project,
especially as it was proposed to be conducted, was the
Project on the table when the continuing threats posed
by open-pit metallic mining came to the fore.

What California did is what state
legislatures and agencies do all the time: It
responded to these problems by promulgating a
regulation and enacting legislation. That Glamis's
proposed project may have been the thing that brought
these problems to light is legally irrelevant. Though
the Imperial Project was clearly impetus for these
measures, Glamis was not targeted by the regulation or
by the legislation, any more than Methanex was.

Both of these measures are applicable
generally, and neither of them prevents Glamis from
exercising its mining rights, however much some may
have wished or even believed otherwise.

Mr. President, Members of the Tribunal, those
are the key points that we hope you will bear in mind
as we proceed to the Claimant's case-in-chief, but we
would also like you to consider the full range of our
arguments in defense, so we thought it would be
helpful to conclude our opening with a summary survey
of the United States's case. So, as I thank you for
your attention to my remarks, I would ask you to call
upon Ms. Menaker to carry out that task.
Thank you.

Thank you.

Ms. Menaker.

Thank you, Mr. President, Members of the Tribunal. Good afternoon.

As Mr. Clodfelter noted, I will briefly summarize for you the manner in which we intend to prevent—present our defense later this week. Now, I'm not going to present detailed responses to the legal arguments that we heard this morning from the Claimant, but rest assured that during the course of presenting our defense later in the week, we will respond in detail to every one of the arguments that Claimant did make this morning. But rather, what I'd like to do now is to just spend a few minutes describing how we intend to organize our defense in order so that I can highlight for the Tribunal what the United States considers to be the relevant issues that need to be determined in this case.

And we are going to be organizing our presentation in much the same way as we have presented our defense in our written submissions, so that is we will separately address the California measures and the Federal measures, and will also first address Glamis's expropriation claim and then we will address its minimum standard of treatment claim.

When addressing Glamis's expropriation claim...
we'll begin by showing that neither of the California measures exacted an expropriation of Glamis's mining claims, and so let me just make a couple of preliminary remarks before setting out exactly what we'll be demonstrating when we address Glamis's claim that the California measures were expropriatory. And the first point that I would like to make is just to remind the Tribunal that there are two distinct California measures at issue in this case: That is the SMGB regulation and Senate Bill 22. And as we have noted throughout our written submissions and as we will continuously note throughout our oral presentations, those two measures are separate and distinct measures that were adopted by different branches of the California government to address different issues. And although it may appear somewhat confusing at first glance because we are dealing with a piece of legislation and a regulation, it's important to note that the regulation at issue does not implement the legislation. So, in other words, the SMGB regulation is not implementing legislation for--is not an
from all of the other reasons, it's quite clear that this is the case when you look at the timeline of events because you will recall that the emergency SMGB regulation was adopted at least four months prior to the time that Senate Bill 22 was even enacted.

So, keeping the distinction between the two California measures clear is important for a number of different reasons. First, throughout various portions of our argument, we will be referring to the purposes of the measures, and the purposes of the two measures was very different. Glamis has also emphasized its expectations with respect to the regulatory and the legislative regime that governs mining in California; and while neither of the measures could have upset an investor's legislative expectations, this is also for different reasons, as each of the measures was adopted pursuant to a different regime and for a different purpose.

And finally and importantly, Glamis alleges that both measures have been applied to it, and that both measures impose on it the same reclamation requirements. Thus, if the Tribunal finds that either one of the California measures is not expropriatory, then Glamis's expropriation claim must fail because Glamis, by its own admission, would have had to comply with the very same requirements pursuant to the other nonexpropriatory measure.

So, in other words, it's unnecessary for the
United States to show that both the SMGB regulation and Senate Bill 22 are not expropriatory; we will do that. However, once the Tribunal concludes that one of the measures is nonexpropriatory, its analysis can stop there.

The second preliminary note that I will raise is in connection with our rightness defense, which Mr. Clodfelter also mentioned this afternoon. So you will recall that it is our submission that Glamis's expropriation claim with regard to the California measures should fail because neither of those measures has been applied to it and, therefore, Glamis's claim is not ripe. But rather than addressing this argument separately, throughout our presentations we will simply note where the lack of rightness is apparent, and we will show how that defeats Glamis's expropriation claim at every step of the way.

Our defense that neither of the California measures expropriated Glamis's property will be divided into two parts. First, we will demonstrate that even assuming that Glamis's mining claims would be rendered worthless if California's reclamation requirements were applied to its proposed Imperial Project, that its claim would fail because neither of the measures interfered with any property right that Glamis holds in its unpatented mining claims. It's axiomatic that there can only be an expropriation if there has been a taking of a property right or a
property interest that is owned by the Claimant, and
here Glamis claims that it has been subjected to the
reclamation requirements in both of the California
measures, but we will show that Glamis's rights in its
mining claims did not include the right to mine in a
manner that would cause the very harm that each of the
California measures was designed to prevent.

When Glamis's claims were located, both SMARA
and the Sacred Sites Act were already part of
California's property law. SMARA requires that mined
lands be returned to a usable condition readily
adaptable for alternate use post-mining, and that such
mines pose no danger to public health and safety. And
the Sacred Sites Act requires that persons that
operate on public property refrain from actions that
would irreparably damage Native American sacred sites
or interfere with Native American's ability to
practice their religion.

Glamis's mining claims were always subject to
these preexisting legal limitations. Because the
SMGB's regulation did no more than specify the manner
in which SMARA's standard should be applied to
open-pit metallic mines, and because Senate Bill 22
did no more than specify how such harm to Native
American sacred sites and religious practices can be
avoided where there is a hardrock open-pit mining
operation in the vicinity of a Native American sacred
site, neither of the California measures can be
In other words, because Glamis never had a right to mine in a manner that produced the kind of harm that each of these measures was designed to prevent, neither measure interfered with any property interest held by Glamis.

This is a threshold inquiry that must be addressed in every expropriation claim. If the Tribunal finds that Glamis had no property right that was interfered with by either of the California measures, as we will show, then Glamis's expropriation claim fails. This is, again, regardless of the economic impact that the California measures have or may have on Glamis's proposed mining operations. No other issues in connection with Glamis's expropriation claim based on the California measures would need to be considered by the Tribunal.

Even if the Tribunal were to find that Glamis's property interest was not limited by the background principles under SMARA and the Sacred Sites Act, however, Glamis's expropriation claim based on the California measures would still fail, as we will show.

We will do this by analyzing each of the...
three factors that tribunals and courts commonly consider when analyzing a claim for indirect expropriation. And those three factors are assessing the economic impact of the challenged measure, the investor’s reasonable expectations, and the character of the measure. And we will show that each of these factors weigh strongly in favor of a finding of no expropriation with respect to each of the California measures.

Now, tellingly, when Glamis this morning discussed these factors, it skipped over the economic impact of the challenged measures altogether. It argued that if the California measures didn’t result in a taking of all of the mining claims value, then the Tribunal would need to balance Glamis’s expectations against the character of the measures. But this is simply wrong. The Tribunal needs to balance the economic impact of the measures with a reasonable investment-backed expectations and along with the character of the measure. And, in fact, if an analysis of the first of these factors, the economic impact of the measure, reveals that the impact was not substantial enough to result in a taking of the property, then the expropriation claim fails, and that, we contend, is the case here.

In this respect, we will demonstrate that Glamis’s mining claims retain significant value, even if one assumes that the reclamation requirements in
the SMGB regulation and in Senate Bill 22 have been
applied to it. As Mr. Clodfelter noted, although
there are voluminous valuation reports on this subject
in from both of the parties, in our view it's quite
unnecessary for the Tribunal to get embroiled in
issues of valuation because we are fortunate to have
contemporaneous documents that Glamis itself prepared
to calculate the cost of complying with California's
reclamation requirements set forth by the SMGB
regulation. Those documents prove that the
reclamation requirements do not render Glamis's mining
claims worthless, as Glamis now argues, and again,
although Glamis has tried to distance itself from
those documents, international tribunals, like
domestic courts, repeatedly have held that

countemporary documents produced in the ordinary
course of business are more reliable than evidence
that disputing parties produce after a dispute has
arisen.

In any event, as Mr. Clodfelter also noted,
our experts have conducted independent valuations that
corroborate the calculations that Glamis itself made
before it hired a valuation expert for purposes of
this arbitration, and we'll go over these reports in
some detail. And while we do that, we will
demonstrate that the expert report that Glamis has
commissioned for this arbitration is deeply flawed and
unreliable.
Because Glamis’s mining claims retain such significant value, even assuming that Glamis was subjected to both of the challenged California measures, Glamis’s expropriation claim fails, and again the Tribunal need not go further, any further in its analysis to dismiss that claim. But we will, nevertheless, analyze each of the two remaining factors and likewise demonstrate that those factors only strengthen the conclusion that neither of the California measures expropriated Glamis’s investment.

In this respect, we will show, for example, that the regulatory regime governing mining, including California’s passage of SMARA and the Sacred Sites Act years before any of Glamis’s mining claims were located, as well as the fact that Glamis never received any specific assurance from the Government that it could mine in a manner that would cause the harm that each of the California measures was designed to address, Glamis could not have had any reasonable expectation that it would not be subject to the reclamation requirements imposed by each of the California measures.

We will also demonstrate the applicability here of the presumption under international law that nondiscriminatory regulatory measures of general application are not expropriatory. We will show that both the SMGB regulation and Senate Bill 22 were...
adopted for distinct public policy purposes and that both measures are not discriminatory. As such, we will demonstrate that these remaining factors

conclusively show that neither of the California measures could have exacted an expropriation of Glamis's mining claims.

We will then turn to Glamis's argument that the Federal Government expropriated its mining claims and show that that claim, too, is unmeritorious. Although the precise underpinning for this is not all that clear to us, Glamis--it appears that Glamis argues that the temporary denial of its Plan of Operations by virtue of the later rescinded Record of Decision, as well as the fact that to date the Federal Government has not approved its Plan of Operations constitutes an expropriation of its mining claims. We will show that neither of these allegations is correct. And specifically, we will demonstrate that at all relevant times the Federal Government conscientiously processed Glamis's Plan of Operations, stopping only when Glamis instructed it to do so, and that none of its actions could be deemed to have expropriated Glamis's rights in its unpatented mining claims.

We will then turn to examine Glamis's claims
14:17:59 that the United States violated the customary international law minimum standard of treatment. And before delving into the specifics of this claim we will spend some time elaborating on the meaning of the minimum standard of treatment and identifying what a Claimant must prove in order to identify a Rule of customary international law.

We will then show that Glamis has not met its burden of establishing that the standards that it proposes to measure the United States's conduct against have become a part of customary international law, and, in particular, we will show that Glamis has not proven that there is any customary international law requiring transparency. We will do the same with respect to Glamis's argument that customary international law prohibits state action that frustrates an alien's expectations, and we'll explain that Glamis has not proven that what it describes as arbitrary conduct is conduct that is prescribed by the customary international law minimum standard of treatment.

We will then examine each of the California measures and show that neither of them violated the international law minimum standard of treatment. We will also show that even if the Tribunal were to apply the standards that Glamis has introduced, the California measures pass muster under
those standards. Both the SMGB regulation and Senate Bill 22 were adopted in a transparent manner. Neither measure could have upset reasonable expectations, and neither measure is arbitrary because both measures were rational responses to perceived problems.

Finally, we will demonstrate that the Federal Government did not violate the customary international law minimum standard of treatment at any time during the processing of Glamis's Plan of Operations. As an initial matter, it is important to note that many of the actions about which Glamis complains in this regard took place more than three years before it submitted its claim to arbitration and, therefore, are time barred. And this is true, for example, of Solicitor Leshy's 1999 M-Opinion, which Claimant spent so much time discussing this morning, but nevertheless, we will show that none of these time-barred actions violated the United States's customary international law obligations.

We will show that Glamis is asking this Tribunal to second-guess factual determinations and legal conclusions drawn by agencies at every step of the process, and we will explain that this is not the role of an international tribunal. And that even if this Tribunal were to find mistakes of fact or law that were made, that such errors do not violate a State's obligation to provide investment's treatment in accordance with the customary international law.
minimum standard of treatment.

Now, Glamis has made it clear this morning that it does not want the Tribunal to scrutinize each of the actions taken by the Federal Government. Instead, it repeatedly urges the Tribunal to look at the totality of the circumstances.

It is our contention that Glamis stresses the totality of the circumstances, because when you do look carefully at each of the actions that the Federal Government took, you won't find anything wrongful. If the actions themselves are not wrongful, considering

all of the actions together as part of the totality of the circumstances gets Glamis nowhere. And we will, indeed, demonstrate that each of the complaints that Glamis has made both about the process and about the substance of the Federal agency's actions and decisions is without merit.

And while we do that, we will also demonstrate, as we will have done with Glamis's claim challenging the California measures, that even under its own standards, Glamis's claim fails because the Federal Government's actions were transparent, that any expectations that Glamis had that the Government would act in a different manner were not reasonable, and that none of the Government's actions can be characterized as arbitrary.

So, with that, this marks the end of the United States's opening remarks, and I thank the
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18 Tribunal for its attention, and we look forward to presenting our defense later this week.

20 Thank you.

21 PRESIDENT YOUNG: Thank you very much.

22 Mr. Gourley, we turn back to you to commence.

14:22:43 1  

MR. GOURLEY: I will turn it over to

2 Mr. McCrum

3 PRESIDENT YOUNG: We will take a quick

4 five-minute break.

5 (Brief recess.)

6 PRESIDENT YOUNG: Thank you. We will commence the hearing again.

7 Mr. McCrum

8 MR. McCrum Thank you, Mr. President,

9 Members of the Tribunal.

10 Claimant Glamis Gold, Limited, will now proceed with the evidentiary phase of this hearing, presenting its sworn witness testimony addressing factual issues that have been heavily contested in this case by the United States since the submission of the Counter-Memorial as well as the Rejoinder. We have witness binders that we have presented to each member of the Tribunal and Ms. Harhay, and we have provided those witness binders with the--to the counsel for the State Department as well, and the witnesses will have witness binders to refers to the exhibits as we move along. Our first
witness is Mr. Kevin McArthur, the Chief Executive Officer of Goldcorp, Inc. The exhibits that we will be reviewing with him are in the binder bearing the tab Hearing Exhibit for C. Kevin McArthur midway through the binder.

If the--we'd be ready to swear the witness in at this time, Mr. President.

Mr. McArthur, will you read the oath in front of you.

KEVIN McARTHUR, CLAIMANT'S WITNESS, CALLED
THE WITNESS: I solemnly declare upon my honor and conscience that I shall speak the truth, the whole truth, and nothing but the truth.

MR. McCRUM Thank you.
THE WITNESS: Thank you.

DIRECT EXAMINATION
BY MR. McCRUM
Q. Mr. McArthur, can you please state your full name, title, and address for the Tribunal.
A. Charles Kevin McArthur. I'm the President and CEO of Goldcorp, Inc. My office address is 666 Burrard Street in Vancouver, British Columbia.

Q. And prior to Goldcorp, what was your position with Glamis Gold, Limited?
A. I was the President and CEO of Glamis Gold,
Q. Do you hold a degree in mining engineering and did you work as a mining engineer in metallic mineral mining before you joined Glamis Gold, Limited?

A. Yes, I hold a degree in mining engineering from the University of Nevada Reno Mackay School of Mines. I've held a variety of positions in metallic mining since 1980.

Q. Can you describe some of your early experience, Mr. McArthur, in the metallic mining field after you obtained your mining engineering degree.

A. Yeah. In 1980, January 1980, I started work with Homestake Mining Company, one of the at that time the largest gold mining producer in the world. That was in 1980. Then, in 1983, I moved to British Petroleum. I was a mining engineer with Alligator Ridge Mine, one of the early heap-leach open-pit mines in Nevada. I was there in a variety of positions as Senior Mining Engineer, Blasting Foreman, General Foreman. Was transferred to the headquarters in Denver. Thereafter, moved on as Chief Engineer to Greens Creek Mine in Alaska, to build that mine.

In 1988, I joined Glamis Gold as an engineer in the Reno office. One of the Projects I was in charge of was the Imperial Project. 1989, I moved down to the Picacho Mine, where I was the General Manager for seven years, and one of
my duties was bringing along the Imperial Project through exploration, to permitting, to building the mine. In 1995, I moved to our same company, the Rand Mining Company. I was the President and General Manager.

1997, I became the Chief Operating Officer. 
1988, the President and CEO of Glamis.

Q. Mr. McArthur, you've referred to several mining operations, metallic mining operations that you have been associated with as a mining engineer and mine manager during your experience at Glamis Gold, Limited, and prior to that. Were those operations profitable?

A. Every one of them. Very highly successful mines and profitable.

Q. Now, from concerning the work at the--in the California Desert Conservation Area, were the Rand and Picacho Mines open-pit gold mines similar to the Imperial Project?

A. Very similar. Open-pit mines, run of mine heap leaching, average grade of about .02 ounces of gold per ton. All of those are very similar mines.

Q. In your experience as Manager of the Picacho Mine, did you gain familiarity with the state regulatory requirements affecting mining?

A. Yes, as a General Manager of that mine for seven years, I was very--I became very familiar with all of the regulatory requirements.
Q. And that experience include reclamation plans under the California Surface Mining and Reclamation Act of 1975?

A. Yes. As a matter of fact, our Picacho Mine was the first mine that acquired a Reclamation Plan under SMARA. It had the SMARA plan number 001.

Q. And did your experience at the RAND and Picacho Mine in the California conservation area give you familiarity with the Interior Department Bureau of Land Management regulations affecting hardrock mining?

A. Yes.

Q. Can you compare the mining techniques at the Rand and Picacho Mines and ore grades to the proposed Imperial Project.

A. Yes. As I said, same process at both mines, open-pit mining, big mining equipment, average grades around 0.2 ounces per ton. We didn't crush the ore. We just blasted it and put it on the liners and leached the gold. Same process.

Q. Did the Bureau of Land Management or the California Counties of Imperial and Kern require complete backfilling as reclamation requirements at either the Rand or Picacho Mine?

A. No.

Q. And did you have an understanding about the role of Imperial and Kern County with regard to the administration of the California Surface Mining and Reclamation Act?
A. Yeah. I understood how it all worked, yes.

Q. Were the other--were there other operating open-pit gold mines in the California Desert Conservation Area during your years of experience there?

A. Yeah, there were a variety of gold mines in the area and then in a very close-in area at Imperial Project there were within a 10- or 12-mile radius, three other operating mines. Our Picacho Mine about 10 miles to the east to--about 10 or 12 miles to the west was the Mesquite Mine, and a handful of miles south of us was the American Girl Project, all very similar in scope and ore grades and processing techniques.

Q. You mentioned the Mesquite Mine, I believe. Was that larger or smaller than the proposed Imperial Project?

A. Much larger in terms of footprint and number of tons of material mined.

Q. How did those other open-pit gold mines in the California Desert Conservation Area affect your expectations and plans for the Imperial Project?

A. Well, I mean, we had over 10 years of operating experience in the area, and we had no
expectations that our permits wouldn't go through. We didn't see anything different in our operation that we didn't see at any of those other operations.

Q. I would like to refer to McArthur Hearing Exhibit Number 1 and put that up on the screen. This is a BLM document the Government had produced in this NAFTA proceeding. It is an internal BLM Director's briefing memo to the National BLM Director dated January 10, 1995.

Mr. McArthur, are you familiar with this document?

A. Yes, I am.

Q. And when you saw it, were you surprised to see in a document dated January 10, 1995, that the Glamis company, Glamis named predecessor Chemgold referred to as a good steward of the public land sharing BLM's responsibilities?

A. Well, no, this didn't surprise me at all. We had been in the desert in Imperial County mining for 15 years. I had been there since 1988, and we knew that we had been doing a very good job. We enjoyed a very good relationship with all of the agencies, not only BLM but the county and the State through the Water Quality Control Board.

Q. The other companies referenced there under the statement, the secretarial statement DOI position, can you refer, describe who those operators are, Santa Fe and American Girl.
A. Well, Santa Fe was the company after Goldfields and then became Hansen and then later Newmont. That was the Mesquite Gold Mine. American Girl was, of course, the American Girl Gold Mine. Chemgold operated the Picacho Mine which I was the General Manager of for seven years, and also the Imperial Project just to the west of Picacho Mine.

Q. Turning to the highlighted section below that, there is a reference to Chemgold submitting a Plan of Operations. What Plan of Operations would that refer to, Mr. McArthur?

A. Well, in 1994, we presented a Plan of Operations for the Imperial Project to construct and operate a open-pit heap-leach gold mine very similar to the mines mentioned above.

Q. So, is that reference referring to the proposed Imperial Project Plan of Operations?

A. Yes, it is.

Q. And what was your level of involvement with that proposed Plan of Operations?

A. Well, I was the Manager of the Project. I was very much involved in preparation of the plan of operations.

Q. And the last highlighted section on this document, position of major constituents, upon seeing this document in this litigation, were you surprised to see the statement: "Local Government agencies and officials support existing and proposed mining
operations in Imperial County"?
A. No. Like I said, not surprising at all. We enjoyed very good relationships with all of the Government agencies. This, I guess, refers to the county, the Planning Department of the county. We had worked with them for many years and enjoyed very good relationship as a responsible mining company. And also the State through the Water Quality Control Board, who had worked very closely with us.

and we enjoyed very good relationships.
Q. Other than the Rand and Picacho Mines in the California Desert Conservation Area, has Glamis operated and reclaimed other open-pit gold mines in the United States and have they required complete backfilling?
A. No, they have not required complete backfilling, and we have reclaimed fully one mine in California, the Alto Mine. We're in the process of reclaiming two other mines in Nevada, the Dee Mine and the Daisy Mine without any issues, and we are also now in the process of reclaiming our Rand Mine up in Kern County, California.
Q. And do you have any substantial gold open-pit operations in the United States today?
A. Yes, we do. The Marigold Mine in Nevada is a rather large mine.
Q. Is that an open-pit mine?
A. Yes, open-pit heap-leaching, very, very
similar to Picacho, Rand, what Imperial would have been.

Q. Is the Marigold Mine in Nevada subject to complete backfilling requirements?

A. No.

Q. Is that mine on lands managed by the Bureau of Land Management?

A. Yes, it is.

Q. Has Glamis operated other open-pit gold mines in Latin America, including Mexico, and are they subject to complete backfilling requirements?

A. Yes, they operate a variety of gold mines in those areas, and, no, they are not.

Q. Roughly how many jobs are provided by your company's Latin American and Nevada open-pit gold mining operations today, Mr. McArthur?

A. Well, the company employs roughly 9,000 people. 2,500 of them are in Canada, roughly 400 in the U.S., and the remainder in Latin America.

Q. Between--turning back to the Imperial Project in the California Desert, between 1997 and December 1994, what types of companies--what type of activities was the company pursuing in the Imperial Project area and what approximate expenditures were involved?
14:46:49  
A. Yeah. That was mainly exploration plus feasibility studies, all the geotechnical investigations, all those things required to get the Project to a feasibility level.

Also, all of our baseline studies work and our permitting work, and by '94, a little over $4 million.

Q. During that time, were the exploration projects reviewed and approved by the Bureau of Land Management?

A. Yes, they were in conjunction with the county Planning Department.

Q. And were any of these BLM approvals for exploration challenged or appealed by the Quechan Tribe in the late 1980s or through the mid-1990s?

A. No, no.

Q. During this time, did the Quechan Tribal historian have any role in cultural resource reviews being carried out in the Imperial Project area under the supervision of the Bureau of Land Management?

A. Yes, a fellow by the name of Lorey Cachora. He was the Tribal historian. He was involved in the early cultural studies and worked with our consultants, and that gave me a pretty good comfort that we weren't having any problems there in the area.

Q. During your years of responsibility for the Picacho Mine, did the Quechan Tribe express opposition...
Q. Did you ever meet with Quechan Tribal leaders when they may have had the opportunity to express any opposition regarding the Picacho Mine or your early ongoing mineral exploration activities at the Imperial Project Site?

A. Yeah, I only had one formal meeting with the Quechan Tribe. They were building a new housing development to the north of the All-American Canal, and they had asked us to participate by spending a million dollars to build them a new bridge, and we, of course—we couldn't afford that, especially the way our company was at that time, and we did not participate in that, but there was no discussion or any indication that they were opposed to any of our mining operations at Picacho nor our Imperial Project at that time.

Q. Was that, the meeting that you referred to with the Quechan Tribe leaders, was that facilitated in any way by the Federal Government?

A. Yes. The Bureau of Indian Affairs sponsored the meeting.

Q. And were those discussions cordial or were they contentious?

A. They were cordial. There were no issues there.

Q. By the time you had submitted the
December 1994 Plan of Operations for the Imperial Project and during your work at the Picacho Mine, had you ever heard of any feature in the California Desert sometimes referred to as a Trail of Dreams in connection with the Imperial Project area or anywhere else in the California Desert?

A. No. I mean, I was aware of certain trails all over the desert and on our project site, but had never heard of it referred to as the Trail of Dreams.

Q. Shortly before you submitted the Plan of Operations for the Imperial Project in December 1994, did you become aware of the enactment of the California Desert Protection Act of 1994?

A. Yes, I did.

Q. And was the Imperial Project placed into any designated wilderness area or national park for permanent protection by the 1994 Act?

A. No. In fact, I worked very hard to make sure that---I wanted to field check the boundaries and to make sure that we were well outside of that bound--of the boundaries of the withdrawal areas.

Q. Were the congressional designations of those protected areas based on recommendations from the Bureau of Land Management, to your knowledge?

A. To my knowledge, yes.

Q. Was the Imperial Project ever in any recommended areas recommended by the BLM to Congress for designation as wilderness area?
A. No.

Q. And are there wilderness areas that are in vicinity, in the general vicinity of the Imperial Project area?

A. Yes, two of them. The Indian Pass Wilderness Area up to the north of the project, a couple of miles north, and also to the northwest of the Picacho Peak Wilderness Areas. These are areas set aside for a variety of reasons, including Native American cultural reasons.

Q. Did you play a role in monitoring that legislation to see how it might affect Glamis's interest in the Imperial Project mining claims?

A. Yes. Yes, absolutely. I worked closely with a person by the name of Kathy Lacy and Senator Feinstein's office here in D.C. to assure that our interests were--were heard.

Q. How did the passage of the 1994 Act in October of 1994 influence your plans regarding the Imperial Project?

A. Well, they gave us comfort that the Imperial Project was clear and that those lands would remain open for a multiple use. And I was very particularly concerned to make sure that the final legislation remained as it was then in the draft, that there were no buffer zones around these wilderness areas that would affect our operation.
Q. And did the language regarding no buffer zones, was that part of the final act, as you understand it?

A. Yes, it was.

Q. By 1997, as the Imperial Project Plan of Operations was pending at the Bureau of Land Management and the Imperial County, did you make any particular large purchases for mining equipment in anticipation of action on the Plan of Operations?

A. Oh, yeah, we were moving forward. We did a variety of things. We put in our first water well that cost about $500,000. We purchased a royalty on the property for another $500,000. We bought a shovel for $7 million, if that's what you're referring to.

Q. Did you say $7 million for one shovel?

A. $7 million for the electric shovel for the project.

Q. By 1998, did you have a face-to-face meeting with the BLM California State Director Ed Hastey?

A. Yes.

Q. Did you form any expectations regarding the Imperial Project in that, as a result of that meeting?

A. Well, I retained the same impression that I had all along, that there were no problems with the Project, and it would eventually get permitted, but Ed
4 Hastey took me aside and looked me in the eye and told me just give it a little time. You are going to get your permits for this project.
5 Q. By 1999, what was going on with the Project?
6 A. Well, we were experiencing some delays with the Project and just trying to figure out where we were going with the Project at that time.
7 Q. By 1999, nearly four years after the submission of the Plan of Operations, what did you do with the 7.2 million dollar mine shovel?
8 A. Yeah, at that time we were holding that shovel. It was costing us about $30,000 per month to store the shovel. We had other capital needs, and so we decided to sell that shovel and then to purchase a new one when we acquired our permits.
9 Q. After Interior Secretary Bruce Babbitt denied the Imperial Project on January 17, 2001, three days before leaving office, what accounting decisions did you make regarding Glamis's cash investment in the Imperial Project, which at that time was over $14 million?
10 A. We decided to write the Project off and to take a loss on our year-end statements.
11 Q. Turning to the California mandatory complete backfilling regulations adopted between December 2002 and April of 2003, what impact have those requirements had upon the value of the Imperial Project?
12 A. Well, they had a stunning, devastating effect
on our company and on the Imperial Project's value. I mean, it rendered the Imperial Project worthless.

Q. Is your conclusion on that consistent with or contradicted by the preliminary assessments of economic impact of backfilling carried out by your company in January 2003, which Mr. Clodfelter referred to this morning on behalf of the Respondent?

A. No, that does not contradict our findings. If you are referring to Jim Voorhees's memo, we asked Jim, our Chief Operating Officer, to provide an analysis of the impact of the consequences of backfilling, what was referred to as back of the envelope, which basically was what it was. We asked

Jim to provide us a view as to where the Project was headed.

And, by the way, we did not include increased costs. We didn't include additional capital costs to the Project because we were going to have to use the equipment more, which means getting new equipment or rebuilding the equipment we had got.

We didn't look at the delays to the Project that would be included and were not included in our economic analysis. We didn't look at the additional financial assurances we would have to put up for the Project.

And even so, with a very conservative view, the Project came up with a negative net present value.

Q. Mr. McArthur, did you hear Mr. Clodfelter say
it had a 9 million-dollar net present value this morning? Is that correct, according to that analysis?

A. No, that's not correct. That--I think he was referring to some of the upside gold values that were used in that analysis. At that time, our company was using $300 for its reserves calculations, $300 per ounce of gold, and our valuations of new projects also utilized $300. And in that case, it was a negative net present value.

But furthermore, we are a business. We just don't crank out numbers. We look at things in a variety of ways, and given the Governor's express intent to stop our project, it didn't make any business sense to move forward at that time. It would have been reckless. It wouldn't have been rational for us to continue with the Project.

Q. The supplemental report filed by Navigant five days ago and Mr. Clodfelter's statement this morning makes a reference to the Cerro Blanco project where Glamis Gold wrote off an 8 million-dollar investment. Is that situation in any way comparable to the Imperial Project, in your view?

A. Well, the only direct comparison is that we wrote the Cerro Blanco off, I believe, at the same time as the Imperial Project, but those are two very different projects. The Cerro Blanco project is an operation--sorry, a project that we have in Guatemala. When we wrote that project off, we were looking at it
the economics just didn't look right.

We had two companies come to us and make very meaningful approaches to us to buy the Project. We rejected that and decided to invest more money into exploration. We have done that since. We discovered a very high grade vein at depth. We have now relooked at the mine as an underground mine. We're in the middle of feasibility on that project right now. It looks actually quite good.

So, it's a very much different from the Imperial Project. The Imperial Project has no underground mining vein. It's just a big homogenous ore body that you couldn't possibly underground mine economically.

But moreover, the biggest factor is that we don't have an Executive Officer of the country of Guatemala telling us that there is absolutely no way that we want you to mine this mine. So, there are all the differences I can think of offhand.

Q. Over the past few years in the precious metals mining industry, how would you characterize the level of investment by operating and developing companies with regard to the acquisition of known gold
deposits?
A. Well, it's a very competitive environment.
Gold is very scarce. That's why it's so valuable.
And where there are deposits, there is a great deal of
interest in acquisition of those deposits.
Q. Is the Glamis Imperial Project a known
reported gold mineral resource?
A. Yeah. It's well-known in our industry as a
plus million ounce deposit that has not been mined.
Q. Has Glamis Gold, Limited, or Goldcorp
received a single offer from any entity regarding a
prospective purchase of the Glamis Imperial Project,
Project properties to the present date?
A. No, no. No offers at all. In fact, I think
I heard the word earlier today the Project has really
been stigmatized by the way that its--the Government
has treated us.
Q. What does that market experience tell you
about the value of the Glamis Imperial Project today?
A. Well, the same as our conclusions back when
we analyzed the Project that we referred to earlier,
that it has zero value.
Q. From your experience in the California
Desert, what was your understanding of the
significance of Pilot Knob to the Quechan Tribe?
A. Well, the Pilot Knob was an area of high
cultural significance to the Quechan Tribe, and my
understanding is there are some deep religious values
Q. According to the Quechan Tribe assertions, as you have understood them, where did the Trail of Dreams lead to heading south from the Imperial Project vicinity?

A. I'm not sure I'm allowed to speak of that in a public forum.

MR. McCRUM: Well, we are approaching an area, Mr. President, that we may be getting into some confidential resource implication, so we may need to turn off the public viewing for several minutes.

PRESIDENT YOUNG: Fine. We will turn off the public viewing at this point.

(Confidential portion begins.)
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(Original Content Removed Due to Confidentiality)
(Original Content Removed Due to Confidentiality)

(End of confidential portion.)
MR. CLODFELTER: Mr. President, could we indulge you for a few minutes to confer on cross-examination? It would--that time would be out of our time as well.

PRESIDENT YOUNG: Well, we are close to our scheduled break, so I'm prepared to accelerate the break by 15 minutes, and we will commence the hearing again. It is 3:17. We will ask everyone to be back here at 3:47. Thank you.

I would like to remind counsel that not to talk with the witness during the breaks. Thank you.

May we turn the camera back on? Are we prepared, or will you be asking questions that would relate, or would you like the camera to be left off?

MR. CLODFELTER: I don't think any of the questions we would pose would raise any confidentiality issues. Is that what you mean,

Mr. President?

PRESIDENT YOUNG: Yes, that's exactly it.

Okay. So, we will be prepared to turn the camera back on after the break.

Could we communicate to the room that we will reconvene at 3:47, and the camera will be on at that time.

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Thank you.

(Brief recess.)

PRESIDENT YOUNG: Okay. It's 3:47. It's time start again.

I will turn the time over to Ms. Menaker and Mr. Clodfelter, the time over to you.

MR. CLODFELTER: Mr. President, we don't have any questions for Mr. McArthur, but I would like to make two comments.

One, at least twice he presented hearsay testimony. We did not object because there are no strict rules of evidence before you, but we would suggest--we will remind you at the appropriate time when the testimony is not based upon personal knowledge, the truth of the assertion and the testimony is not based on personal knowledge but is based strictly on hearsay.

And, secondly, on at least one occasion testimony was new—it did not appear in the statements presented in writing—and we would ask Claimant to indicate, as they call their witnesses, if they intend, in fact, to elicit new testimony so that it can be debated under the standard set in your last Order that is exceptional.

PRESIDENT YOUNG: Thank you very much.

Do you want to specify the instances of hearsay and instances of new testimony for us?
MR. McCRUM: Mr. President, I would request Mr. Clodfelter to specify the areas that he believes exceeded the scope of the witness's statement now.

MR. CLODFELTER: Ms. Menaker can describe that testimony.

PRESIDENT YOUNG: Thank you.

MS. MENAKER: I don't have the LiveNote right in front of me, but at one point Mr. McArthur said that he had approached officials in the new administration who had said something about whether or not they would consider changing the prior administration's rules or regulations, and there is nothing about that in the evidence.

MR. McCRUM: Thank you.

PRESIDENT YOUNG: And Mr. McCrum should you
choose to talk about that, you are perfectly welcome
to do that during your closing statement.

MR. McCrum: Thank you.

Claimant Glamis Gold will now call its second
sworn witness to address contested facts that the
United States has put in issue in its countermemorial
and Rejoinder filings in this case. Our second

15:46:30 1 witness is Mr. Charles Jeannes.

CHARLES JEANNES, CLAＩMANT’S WITNESS, CALLED
PRESIDENT YOUNG: Mr. Jeannes, you have a
witness oath there.

THE WITNESS: Yes, I do.

PRESIDENT YOUNG: If you would read that,
please, or state that, please.

THE WITNESS: I solemnly declare upon my
honor and conscience that I shall speak the truth, the
whole truth, and nothing but the truth.

PRESIDENT YOUNG: Thank you very much.

Mr. McCrum

MR. McCrum: Yes, thank you.

DIRECT EXAMINATION

Q. Mr. Jeannes, could you please state your full
name, current title, and business address.

A. My name is Charles Jeannes. I’m the
Executive Vice President of Corporate Development for
Goldcorp. Our address is 666 Burrard Street,
Vancouver, British Columbia.
Q. And prior to being with Goldcorp, what were your positions with Glamis Gold, Limited?

A. Most recently, I was Executive Vice President - Administration and General Counsel. Previous to that, Senior Vice President. And at one point a while back I was Chief Financial Officer, as well.

Q. Mr. Jeannes, Glamis submitted the Imperial Project Plan of Operations to the Bureau of Land Management and Imperial County in December 1994; is that correct?

A. That's correct.

Q. Based on your understanding, how would you characterize the first few years of BLM's review of that Plan of Operations based on the facts that you're aware of?

A. It seemed to go fairly normally. By December 2006, there was a Draft Environmental Impact Statement issued, and then some additional issues regarding cultural resources arose during the comment period, and so a second Draft EIS, which is a little unusual, was issued in late 1997.

Q. In the Draft 1996 EIS, Environmental Impact Statement, Environmental Impact Report, was there a
preferred alternative identified, and what was it?
A. Yes. In both the '96 Draft and the '97 Draft, the proposed Plan of Operation submitted by Glamis was designated as the Government's preferred alternative.
Q. And I'm going to now refer you to Jeannes Hearing Exhibit 1. This is a document obtained in discovery in this case from the Government. It is a BLM internal schedule of the Imperial Project as of July 27, 1998. Let's turn to that in the witness binder as Jeannes Exhibit 1 because, on the screen, it's not too clear.

But what is that document, Mr. Jeannes? What does that document describe, as you understand it?
A. Well, as I understand it, it is an internal schedule that the BLM prepared, identifying when they expected to have the Final EIS completed, and that would have been September of 1998.
Q. And does this internal schedule provide a date for the Projected Record of Decision on the Imperial Project?

A. Yes. Thirty days later, in October 1998.
Q. There you go. The schedule is much more visible now.

So, what is the Projected date for the BLM to issue the Record of Decision on the Imperial Project?
A. To actually complete it would be October 18, 1998.
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Q. And was the Imperial Project Record of Decision issued in 1998?

A. No, it wasn't. It was issued quite a bit later in September--well, the Record of Decision would have been January 2001.

Q. And, by 1999, what was the status of the Imperial Project?

A. Well, it had become apparent that it had become delayed.

I joined the company in early 1999, and one of my tasks was to try to help move it along, and I met with the BLM in Sacramento and was told that all decisions on this project were now being made in Washington at the highest levels.

Q. Mr. Jeannes, prior to your joining Glamis Gold, Limited, did you have experience with other gold mining companies?

A. Yes. I worked for Placer Dome from 1994 through 1999. And, prior to that, I was a mining lawyer in private practice in Reno, Nevada.

And one of my clients prior to joining Placer Dome was Glamis, so I had involvement with the Imperial Project from the very beginning.

Q. Was Placer Dome a small startup company?

A. No, it was one of the world's larger gold mining companies until it was taken over just recently by Barrick Gold Corporation.

Q. And, by 1999, when you were at Glamis Gold,
Limited, were the delays appear to be usual, in your experience?

A. No. At this point, as I said, we--nothing was moving, and we weren't getting any information as to why that was the case, and so we had the meeting in Sacramento and were told that decisions were being made in Washington.

Q. And was there any particular individual you understood was the source of delays on the Imperial Project?

A. It was suggested that I meet with Solicitor Leshy, which I did in July of 1999.

Q. And, in your meeting with Solicitor Leshy in the Interior Department headquarters, what did he tell you about his role regarding the Imperial Project?

A. He said that they--that his office was conducting legal review of a variety of issues involved in the Project, and that nothing was going to happen until that legal review was completed.

Q. When Secretary Babbitt denied the Imperial Project on January 17, 2001, what did he rely on for a legal authority?

A. Largely the Solicitor's Opinion issued by Solicitor Leshy about a year earlier in January of 2000.

Q. And what's the status of Solicitor Leshy's Solicitor's Opinion today?

A. It's been revoked today. At the time, he
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came up with the new undue impairment standard that we heard about earlier; and, when Solicitor Myers took a look at that in the new administration, he found it to

be not in accordance with the law, and that Solicitor's Opinion was revoked.

Q. I would like to refer to Jeannes Hearing Exhibit Number 2. This is a memorandum from Interior Solicitor John Leshy to BLM California State Director Ed Hastey on October 30, 1998.

Is this a document that you are familiar with, Mr. Jeannes?

A. Yes. It was produced in this litigation.

Q. Had you seen it prior to its production in this NAFTA proceeding?

A. No, I hadn't.

Q. Is this document consistent with the impressions you formed in 1999 regarding the delays on the Imperial Project?

A. Well, yes. As I said, it was obvious that things were being delayed. This certainly confirmed what we came to understand the Solicitor's Office had put the stops on the Project.

Q. Turning to the last paragraph in this memorandum, what does Solicitor Leshy say that BLM State Director Ed Hastey should do with regard to the
validity of the examination for the Imperial Project
and the Final Environmental Impact Statement?
A. Well, it says: "In the meantime, your folks
should delay completion of the validity examination
and the Final EIS."
Q. After the Interior Department's January 17,
2001, denial of the Imperial Project, what actions did
Glamis Gold, Limited take as a publicly traded
corporation with regard to the reported mineral
reserves at the Imperial Project?
A. Well, we each year have to re-examine our
reserves and resources, and we had to recharacterize
the proven and probable reserves for the Imperial
Project down to the lesser category of mineral
resource for our year-end statement because the SEC
and Canadian rules required that there be some
reasonable expectation of having the legal right to
mine and remove those minerals in order to call them
reserves. And once our permit was denied by Secretary
Babbitt, we took that action to recharacterize the
reserves to resources.
Q. Does Glamis Gold, Limited face any

consequences in the marketplace for downgrading
reserves to resources?
A. Absolutely. We are valued based on our
reserves. There is a lot of metrics that are used by
investors in our sector, and one of them is the number
of proven and probable reserves per share of stock
that you have of a public company. And when
determining relative values between different mining
companies, that's one of the many metrics that they
look at, and so it hurt to take those reserves out of
our statement.

Q. In the United States Rejoinder at page 62, the Government has asserted that Glamis wrote off its
investment in the Imperial Project as a function of
its litigation plans. Do you have a response to that,
Mr. Jeannes?

A. That is absolutely wrong. We are governed by
generally accepted accounting principles in Canada and
the U.S. as well because we do a reconciliation note,
and those principles require that, if you don't have a
reasonable expectation of recovering an investment
that you are carrying on your balance sheet as an
asset, then you have to look at that asset as impaired
and write it down, and that's exactly what we did, not
happily because, as Kevin McArthur mentioned earlier,
it put us into a net-loss situation for the year.

Q. I'm going to refer to Jeannes Hearing Exhibit 3, which is an Interior Department briefing
document to the National BLM Director dated
April 2003.

And does this document refer to the
rescission of the Solicitor Leshy's legal opinion that
you were referring to?
A. Yes, it does. It states that that opinion was legally in error, which certainly was consistent with our belief.

Q. And does this document describe the actions that Secretary Norton took with regard to the denial of the Imperial Project by Secretary Babbitt?

A. Yes. Shortly after the Solicitor's Opinion was issued, Secretary Norton rescinded the Record of Decision that denied the Project in January 2001.

Q. Turning to the last highlighted statement on that particular document, there is a characterization to the prior processes that the Glamis Imperial Project was subjected to. How does that statement compare with your impressions about the Glamis Imperial Project in the latter 1990s under Solicitor Leshy?

A. Well, it certainly agrees—or my understanding would agree with that statement. It was unusual the way in which the Interior office in Washington, D.C., took ahold of this project and took such an interest in it. And the delay was certainly unusual.

Q. Were any other mine proposals denied by the Federal Government on the basis of the now-rescinded Interior Solicitor's Opinion by John Leshy?

A. No.

Q. Did BLM ultimately finish the Glamis Imperial Project mineral examination that Solicitor Leshy
halted in 1998?

A. Yes, eventually about four years later--it would have been September of 2002--the Mineral Report was issued.

Q. Was that Mineral Report approved by a mere low-level BLM official?

A. No. As you can see on the screen, there were--I think I counted 11 BLM officials who signed that report, including the State Director in California, Mike Poole.

Q. And turning to the findings of the Federal Government in the Bureau of Land Management Mineral Report, what did the Federal Government conclude?

A. Well, they concluded that the Project was a valuable discovery of minerals, and that the possibility of backfilling was not economically feasible.

Q. One particular part of the highlighted section of that report states that Glamis has found minerals within the boundaries of the 187 load mining claims and evidence of such a character that a person of ordinary prudence would be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine. What did this Federal finding indicate to you, Mr. Jeannes?

A. Well, it confirmed what we believed all
along, that we had properly staked and maintained the
mining claims and that they contained mineralization
that was economic and could be mined at a profit, and
that our expectations in that regard were reasonable.
Q. By 2002, had the assertions about a Trail of
Dreams being in the Imperial Project been made and
reported?
A. Yes.
Q. Has this finding of the Federal Government
about the prudence and reasonable prospect of success
concerning the Imperial Project made in September 2002
been rescinded to the present date?
A. No, it's my understanding that it's still a
Q. Now, after September 27, 2002, when the BLM
Mineral Report was issued, what happened next within a
matter of days?
A. Our excitement over receiving that report
lasted three days, and then Governor Davis announced
publicly his opposition to the project and his
direction to his staff to take all available means to
stop it.

Q. And let's take a look at the Jeannes Hearing
Exhibit 5. Is this a document that you're familiar
with?
A. Yes.

Q. This is a statement by Governor Gray Davis on September 30, 2002, and I will refer you to the first highlighted portion which is actually the last conclusion—the last paragraph of that document. Does that statement by Governor Gray Davis refer to any other mine, other than the Glamis Imperial Project?

A. No, it doesn't. This is what I just mentioned, that he made a statement that he was directing his Secretary of Resources to pursue all available legal and administrative remedies to stop—assist in the—stopping the development of that mine.

Q. And what was the context of Governor Gray Davis's public statement on September 30, 2002, Mr. Jeannes?

A. Well, this was his veto message to the Senate. I had been active on this bill S.B. 1828 that had been working its way through the California legislature, and he—the bill generally would have given Native American Tribes in California a very broad veto power to stop all kinds of development if they were found to interfere with sacred sites, not just mining, and so it was quite broad.

So, Governor Davis vetoed the bill and, as you can see on the screen, he's concerned that, as the bill is written, someone might invest large sums of
So, as you understood it, the Governor was concerned about that circumstance as it would apply to other projects around the State that were beyond the mining industry?

A. Yeah. I mean, it's very--it's bothersome because he was obviously concerned about other projects, but he directed him to try to stop ours.

Q. Did S.B. 1828 have implications for projects that the State Government itself might be associated with?

A. Oh, yeah, S.B. 1828 was very broad, and it didn't matter who was the sponsor, whether it was a public or private project, and actually was so broad as to include private and public land, as well.

Q. Now, the Governor's directive to the Secretary of Resources to pursue all possible legal and administrative remedies that will assist in stopping the development of the Glamis Imperial Mine, what did that lead to, Mr. Jeannes?

A. A few months later, in December of 2002, the California Mining and Geology Board issued emergency temporary regulations that we have heard about today. Those required that all metallic mines--new metallic mines be backfilled and recontoured to a height of no more than 25 feet on the property.

Q. Referring to Jeannes Hearing Exhibit 7, which
A. The sole reason cited for the emergency is our project, the Glamis Imperial Project.

Q. Are you aware of any other metallic mine projects statewide that had gone through the costly multi-year Environmental Impact Statement, Environmental Impact Report process that was pending statewide at that time?

A. No, I'm not.

Q. Mr. Jeannes, did the State of California Mining and Geology Board identify any scientific or technical studies as part of the issuance of the mandatory backfilling requirements in the regulations?

A. No. In fact, they specifically said that they weren't relying on any technical or scientific studies. I was at one of the two hearings, and people tried to submit evidence that backfilling and open pit is not always the most environmentally appropriate thing to do, and the Board didn't want to hear that evidence.

Q. We are referring now to Jeannes Hearing Exhibit 8, which is the final statement of reasons of
And, Mr. Jeannes, is this the affirmative finding you were referring to regarding the lack of technical or empirical studies or reports or documents relied on by the SMGB?

A. Yes, that's correct.

Q. Mr. Jeannes, are you aware of any similar mandatory complete backfilling regulatory requirements for metallic mines in the United States?

A. No, not in the United States. We also operate in Canada and in numerous countries in Latin America, and I'm not aware of any complete backfilling requirements anywhere.

Q. In addition to creating the new complete backfilling and site regrading requirements for metallic mines, did the new California requirements impose obligations regarding financial assurances for such projects?

A. Yes. They provided that the additional work required at the end of the mine life to rehandle the material and backfill the pit and recontour the site had to have financial assurances.

Q. What type of new economic burden did these financial assurance requirements place on the Glamis
Imperial Project as of the adoption of these regulations?

A. Well, it was substantial because you're being required to put up security in the form of a bond or cash, Letter of Credit or whatever it may be, for something that's not going to happen until the very end of the mine life, which, in this case, would have added four or five years to the Imperial Project. And it's a substantial cost at a time when you have got no revenue coming in.

Q. Mr. Jeannes, did Glamis Gold, Limited post financial assurances for other gold mine projects in the United States around this time frame of 2002-2003?

A. Well, certainly. It was standard procedure for us to bond or otherwise put up financial assurances for our obligations to reclaim a property when we were done mining, and we did that. By this time, after 9/11, we were no longer able to get traditional surety bonds. That market had dried up, and so Glamis was posting Letters of Credit through U.S. bank, but those Letters of Credit were

100 percent cash-collateralized.

Q. What do you mean by cash-collateralized Letters of Credit, to those of us that don't have a financial background?

A. Sorry. We would have a deposit at U.S. bank either in the form of cash money market or CD usually, because it was long-term equal to the amount of the
obligation in the Letter of Credit that was then delivered to the BLM or other regulatory agencies.

Q. At Glamis Gold, Limited, did you have responsibility for coordinating such financial assurances?

A. My department, yes.

Q. And the experience you described at Glamis Gold, Limited was in terms of collateralizing the Letters of Credit? Was that your typical experience?

A. Well, that's the only way we could do it after the surety market dried up. I mean, this was a big crisis in the mining industry, starting in late 2001-2002. There was congressional hearings on it I testified at. The traditional way of getting a surety bond from an insurance company just went away, so all of our new financial assurances, as those surety bonds rolled over, became a hundred percent cash-backed Letters of Credit.

Q. During this period, did Glamis Gold, Limited have economic incentives to obtain financial assurances in the most cost-effective manner?

A. Absolutely. If we could have done it in a way that conserved our capital or was less expensive, we certainly would have done it.

Q. Based on your experience, could Glamis Gold, Limited have obtained a Letter of Credit without cash on the order of 50 to $60 million?
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14      A.   No.  
15      Q.   In response to the Governor's directive in
16  September 2002, the State resources agency also began
17  working with the California legislature to pass
18  legislation.  Did you have familiarity with that
19  legislation that turned into S.B. 22? 
20      A.   Yes.  It was all intertwined with and going
21  on at the same time as the State Mining and Geology
22  Board regulations were being considered. 

16:13:22 1      Q.   Let's take a look at Jeannes Hearing Exhibit
2  9.  This is a California Senate Natural Resources and
3  Wildlife Committee report on S.B. 22, and we are
4  looking at the highlighted statement here which says:
5  "Changes to the statute are urgently needed to stop
6  the Glamis Imperial Mining Project in Imperial County
7  proposed by Glamis Gold, Limited, a Canadian-based
8  company."  
9  Mr. Jeannes, were any other mining companies
10  referred to in this particular Senate report?  
11      A.   No, the same as the temporary emergency
12  regulations that the Mining and Geology Board adopted,
13  they used our project as the basis for the emergency
14  adoption.  And then--it's kind of interesting--the
15  legislature then used the fact that those temporary
16  regulations were about to expire as the basis for the
17  emergency to short-circuit the legislative process and
18  rush S.B. 22 through.  A couple of days later, they
19  made the regulations permanent anyway.
20 So, it was an interesting process at the
time.
21
22 Q. The finding in the Senate report in Jeannes

16:14:58 1 Hearing Exhibit 9 makes a particular finding about the
2 feasibility of Glamis complying with these
3 requirements.
4 Is the statement that the backfilling
5 requirements make the Glamis Imperial Project
6 infeasible consistent with the determinations made by
7 Glamis Gold?
8 A. Yes. The author’s understanding is the same
9 as ours.
10 Q. Let’s take a look at Jeannes Hearing
11 Exhibit 10, which is a confidential Enrolled Bill
12 Report to the California Governor, dated March 25,
13 2003, from the Governor’s Office of Planning and
14 Research.
15 What does this indicate was the intent of
16 S.B. 22 as it related to the Glamis Imperial Project,
17 Mr. Jeannes?
18 A. It says it’s intended to provide a permanent
19 prohibition to the approval of the Glamis Gold Mine
20 project in--it says San Diego, but it was Imperial
21 County.
22 Q. Let’s take a look at the highlighted phrase
here, the highlighted sections of that report,

Mr. Jeannes.

Does it indicate that any one particular
project is targeted?

A. Again, only our project is mentioned. It was
the only one pending at the time.

Q. Let's take a look at another section of that
particular exhibit, Jeannes Hearing Exhibit 10, back
on the prior page. In the second-to-last paragraph,
does this confidential Enrolled Bill Report to the
California Governor on S.B. 22 indicate a coordination
of the legislation with the pending State Mining and
Geology Board regulatory process?

A. Yes. This is what I was making reference to
earlier. They used the fact that the emergency
regulation was only temporary as the basis for the
urgency to get S.B. 22 through without going through
the normal legislative process. And then shortly
after, I believe, S.B. 22 was passed and signed by the
Governor, they made permanent the emergency
regulations at the State Mining and Geology Board.

Q. Mr. Jeannes, how did this experience and
treatment by the California Government compare with
Glamis's prior experience in California?

A. Well, we had a very good—as Mr. McArthur
mentioned, a very good, long-standing relationship
with the State. We had been commended for our
reclamation activities at Picacho, a lot of dealings with the State through primarily the Water Quality Control Board at both Rand and Picacho.

Kevin used to say in his investor tours that California is a great place to do business, but things changed.

Q. I refer you to Jeannes Hearing Exhibit 11, which is the press statement of Governor Gray Davis on April 7, 2003, upon signing S.B. 22 into law. Does this press statement refer to any other mine other than the Glamis Imperial Project?

A. No. Again, it is our mine that he talked about stopping.

Q. Referring to the first highlighted sentence, does this indicate whether the Government envisioned the Project proceeding in a particular way, or does it indicate an intent to stop the Project, to you?

A. No. It was their intent and understanding that, if they imposed this backfilling requirement, it would stop the Project, and it did.

Q. Turning to the next highlighted sentence, "This measure sends a message that California's sacred sites are more precious than gold," was that message received by Glamis Gold, Limited?

A. Yes, certainly. And, I would say, the rest of the mining community.

Q. Turning to the final highlighted sentence, the statement that the reclamation and backfilling
requirements of this legislation would make operating
the Glamis Gold Mine cost-prohibitive, is that
statement consistent with the determinations of Glamis
Gold, Limited?
A. Yes, it is.
Q. Mr. Jeannes, are you needing to speculate
about what the California Governor intended in
answering these questions?
A. No. He made it very clear in his various
statements, as did the legislature and the State
Mining and Geology Board.

Q. Mr. Jeannes, have these findings of the
California Governor been rescinded, to your knowledge?
A. No, they haven't.
Q. Mr. Jeannes, have you become aware of the new
proposed Quechan casino and resort at the base of
Pilot Knob?
A. Yes. I had a newspaper reporter contact me
several weeks ago. That was the first time I had
heard about it.
Q. Have you reviewed an amendment to the
California Tribal-State Compact between the State of
California and the Quechan Tribe approved by the
Governor Schwarzenegger and the Quechan Tribe as of
June 26, 2006?
A. Yes, I have looked at it.
Q. Does this agreement approved by the
California Governor pertain to the site of the new
Quechan casino at the base of Pilot Knob?

A. Yeah, the agreement authorizes the casino to be constructed at that site.

Q. Has the U.S. Interior Department approved the Tribal/State Gaming Compact between the State of California and the Quechan Tribe in 2007?

A. Yes, it was approved by Notice in the Federal Register a few months later.

Q. Is that Federal Register Notice and the Governor's agreement contained in your last rebuttal statement filed in this case?

A. Yes, they're exhibits.

Q. Mr. Jeannes, has Glamis Gold, Limited, or Goldcorp received any offers to purchase the Imperial Project mining claims from other mining companies or mining investment interests in the last five years?

A. Not just the last five years. We never have.

Q. Mr. Jeannes, the Government asserted in its Rejoinder that one's home does not lack value merely because buyers do not appear at one's doorstep with offers to buy it. Is that analogy applicable to the Imperial Project, based on your experience?

A. No, not at all. It reflects someone who doesn't really understand our business.

The gold sector is a very small part of the overall mining industry, and there is just not that many gold deposits. I'm in charge of business

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development for Goldcorp, and I would say I know of or have a file on every mineral deposit in the western hemisphere, gold deposit of over a million ounces. And my counterparts at the other companies do, too. There's just not that many of them. And we also have it seems like an abundance of investment bankers in our business who act as brokers trying to look at assets that may be noncore to one company and interest another company and buying them or selling them, and that's how they generate fees, and I have never had any interest expressed by any investment banker to try to help sell or run a process for Imperial because the industry knows it has no value. It can't be built.

Q. Are the mineral resources, the gold mineral resources, at the Imperial Project, do they continue to be reported annually by Goldcorp and its predecessor Glamis Gold, Limited?

A. Yeah, it's still a mineral resource. It doesn't have an economic value, and that's why we can't report it and don't report it as a reserve, but it's a finite, you know, bit of mineralization that we have to report as a resource, and we do. So—and that's been in our Annual Report every year.

Q. Has Goldcorp changed its treatment of the
reporting of the mineral resource as compared to the way Glamis Gold, Limited reported the resource?

A. No. I'm pretty sure it's still in there as a mineral resource.

Q. Why do you think that no entity has come forward with an offer to purchase the Imperial Project mining claims, particularly given the assertion by the United States in this proceeding that it has a market value of $159 million at least?

A. Well, I don't think anyone else in the business believes that, or else I would have received numerous inquiries.

You know, everything that we went through at Imperial was very high profile in our business. There was a lot of media, there was a lot of discussion about it within our sector, and people know what happened. They know the position of the State of California with respect to open-pit mines, or at least the one of that Imperial Project, and I don't think anybody believes there is any value there, as do we.

Q. Thank you, Mr. Jeannes.

MR. McCRUM: That will conclude our direct testimony.

THE WITNESS: Thank you.

PRESIDENT YOUNG: Thank you very much.

MS. Menaker or Mr. Clodfelter?

CROSS-EXAMINATION

BY MS. MENAKER:
Q. Good afternoon, Mr. Jeannes.
A. Good afternoon.

Q. In paragraph seven of your rebuttal statement, you state: "There was recently a single inquiry made by a mining company for information regarding the Imperial Project, but there has been no subsequent offer to purchase"; is that correct?
A. That's correct.

Q. And what company made this inquiry?
A. I have signed a confidentiality agreement, and I'm not supposed to say.

Q. I don't know how to handle that. The confidentiality agreement says that you don't identify the fact of the discussions. Should we shut off the cameras? I don't know how to handle that.

I could give you a lot of details about it without identifying it. It's a small gold--or a company that's not operating anything but developing gold projects, and they wanted to learn more about the Imperial Project. I gave them full access to our Feasibility Study, gave them the block model and the resource model electronically so that they could manipulate it themselves. And I gave them Web site for this proceeding and said, "Go. You will have everything you need there to understand what has been the history of the Project from a permitting and legal standpoint."

Q. How was this inquiry first made?
A. I got a phone call from one of our guys in Toronto who had a friend who called him and said, "Who should I talk to?"

Q. And then--so, you obviously talked to them by phone.

A. Umm hmm

Q. Did you consequently meet?

A. Yes.

Q. And how many times did you meet?

A. Once.

Q. And did this inquirer ask whether the mining claims, whether Goldcorp would be interested in selling the mining claims?

A. Yes.

Q. And how did you respond?

A. I told him everything was for sale, "Go look at the data;" and, if they wanted to make us an offer, we would listen to it.

Q. And did they indicate any amount that they were thinking about offering?

A. No.

Q. And did you tell them what price you would accept?

A. No.

Q. So, there was no discussion at all about any price?

A. No.

Q. And how many meetings did you have with this
A. One.

Q. And how many phone calls did you have?

A. I probably had, I think, only one other phone call. I think we exchanged messages once and maybe an E-mail. No, I don't think we ever e-mailed. Just phone messages and one live call.

Q. And did this person travel to meet you?

A. Yes.

Q. And from about how far away?

A. I have no idea where he was before he came to Vancouver.

Q. And did you give this person the information that you were just referring to, the link to the Web site and some of the other information by telephone, before he or she came to meet with you?

A. Yeah. I asked--once the inquiry came in, I had someone in our group hook up with them a guy who works for me, and I said make available the block model and Feasibility Study and anything else they asked for.

Q. And about how long ago was your last contact with this person?

A. I would have to look at my calendar, but I'm
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2 guessing three weeks.
3 Q. And did this individual ask about Glamis's
4 claim in this arbitration?
5 A. Yeah, yeah. Like I said, I made reference to
6 it and gave him the Web site so he could go see
7 everything he needed to know about it.
8 Q. During your testimony today, you read from
9 the 2002 BLM Mineral Report, which stated that
10 complete backfilling was economically infeasible; is
11 that correct?
12 A. Correct.
13 Q. And are you aware that BLM used a gold price
14 of $296 per ounce in making that determination?
15 A. I didn't recall, but it is what it is. It's
16 in the report.
17 Q. Was it your desire--and by "your," I mean
18 Glamis's and Goldcorp's desire--that DOI continued to
19 process Glamis's Plan of Operations even after Glamis
20 submitted its claim to arbitration and wrote to DOI
21 that it was going to pursue other avenues?
22 A. Well, as you know, at one point, very
Q. When you were referring to your letter of, I believe it was, March 2003, where Glamis said that it cannot renew its request, so basically hold DOI harmless by any delay by reaffirming its request that it stop processing; is that correct?
A. I wasn't renewing anything. They asked me and said, "If you want us to stop, you have to hold the Government harmless for any damage," and I said no. And so, then, when I wrote the letter back in March, I said, "Please forget that I asked you to stop and carry on."
Q. Right. And when you originally asked them to stop, that was pursuant to a request that you made back in December; is that correct?

A. Yeah. So, there was about a three- or four-month period there.
Q. So, this letter that you're referring to was in March, but then it was a few months after that, in July, when the Glamis decided to pursue arbitration and then wrote to the DOI saying that it was going to pursue other avenues; isn't that correct?
A. I don't recall writing after this was submitted. If I did, I need my recollection refreshed.
Q. Okay. So, you don't recall Mr. McCrum sending a letter on behalf of Glamis to DOI, informing them that Glamis Gold had decided to pursue...
arbitration, thanking DOI for its past attention to
this matter, but saying now that the issue has become
so intractable that Glamis has decided to pursue other
avenues. Are you aware of that letter?

A. Yeah, I recall there was something like that.

We certainly didn't ask them to stop work on the
Project, though.

Q. Did you at any time, after that letter was
sent, contact DOI or BLM officials about your Plan of

Operations?

A. Well, we had ongoing discussions throughout
the 10-year period.

At that point, I don't recall any further--I
could be wrong, but I don't recall any further
discussions, no.

Q. Thank you.

You testified earlier that people tried to
submit evidence against backfilling. This is before
the SMGB Board.

A. Um hmm

Q. But the board didn't want to hear that
evidence.

A. Um hmm

Q. Is that correct?

A. That's correct.

Q. You attended a board hearing, didn't you?

A. Yes.

Q. And is it also the case that you testified
before the board?

A. I couldn't recall. I know I testified several times, and I couldn't recall whether it was always in relation to the legislative efforts or whether I also did at the board. To this day, I can't recall. I know Jim Voorhees did, and I was with him.

Q. Okay. But you seemed to recollect another Glamis officer testifying before the board?

A. Yes.

Q. At any time, did the SMGB tell you that you were prohibited from submitting evidence?

A. No.

And it wasn't one of us who was proffering this evidence. It was another person whose name I don't know who was making reference to a study about the fact, as I said, that it is not always the most environmentally appropriate alternative to backfill an open pit, particularly given certain water issues. And I can't recall exact words that were said, but my recollection is that he was told, "Thank you very much, but we are going on," and they didn't want to--or didn't allow him to elaborate on this study.

Q. So, was he prohibited from testifying further?
16:34:43  1      A.  I don't recall. There may have been a time
2  limit on all of us. I don't recall.
3      Q.  So, is what you're saying that the board
4  disagreed with—is it fair to say that the board
5  disagreed with some of the views that were expressed
6  by some of the individuals regarding backfilling that
7  may also have been shared by Glamis?
8      A.  Yeah, I assume they disagreed or they
9  wouldn't have adopted it, but they also said in their
10  records that they weren't relying on any technical
11  reports, period.
12      Q.  But, as far as you're aware, they did not
13  refuse to receive any technical reports; is that
14  correct?
15      A.  My recollection is that they didn't want to
16  hear about that topic. And whether the guy physically
17  tried to hand them a report, I don't know
18      Q.  But everybody who wanted to testify--are you
19  aware that they ever prevented or prohibited anybody
20  who wanted to testify from testifying at these
21  hearings?
22      A.  No, no, I'm not.

16:36:00  1      Q.  I just want to return to an earlier question,
2  I apologize, but when I started asking you about
3  Glamis's intentions regarding DOI's processing of the
4  Plan of Operations, my original question was: After
5  July 2003, did Glamis want BLM to continue to process
its Plan of Operations?

A. I don't recall that we took a position one way or the other. I mean, we were in this litigation process, and I'm not sure what that meant, but we always took the position that, if we could have gotten a permit to operate this mine, we wanted to operate it. That's why we stayed at it for 12 years.

Q. Thank you.

PRESIDENT YOUNG: No further questions.

MS. MENAKER: No, thanks.

PRESIDENT YOUNG: Thank you.

MR. McCRUM: No redirect here.

PRESIDENT YOUNG: Thank you.

Mr. Jeannes, thank you very much. You are excused.

(Witness steps down.)

PRESIDENT YOUNG: Mr. McCrum do you want to call your next witness?

MR. McCRUM: Yes, we are prepared--our next witness is Daniel Purvance, and he is here, and we are fully prepared to proceed with him. I would ask for the Tribunal's indulgence. We wasn't scheduled for today. We don't have a witness binder prepared for him today. We have exhibits ready to show on the screen which have been submitted in the record of this
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12 case, and I think we could proceed efficiently with  
13 that and provide the binder first day tomorrow morning  
14 with the day two schedule, if that's allowed.  
15 PRESIDENT YOUNG: That's acceptable. Thank  
16 you.  
17 MS. MENAKER: Mr. President, would it be okay  
18 to take a five-minute break, or even less?  
19 PRESIDENT YOUNG: We will take a break until  
20 quarter to 5:00, if that's all right.  
21 (Brief recess.)  
22 PRESIDENT YOUNG: We would request you to  

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16:46:51 1 read the witness statement.  
2 DANIEL PURVANCE, CLAIMANT'S WITNESS, CALLED  
3 THE WITNESS: I solemnly declare upon my  
4 honor and conscience that I shall speak the truth, the  
5 whole truth, and nothing but the truth.  
6 PRESIDENT YOUNG: Now, Mr. Purvance, as I  
7 understand, part of your testimony will relate to  
8 locations of coordinates for certain kinds of  
9 information that we desire to keep confidential. So,  
10 MR. McCrum if you could give us adequate warning  
11 before you venture into those areas, we will have to  
12 curtail the public part of the hearing during the  
13 brief parts of the testimony relevant to that.  
14 MR. McCrum Yes, Mr. President. We'll try  
15 to have that confined to the latter part of  
16 Mr. Purvance's testimony.  
17 PRESIDENT YOUNG: Thank you.
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18 Proceed.

19 DIRECT EXAMINATION

20 BY MR. MCCRUM:

21 Q. Mr. Purvance, can you please state your full name, title, and business address.

16:47:46 1  A. Dan Purvance. I'm Director of Environment for Goldcorp. My address is 10 Caterpillar Court, Sparks, Nevada.

Q. And what is your position with Goldcorp, Inc.?

A. I'm currently the Director of Environment with Goldcorp.

MR. MCCRUM Are you able to hear the witness, Mr. President? Okay.

BY MR. MCCRUM

Q. And what's your current title? I didn't quite get that.

A. My current title is Director of Environment for Goldcorp, Inc.

Q. Are you a geologist; and, if so, where did you get your degree?

A. Yes, I am a geologist. I received my degree from the University of Utah in 1975.

Q. And have you worked as a geologist in the metallic mining industry since getting your degree?

A. Yes, I have both metallic--I started my career in the uranium industry early on. I worked for
Real Alum and Home State Mining Company, two large international mining companies in southern Utah, Colorado, Arizona. I joined Glamis in 1992 at the Picacho Mine.

Q. And at the Picacho Mine, what was your--what was your--Mr. Purvance, what was your role at the Picacho Mine?
A. I was the mine geologist and project geologist for the site.

Q. And, after 1994, did you--well, I'm sorry. In the early 1990s, did you become involved with the Imperial Project?
A. Yes, yes. In 1994, approximately 1994, I became the Project geologist for the Imperial Project which was responsible for all the exploration, exploration permitting activities, all the field studies that were going on at that time.

Q. And prior to your work for Glamis Gold Limited in the California Desert, had you worked at any other open-pit gold mine operations in the California Desert conservation area?
A. Yes. Prior to being employed by Glamis, I was employed by American Girl Mine, a mining company at the American Girl Mine; also, of course, at the Picacho Mine which is nearby. And I'm also the
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Project Manager for the Rand Mine, which is located in the north end of the CDCA.

Q. Is the Rand Mine in the California Desert Conservation Area?
A. Yes, it is.

Q. Now, Mr. Purvance, during your years of work at the American Girl Mine and the operation of the Picacho Mine when you worked there, do you recall any Native American objections to the operation of those open-pit gold mines?
A. No, at no time did I witness any kind of demonstration or see any kind of demonstration or appeal or anything.

Q. By the early 1990s, when you became responsible for coordinating the cultural resource reviews for the Glamis Imperial Project, did you become aware of the participation of Lorey Cachora, the Quechan Tribal historian, in the cultural resource reviews for the Imperial Project?

A. Yes. I was--as the Project geologist for Imperial, I was in charge of all the cultural studies--all the permits that are required to drill, you have to have, of course, clearance from the BLM so I was familiar with all the cultural studies that had been done on the Project area.

Q. And these cultural studies you're referring to, did they involve Mr. Cachora, and was that in the Imperial Project area?
A. Yes, they were for the Imperial Project, especially for the Imperial Project area; and, yes, I was aware that Mr. Cachora was involved in those studies.

Q. Did you personally meet with Mr. Cachora, the Quechan Tribal historian, as part of those cultural resource reviews in the early 1990s?

A. Yes. Again, I was responsible for the field activities at the project site. So, as the archaeology crews would come and go to the field and to the site, I would meet with them and acknowledge where they are at.

Q. Was Mr. Cachora on-site in the Imperial Project area for a matter of a few days or longer periods?

A. No, he was--typical, they were there for several weeks or months doing field surveys, and he was active daily in those surveys.

Q. Between 1992 and 1995, what types of activities was Glamis Gold carrying out in the Imperial Project project area?

A. We were actively developing the Project by drilling. I was in charge of drilling programs, and so we were permitting drilling programs to the BLM. And then, also we were developing a water source for the Project, so we were drilling water wells and investigations to secure water for the site.

Q. In the early 1990s, were any of those
BLM-approved activities the subject of administrative appeals or judicial challenges by the Quechan Tribe?

A. No, not at all.

Q. By 1995 to 1996, roughly how many mineral exploration drill holes had been drilled in the Project area, the Imperial Project area, and the surrounding immediate vicinity?

A. There was over 400 drill holes that had been drilled into the deposit and into the area for investigation of groundwater.

Q. Did those 400 drill holes primarily investigate the ore reserves or groundwater resources?

A. Primarily the ore reserves. There are approximately a dozen holes that were used to seek water remaining or for specifically to define and develop the ore body.

Q. And what kind of expenditures roughly are we talking about for the exploratory drilling and related activities during the early-mid 1990s?

A. We had expended several million dollars' worth of funds towards drilling.

Q. Mr. Purvance, are you familiar with the Running Man feature and its proximity to the Imperial Project site?

A. Yes, I am. It's a rock feature that's approximately a mile and a quarter away from the southern end of the project area.

Q. Let's take a look at Purvance Hearing Exhibit...
I'm going to show you a paragraph,
Mr. Purvance. A photograph. And can you describe
this photograph that is Purvance Hearing Exhibit
Number 2?
A. Yes. That's me standing in the background.
The Running Man geoglyph is a collection of rocks that
you can see in front of me there. The background is
the typical desert landscape that's around the Project
area.
Q. Now, roughly how far is the Running Man
feature from the Imperial Project mine-pit area?
A. It's a mile-and-a-half, approximately a
mile-and-a-half from the open pit itself.
Q. And would the proposed Imperial Project have
had any direct physical disturbance to the Running Man
site?
A. No, not at all.
Q. Let's turn to the Hearing Exhibit Number 1.
Did the Running Man feature assume
significance when Interior Secretary Babbitt denied
the Imperial project on January 17, 2001?
A. Yes, it did. This is from the Record of
of the map is the Running Man geoglyph. Off to the right near the legend is Picacho Peak, and then to the north is the Indian Pass and the Indian Pass ACEC. The project area is the black area in the center of it.

Q. And is this figure that we are looking at the actual figure from the Secretary's decision, except for the color highlighting that has just been added on the screen?

A. Yes, it is.

Q. And what is the black area in the center?

A. The black area in the center represents the Imperial Project Site.

Q. And what are those shaded gray areas to the north?

A. The shaded gray areas to the north, there are two, as Mr. McArthur spoke of, the Indian Pass Withdrawal Area and the Picacho Peak Wilderness Area.

Q. Were those the areas that were closed to mineral entry and mineral development by the 1994 California Desert Conservation Act?

A. Yes, they are.

Q. And what is that rectangle to the north that says Indian Pass?

A. That's the Indian Pass ACEC.

Q. And what does ACEC stand for?

A. It's an area of environmental critical concern, I believe.
Q. And was the Imperial Project within the designated wilderness areas or the area of Critical Environmental Concern as designated?

A. No. As clearly shown, the Imperial Project is about a mile, two miles south of the ACEC and the Picacho Wilderness--Picacho Peak Wilderness Area.

Q. What does the dotted line that surrounds the Imperial Project, what does that reflect?

A. That's the boundary of the ATCC, area of traditional cultural concern that was assigned to the Project.

Q. And was that area designated before or after the Imperial Project Plan of Operations was submitted?

A. It was after.

Q. Now, Mr. Purvance, one of the other features depicted in Secretary Babbitt's denial decision is to the right, Picacho Peak. Where would the Picacho Mine be in relationship to Picacho Peak?

A. Picacho Peak is about seven miles east of Imperial Project. The Picacho Mine is located at the base of Picacho Peak.

Q. Mr. Purvance, was there a--there was a field hearing of the Advisory Council on Historic Preservation in March of 1999. Did you attend that?

A. Yes, I did.

Q. I'm sorry, let me strike that. I will come back to that topic. I passed over an area I wanted to
Mr. Purvance, in 1997 did you have an encounter with the Quechan Tribal Historian Lorey Cachora?

A. Yes, I did in--I believe it was February of 1997 I encountered Mr. Cachora and two people that were leaving the Project site. They were on the project site driving along Indian Pass Road.

Q. And would that encounter have been in '97, would that have been after the cultural resource studies that Mr. Cachora had been involved in in the Imperial Project area?

A. Yes, it was.

Q. And why is it that you recall that particular encounter with Mr. Cachora in early 1997?

A. I approached Mr. Cachora, and we talked, and he explained to me what the two people were doing on our project site, and explained that they were a journalist and a photographer from the Imperial Valley press, and he was showing them the cultural features that were in the area. And at that time, Mr. Cachora asked me about Running Man, asked me where Running Man was located or where to stop his car along Indian Pass Road so he could go visit Running Man.

Q. And did that strike--how did that encounter strike you at that time?

A. That struck me very strange and odd considering that he was the Tribal historian and
obviously had participated in several field studies in the area that he would be asking me for directions on how to find it.

Q. Did you make a notation in your field log at the time of that encounter?
A. Yes, I did.

Q. And has that been submitted with a--one of your witness statements in this case?
A. Yes, it has.

Q. Now, turning to the Advisory Council field hearing in March of 1999, did you attend that?
A. Yes, I did.

Q. And was Mr. Cachora there on behalf of the Quechan Tribe, as you understood it?
A. Yes, Mr. Cachora and several other individuals were on that tour.

Q. Let's look at Purvance hearing Exhibit Number 3. Can you tell us what this map depicts.
A. This is a map that I prepared that showed the ACHP tour stops after the tour occurred. As you can see, the--in black there, there are four stops. They made Running Man, trail, another trail segment north of the Project area, and then they proceeded to the petroglyphs and the Indian Pass ACEC.
Q. And what reaction did you have when the Advisory Council on Historic Preservation field tour visited these particular sites?

A. Well, as you can see, the trail that's on the southwest corner on the Project area was the only spot or the only stop on the ACHP tour, and I was shocked. I thought the whole intent of the tour was to tour the Project area and look at the cultural resources and cultural features that were contained within the Project area.

And obviously they visited one small trail segment that had been isolated outside of any disturbance area, so it was not going to be disturbed. It had been--in fact, that trail segment had been presented in mitigation to be completely outside of our project or outside of our disturbance area.

And then we looked at that trail segment and proceeded to the north of the Project area to the second trail marking that's shown on the map.

Q. The dotted line that runs along that area, what does that depict?

A. The dotted golden line is the Indian Pass Road. That's the access through the area that we used.

Q. Is that an access road that vehicles are allowed to travel on?

A. Definitely, yes.
Q. Did you prepare a photographic map of the 
Advisory Council on Historic Preservation tour sites?
A. Yes, I did.
Q. Let's take a look at the Purvance hearing 
Exhibit 4.
And what does this map depict?
A. This is an aerial photo. It's similar to the 
first map except, like I say, it's an aerial photo 
that shows the terrain and the project outline. It's 
a little bit of a closer up view of it.
But again, in yellow you can see Running Man, 
the ACHP stops that were down along Indian Pass Road. 
You can actually see Indian Pass Road there. And then 
the ACHP stopped to the north. On the far left of the 
photograph is the Indian Pass.
And again, you can see this photograph shows 
especially in the ACHP stop on the Southwest corner of 
the Project area, that's where we viewed a trail 
segment that had been removed from our disturbance 
area.
No, it's the one below that. Yeah, that one.
Q. The map showing the ACHP stops that this is 
based on, was that a map you prepared back in 1999, or 
for this litigation?
A. No, it was back in 1999.
Q. Mr. Purvance, during the 1990s when you were 
a geologist working in the California Desert, did you 
become aware of the fact that the Quechan Tribe
authorized mineral exploration and drilling activities for gold on the Fort Yuma Indian Reservation?

A. Yes, I did through my employment at American Girl, and then later on I learned that the Tribe was actively looking for gold deposits on the Reservation.

Q. And have you become familiar with documents obtained from the Government through a Freedom of Information Act request indicating that the Quechan Tribe sought and obtained Government funding from the U.S. Interior Department's Bureau of Indian Affairs for gold mineral exploration between 1988 and 1992?

A. Yes, I am familiar with those documents.

Q. Let's look at Purvance hearing Exhibit Number 5.

Do we have the prior page on this exhibit? Okay.

This is—is this exhibit part of the 1988 drilling application as you understand it, Mr. Purvance?

A. Yes. It's the appendix for the location of neighboring gold mine deposits that are in the area.

Q. Okay. Let's look at the next map attached to this.

A. It's the previous one.

Q. Oh, you found it. Okay. This is Purvance hearing Exhibit Number 6, and this is the Quechan Tribe application to the Interior Department Bureau of Indian Affairs dated February 18, 1988.
18 Mr. Purvance, are you familiar with this document?

19 A. Yes, I am.

20 Q. And does this--how does this application characterize the Tribe's level of interest in gold mining, gold development?

21 A. Characterizes it as they were excited to be able to provide jobs for the residential--Reservation residents, travel revenue from leases, royalties, and whatnot, source of funds for reinvestment of other areas of economic.

22 Q. And now let's look back at the part of this application that includes a map.

23 A. Yes, that is the map.

24 Q. And what is it showing there, Mr. Purvance?

25 A. The yellow highlighted areas are approximate locations of gold deposits. As you can see, Mesquite has been truncated a bit, but Mesquite Mine was at the time being developed, was a very large project. Indian Pass Project had also been discovered by the Goldfields people as an exploration and was being developed.

26 Picacho is just below Indian Pass. You can't read the text because of what it is, but that's
Picacho Mine had been in operation for a few years. And then in the center of the photograph is the American Girl Mine and the ore cruise, the Cargo Muchacho deposits that were being developed and had been discovered at the time.

Q. And had there been a recent discovery of gold mineralization in the Indian Pass area by 1988?
A. Yes, as I mentioned, the Goldfields had originally discovered and had conducted exploration drilling on Indian Pass.

Q. And in the 1988 application for Federal funding to carry out gold mineral exploration on the Reservation that you have reviewed, Mr. Purvance, did the Tribe express any concern or objection to the Bureau of Indian Affairs about potential gold development in the Indian Pass area?
A. No, not at all. I think the Tribe noted that there was a lot of development going on around their Reservation. The same rock units, the same structural features go into the Reservation, so I can see they would obviously be looking for similar-type deposits on their Reservation.

Q. And the other mines that are depicted here, the other gold deposits, Picacho, Mesquite, and American Girl, were they open-pit gold mine projects?
A. Yes, they are.
Q. And were they as of the late 1980s?
A. Yes, they were being developed and mined at that time.

Q. Mr. Purvance, the counsel for the United States asserted in their opening brief in this case, their Counter-Memorial, at page 238, and I will quote, "While it is true that the Quechan commissioned a limited survey for the potential for bulk gold mineralization on their Reservation in the late 1980s, the only exploratory drilling involved in this area was on the stone face prospect, an area in the northwest corner of the Reservation that had already been mined extensively."

Did you offer a response to that assertion in your second statement filed in this case, and if so, what was it?
A. Yes, I did offer a response that simply that was not the case. There has not been any scale mining in that area of the stone face prospect.

Q. And had--by that time of your second statement, did you submit photographs showing the mineral exploration drilling that had been carried out by the Quechan Tribe with Federal Government funding at that time?
A. Yes, that's--the whole purpose of the statement was--is that the mineral exploration that had been conducted by Quechan Tribe was at the stone
face prospect, and I have visited the site several times.

Q. Mr. Purvance, after you filed your second statement in this case, the United States then repeated the assertion in the Rejoinder at page 223 filed in March of 2007, and continued to claim that the Quechan drilling was located in an area, "that had been mined in the past."

What did you then do to disprove that repeated assertion by the United States in this NAFTA proceeding?

A. I returned to the site in July of this year and took photographs of the exploration sites in the area around that, those drill holes, to show the activity that had gone on there.

Q. And, Mr. Purvance, we are now looking at hearing Exhibit 7. Would that be the paragraph that you have just preferred to?

A. Yes, it is. You can see on the left are the prospect holes that are shallow prospect hits that are typical of the entire area, Imperial Project included. The exploration drill hole sites are a light-colored material. The drill holes were unreclaimed, so you can still see the cuttings from the drill holes are a light-colored kind of a cream-colored material.

They're still evident there. And as you can see, there is no disturbance at the area other than what has been taking place.
16 there.
17 Q. Mr. Purvance, the prospect holes there, can
18 you give us a rough idea of the diameter of those
19 holes.
20 A. They're approximately 5 feet in square, maybe
21 10 feet deep. Typically hand dug prospect holes,
22 historically, and have been, you know, scattered all
23 over the area.
24
17:12:35 1 Q. By the area, what area do you mean?
2 Q. The Imperial Project area, the Cargo
3 Muchacho, the district, the mining district.
4 Q. And the mountain range that we are seeing
5 right in the background next to the drill hole sites,
6 what mountain range would that be?
7 A. That is the south end of the Cargo Muchacho
8 Mountains.
9 Q. And, Mr. Purvance, in this area where the
10 exploration drill holes were carried out, has there
11 ever been any commercial mining?
12 A. No. Obviously, there has not been any
13 commercial mining at that site.
14 MR. MCCRUM Mr. President, we are now
15 getting into an area where we may be referring to
16 confidential cultural resource information.
17 PRESIDENT YOUNG Thank you. At this point,
18 we will turn off the cameras. I'm not sure how long
19 you anticipate that will--this part of the question
20 will take.
I would say less than 10 minutes.

Okay. Thank you.

(End of open session.)
(Original Content Removed Due to Confidentiality)
11 (End of confidential session.)

17:22:49 1 OPEN SESSION
   BY MR. McCRUM
   Q. Mr. Purvance, are you familiar with the
      Norwest expert report dated March 15, 2007, submitted
      with the U.S. Rejoinder which asserts that the great
      majority of the overburden rock at the Imperial
      Project Site consists of, quote, gravel? And do you
      have a response to that assertion?
   A. Yes, I am familiar with that report, and
      definitely I have an assertion or I have a response to
      that assertion. The Norwest report in several
      instances refers to the rock unit as gravel. In no
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13 terms—I'm project geologist for the development and
14 for all the drilling that took place at that site, and
15 I was in charge of the assigning the rock types and
16 the character of the rocks that were going to be
17 mined.
18 Q. Let's bring up Purvance hearing Exhibit 12.
19    Mr. Purvance, did you take—well, has Glamis
20 Gold, Limited, maintained core samples from the
21 Imperial Project over the years since the drilling
22 that you supervised in the early 1990s?

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17:23:59 1 A. Yes, we have maintained the core samples.
2 This is a core sample from a representative core
3 sample from the deposit that I chose in the
4 mid-nineties to be submitted to a laboratory for
5 testing.
6 Q. And the picture that we are looking at now,
7 Purvance hearing Exhibit 12, was that submitted with
8 your rebuttal statement in July of 2007?
9 A. Yes, it was.
10 Q. And it shows a particular sample, does it
11 not—how would—sample number?
12 A. The sample number is the designated by—WC
13 designates the type of hole it is. It is a core hole
14 that was drilled in the West Pit, the hole number is
15 4. The depth is the final number there, was at
16 74 feet. And as you can see, the core has been
17 identified to make sure that the lab does not mix
18 samples up. We take a Magic Marker and write the
number right on the core.

Q. Mr. Purvance, you said Magic Marker. Is that something that can rub off easily?

A. No, we definitely use an ink and a pen that does not rub off.

Q. In other words, an indelible marker?

A. Yes.

Q. Mr. Purvance, I'm going to hand you a physical sample in a bag. Do you recognize that?

A. Yes, this is the sample that's in the photograph.

Q. Is that the same bag that we are looking at in the photograph?

A. Yes, it is the same bag.

Q. Can you read the number on the bag.

A. WC-4-74.

Q. And what is in the bag, Mr. Purvance?

A. It's the core sample that we have retained that says the exact same thing.

Q. And, Mr. Purvance, as an experienced mining geologist, do you have an opinion about whether this material that you're holding is gravel, or is it some other type of rock?

A. No, it's definitely not gravel. It's referred to and would be classified as conglomerate.

It's well cemented, and it's typically and
representative of the overburden that's at the
Imperial Project Site.

Q. In your training at the University of Utah in
the geology department, when did you learn the
distinction between gravel and conglomerate?
A. I learned it very early on in my field trips
with a couple of the noted professors at the
University of Utah.

Q. Is this a difficult geologic classification
to make?
A. No, this is not. It's very plain that this
is well cemented hardrock.

Q. Let's look at the other photographs in this
exhibit that were submitted with your rebuttal
statement, if we could.
Are these--is this another paragraph that was
submitted with your rebuttal statement?
A. Yes, it is. It's a core hole that was
drilled on the east deposit at a depth of 37 feet.

Q. Do you have an opinion about whether that is
cemented conglomerate or gravel?
A. It is cemented conglomerate, as the first
sample.

Q. And let's look at the next photograph
submitted with your rebuttal statement.
A. Again, this is EC-3 at a depth of 226 feet,
and you can see we have identified the core to make sure the lab doesn't mix them up, and again you can see the rock is solid.

Q. Let's look at the next photograph in this exhibit.

A. Again, this is another core hole that was drilled in the West Pit area, number three, is at the depth of 90 feet. And again you can see the rock is well cemented.

Q. Let's look at the next photograph attachment in this exhibit from your rebuttal statement in Exhibit 11.

A. Again, the West pit WC-4, at 73 feet, and it's got the sample number on there, and the markings as to the footage that it came from that it represents in the hole.

Again, can you see that it's typical or real similar to the sample I have in front of me here.

It's solid cemented conglomerate.

Q. These samples that we have been looking at, do they--how do they relate to the material that would have to be extracted at the Imperial Project Site?

A. These samples represent and are representative of the overburden that will be or the conglomerate rock unit that will be removed at the rock site or at the mine site.

Q. And is the vast majority of that overburden gravel or cemented conglomerate?
A. Definitely cemented gravel - cemented conglomerate, gravel.

Q. I'm sorry, let's get that clear on the record, Mr. Purvance. Is the overburden material dominantly cemented conglomerate or gravel?

A. It is cemented conglomerate.

Q. Now, these samples we have been looking at, were they identified by number in charts that you prepared as the Project geologist in the mid-1990s?

A. Yes, that's the whole point of sending them off-site for analysis. We prepared a chart that lists the findings of the analysis that was done.

Q. Let's look at Purvance hearing Exhibit Number 11. And this is a letter bearing your signature, Dan Purvance, Project Geologist, from 1996, and, Mr. Purvance, is that a letter that you prepared back in 1996?

A. Yes, it is.

Q. And let's look at the next attachment here. Let's look at the third in the yellow highlighted section below the third entry from the bottom, the hole designated as WC-4 at depth of 74. Would that sample description correlate with the sample that you have before you, Mr. Purvance?

A. Yes, that is the same sample, and that is the description of it there in the table.

Q. Now, on the far left, it bears the
description C-O-N-G-L period/gravel.
A. That is the abbreviation for conglomerate.
As I mentioned, that's the rock type that had been assigned to it.
Q. What is the term gravel?
A. Gravel was a simplified shorthand term that

we used quite commonly, but at no time was this rock ever classified or considered as gravel.
Q. Did you understand it at the time to be cemented conglomerate or gravel?
A. It is cemented conglomerate.
Q. And is the sample that's referred to in that chart the same sample you have here today?
A. Yes, this is the same sample.
Q. Let's look at the next chart in this exhibit.
And again, this is another exhibit filed with your rebuttal statement that identifies the hole WC-4 among others at 74 feet with the description to the left C-O-N-G-L period/G-R-A-V; is that correct?
A. Yes, that is correct.
Q. And now let's look at the next chart in this exhibit.
And is the same sample hole description we have been referring to reflected in this third chart, WC-4 at 74 feet?
A. Yes, I believe it's the second one from the bottom
Again, the rock type on the far left is noted
as conglomerate. This is just a listing of all the samples that we did at the time, and as you can see, it was considered and is conglomerate at that footage, and under the remarks we show that it's a full core, and it's well cemented.

Q. Now, these various charts that we have been looking at, different descriptions, do they all refer to the same sample that you have in your hand right now?

A. Yes, they do.

Q. So, sitting here today, is there any doubt about whether this material is conglomerate or gravel, in your mind?

A. No doubt at all. It's always been considered conglomerate. We will treat it and would have been treated the same as any other rock unit that we mined at the site.

Q. And the charts that we have been referring to, were they included as attachments in the Norwest expert report, as well?

A. Yes, they were.

Q. And yet Norwest considers this material to be gravel; is that your understanding?

A. Yes, that's what the report indicates.
Q. Mr. Purvance, were you surprised that since these photographs were submitted in July that there has been no request by Norwest through the Government, to our knowledge, to inspect these samples prior to this hearing?

A. Yes, considering that Norwest had stated that they believed that we had mischaracterized the rock or I had mischaracterized the rock as gravel. Obviously, the rock is conglomerate.

Q. Thank you, Mr. Purvance.

MR. McCrum: That concludes our direct testimony.

PRESIDENT YOUNG: Ms. Menaker?

Mr. Clodfelter?

(Pause.)

MS. MENAKER: Thank you, we have just a few questions.

CROSS-EXAMINATION

BY MS. MENAKER:

Q. It’s not true that Indian Pass Road is a dirt road; is that correct?

A. That’s correct. It is.

Q. And would you mind putting back on exhibit 1 believe it was 2, which was the map of the ACHP site visit.

MR. McCrum: I believe that is Purvance Hearing Exhibit 3.

BY MS. MENAKER:
Q. Okay. So-and you testified that Indian Pass Road was the road on which the people on the ACHP site visit traveled; is that correct?
A. That's correct.
Q. And are there any other roads in the vicinity, or I should say that intersect the Imperial Project mine area?
A. There are drill exploration roads and small jeep trail-type roads, but there are no what you would consider gravel or maintained road except Indian Pass.
Q. So, it's correct that there are no roads that vehicles regularly travel on other than the Indian Pass Road in the Imperial Project Mine area; isn't that correct?
A. No, that's not correct. The Indian Pass Road, it provides easy access or a maintained road to go to Indian Pass, but there are also, you know, we had access through exploration roads that go throughout the area out there.
Q. And what were those--are those exploration roads--they're not gravel roads, you said?
A. No, they're just roads that were--well, there is a series of roads. There are Jeep trails that have been used out there for a long period of time, and then the exploration roads that we used were just trails or pass where we were allowed to put in a drill hole. In other words, the BLM will give you clearance, and you're allowed to drive your vehicles.
Q. So, basically once you get BLM permission because you have permission to drill, you can kind of--you can go off road and travel to that site to do the work that you need to do; is that correct?

A. Yeah, there's existing trails there that I'm sure off-road vehicles have created, and then there are disturbances that we created specifically for the exploration sites.

Q. Thank you.

Now, you mentioned that you met Lorey Cachora, and I believe it was on Indian Pass Road where he stopped you--

A. That's correct.

Q. --for directions to go to the Running Man site?

A. That's correct.

Q. And you testified that that was strange; is that correct?

A. Yes, it was strange.

Q. And what relevance does that have to this case? Why is that strange?

A. Because Mr. Cachora, being the Historian for the Quechan Tribe and had participated in a lot of field activities obviously would know where Running Man is, and it had been like--been shown in the field studies that Running Man had been identified, so I found it strange that he asked me for directions to
21 how to get to it.
22 Q. But is it your assertion that it casts doubt

17:38:37 on the fact that the area has cultural or religious
1 significance to the Tribe just because Mr. Cachora was
2 purportedly lost or unsure of where to turn off in the
3 road in order to find this geoglyph in the desert?
4 A. I'm not sure I understand your question.
5 Q. Do you have any reason to doubt the Tribe's
6 assertion that the area has cultural and religious
7 significance to the Tribe just because Mr. Cachora had
8 some difficulty locating the Running Man geoglyph?
9 A. No. The Tribe in several studies had
10 expressed that the cultural features were known to be
11 there and had been identified by Tribe and the
12 archaeologist at the time. As far as their religious
13 significance, I'm not sure what they have.
14 Q. Okay.
15
16 MS. MENAKER: Okay. I have no further
17 questions. Thank you.
18 PRESIDENT YOUNG: Mr. McCrum? Any further
19 questions for Mr. Purvance?
20 MR. MCCRUM: No, Mr. President. We have no
21 further questions.
22 PRESIDENT YOUNG: Thank you, Mr. Purvance,
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17:39:46 1 you're excused.
2
3 Oh, before you do, I'm sorry, allow me to ask
4 my colleagues if they have questions.

QUESTIONS BY THE TRIBUNAL

ARBITRATOR HUBBARD:  I would like to ask one
2 question about the use of the word gravel after the
3 slice with conglomerate. Is that because what's in
4 that conglomerate piece may have at one time been
5 gravel?

THE WITNESS:  Yes. Typically conglomerate is
6 made up of and classified. It's gravel that has been
7 cemented over a period of time, so, yeah, that could
8 be said.

ARBITRATOR CARON:  Mr. Purvance, going back
15 to the ACHP map, approximately how long--how many
16 people are on the tour, and about how long are they
17 stopping at each of these various stops?

THE WITNESS:  I would estimate the group was
19 probably 30 to 40 people, something like that, and we
20 spent approximately 10 to 15 minutes at each site.

ARBITRATOR CARON:  How many cars was that?

THE WITNESS:  I would say a dozen cars.

17:40:59 1

ARBITRATOR CARON:  And when they reached the
2 trail segment on the southeast corner of the Project
3 site, do you remember what they discussed?

THE WITNESS:  Yeah, specifically I remember
5 what they discussed. They--we didn't--we had no idea
6 where they were going to stop. And then when they
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7 stopped there, they walked over to this trail segment
8 and said this is one of the trail segments that's
9 going to be destroyed by the mining activities. And,
10 of course, we pointed out at that point that it
11 wasn't, that that particular segment, trail segment
12 had been removed by our mitigation efforts from our
13 disturbance. And as you can see, the waste rock
14 storage pile that was supposed to go there had been
15 moved into the Project approximately 100 feet.
16 And so at that time we actually pointed that
17 out. We had restaked the toe or the bottom of that
18 waste rock stockpile, and that's represented by that
19 straight line that is just to the right of the ACHP,
20 that X there, yeah.
21 Now, that's what it was discussed. And, of
22 course, they discussed what the trail segment was and

17:42:05 things like that.

2 ARBITRATOR CARON: Thank you.
3 THE WITNESS: Sure.
4 MS. MENAKER: I just wanted to ask if I could
5 have the Tribunal's indulgence. I had one additional
6 question that I forgot to ask.
7 Thank you.
8 CONTINUED CROSS-EXAMINATION
9 BY MS. MENAKER:
10 Q. This relates to your testimony regarding the
11 prior mining or lack thereof at the stone face
12 prospect. And the document that I'm referring to is
Page 232
PRESIDENT YOUNG: Counsel, do you have a page number available for us?

MS. MENAKER: Yes, it's page 34.

BY MS. MENAKER:

Q. If I could ask the witness to take a look at this document.

(Document handed to the witness.)

Q. And do you recognize that document as the document that the United States cited in response to your previous--your assertion made in your statement that no mining had occurred in this area?

A. Yes, this is one of the documents that were included.

Q. Okay. And could you turn to page 34 of that document, please.

A. Yes, it does state that.

Q. And can I just distribute this map.

(Document handed to the witness.)

Q. If you take a look at this map, please, can you see that the symbol under, on the right-hand side where it says explanation, and has a symbol that says mine underneath it?
A. That is correct.

Q. And do you also see that where it says mines and deposits, number one says stone face?

A. Yes.

Q. And do you see in the upper left-hand corner that there is a symbol of a mine with then a bar that says one next to it?

A. Yes, I see that.

Q. Okay. Thank you.

PRESIDENT YOUNG: Is that the last of your questions?

MS. MENAKER: It is, thank you.

PRESIDENT YOUNG: Redirect, Mr. McCrum?

MR. MCCRUM: Thank you, Mr. President.

BY MR. MCCRUM:

Q. Mr. Purvance, referring to this map that Government counsel has just presented, are you familiar with this map?

A. Yes, I am.

Q. And when the heading above the listing of location says "Mines and Deposits," what does that mean to you?

A. That can mean various things, but it can mean anything from a prospect to a project the size of Mesquite.
17:46:11 Q. So, does this map listing the stone face site under the category of mines and deposits indicate to you as a geologist that the stone face site is the sight of a mine?
   A. No, not at all. That's a common--the symbol's commonly used in a lot of topographical maps, and like I say, it can represent a prospect or minor amount of disturbance or a mining operation. In this case, the stone house is actually referred to as the stone house prospect in several other reports, and that is what it is. It's a prospect.

17:48:09 Q. So, Mr. Purvance, looking at this map of the Fort Yuma Indian Reservation up to the--in the upper left-hand corner where the number one is indicated by the symbol, what does that indicate to you as a professional working geologist?
   A. That means that there has been some kind of an activity or some kind of an interest or disturbance that has been noted on a topographic map when they were producing the map.

Q. Turning to page 34 of U.S. Government Memorial Exhibit 118 that Ms. Menaker referred to, can you refer to that, Mr. Purvance? Do you have that?
   A. I'm not sure.

Q. Let me hand you page 34 of Government Exhibit 118.
And there is a description of the Cargo Muchacho mining district. Does that indicate to you as a professional geologist that the stone face prospect is the site of a mine?

A. No, not at all. The Cargo Muchacho Mountains—the mine they're referring to in this document is the American Girl Mine. I'm very familiar with it.

Q. Is that the American Girl Mine where you worked?

A. Yes, it is.

Q. And roughly how many miles away is it from the stone face prospect.

A. It's approximately two miles by the crow flies to the American Girl Mine.

Q. Mr. Purvance, would you say that this exchange reflects an example of the problem of Government counsel making factual assertions based on documents in the record without a supporting expert witness to interpret them?

Ms. Menaker: Objection.

President Young: We'll take the objection under advisement, but you go ahead and answer.

The Witness: Yes, definitely. The Government has looked at the map, saw the—basically the symbol for a mine, and automatically assumed there was a mine there. I have taken photographs. I visited the site several times, and I can swear there...
is no mining operation at that site.

BY MR. MCGRUM

Q. And, Mr. Purvance, even after you submitted your first declaration in this case stating that there had been no mining there, the Government continued to make that assertion in this proceeding; isn't that correct?

A. Yes, it is.

Q. Thank you.

PRESIDENT YOUNG: Any further questions for this witness?

MS. MENAKER: No, thank you.

PRESIDENT YOUNG: Thank you.

Mr. Purvance, we will excuse you with the Tribunal's thanks.

THE WITNESS: Thank you.

(Witness steps down.)

PRESIDENT YOUNG: We are close to the 6:00 hour, and if everybody will cede two-and-a-half minutes each of their time, we will rise now rather than waiting, requiring you to call your next witness. The next witness called tomorrow will be... MR. MCGRUM: That will be Dr. Sebastian first in the morning.

PRESIDENT YOUNG: We'll start with Dr. Sebastian in the morning, then.

MR. GOURLEY: And most of that will be confidential.
PRESIDENT YOUNG: So, most of the--certainly the first witness, but I think the next three witnesses, as I recall, will largely be confidential.

MR. GOURLEY: That's what I believe.

PRESIDENT YOUNG: Well, the next two.

Dr. Sebastian and Mr.--

MR. GOURLEY: Mr. Kaldenberg.

PRESIDENT YOUNG: Mr. Kaldenberg.

MR. GOURLEY: Dr. Cleland is at the end.

PRESIDENT YOUNG: Okay. So, we will start tomorrow without video for the public hearing.

Do you have any idea about how long those two witnesses may go?

MR. MCCRUM: They it would take most of the morning.

PRESIDENT YOUNG: Most of the morning. So, it is likely we will not have the public hearing available through most of tomorrow morning, so in all likelihood start again with the public part of the hearing in the afternoon? Okay?

MR. MCCRUM: Yes.

PRESIDENT YOUNG: Thank you very much. We will see you in the morning. Thank you very much.

I'm sorry.

MS. MENAKER: May I ask the Tribunal a procedural question. Can we get from the Secretary of the Tribunal the time so we can keep track of how much time each party has used perhaps at the end of the
17:51:50 1 day?

2             PRESIDENT YOUNG: We should be able to do
3 that. We could do it either at the breaks or the end
4 of each day if that would be all right.
5               MS. MENAKER: Thank you.
6             PRESIDENT YOUNG: Thank you. We will make
7 that available. In fact, we have it right now. Why
8 don't you give it to them off-line.
9               Thank you very much.
10 (Whereupon, at 5:52 p.m., the hearing was
11 adjourned until 9:00 a.m the following day.)
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I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

David A. Kasdan