NAFTA/UNCITRAL ARBITRATION RULES PROCEEDING

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In the Matter of Arbitration Between:

GLAMIS GOLD, LTD.,

Claimant,

and

UNITED STATES OF AMERICA,

Respondent.

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HEARING ON THE MERITS

Thursday, August 16, 2007

The World Bank
1818 H Street, N.W.
MC Building
Conference Room 13-121
Washington, D.C.

The hearing in the above-entitled matter came on, pursuant to notice, at 9:06 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

Assistant to the Tribunal

Court Reporter:

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C O N T E N T S

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P R O C E E D I N G S

PRESIDENT YOUNG: Good morning.

Counsel, are we ready to proceed?

MR. CLODFELTER: Yes, we are, Mr. President.

PRESIDENT YOUNG: As we start, Mr. Clodfelter, I want to ask a question of the Government, if I may, which is, you will be proceeding, and, as we understood from Ms. Menaker yesterday, following a certain order of the arguments in relationship to the Table of Contents that has been laid out.

Would you like us to ask our questions sort of at the end of each section of your argument? Would you prefer we wait until the very end and sort of go back and struggle--we don't want to interrupt the flow of the argument, on the one hand; on the other hand, we also don't want to sort of force you to sort of go back and think of something you said, you know, four hours earlier. So what would you prefer?

MR. CLODFELTER: I think in general, if questions could be held to the end of a section or a presenter's piece, that might be helpful for regular

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09:05:11 questions. For burning questions, ask away.

PRESIDENT YOUNG: Thank you. With that, we will turn the time over to the Government.

FACTUAL PRESENTATION BY RESPONDENT

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

The United States will present its defense today and tomorrow in two parts. First, we will address Glamis's expropriation claim, and then we will address its minimum standard of treatment claim.

Within each claim, we'll first examine the challenged California measures and then turn to the Federal Government measures at issue.

Mr. President, the hearing to date has been somewhat disembodied. While we did hear some discussion about the legal elements of Glamis's claim on Sunday, Glamis has spent virtually no time attempting to relate the evidence to those legal elements. We apparently will have to wait until September to hear that.

Our approach is going to be quite different, as we mentioned. In our presentations, we will

09:06:27 present our arguments about what Glamis has to prove in order to make out a violation of Article 1110 or Article 1105, and we will show in great detail how the evidence mustered by Glamis falls far short of proving such violations and, in fact, disproves them.

This morning I'm going to make some preliminary remarks about Glamis's expropriation

claim, and then I will outline for you in--exactly how we are going to address that claim, and I will return later to do the same for Glamis's 1105 claim.

Glamis's claim that the State Mining and Geology Board's regulation and Senate Bill 22 effected an expropriation of its mining claims fails on many grounds. First, as I argued on Sunday, its challenge to those measures is simply not ripe, and I would like to make a few additional comments on this issue this morning.

It's undisputed that neither of these measures has been applied to Glamis. At no time did the State of California disapprove a Reclamation Plan submitted by Glamis on account of the fact that that plan did not comply with the requirements set forth in

09:07:38 either the regulation or in Senate Bill 22. Although Glamis argues that there's no doubt that both measures would be applied to it were it to seek approval of a Reclamation Plan that did not contemplate complete backfilling and recontouring, the fact remains that neither has been applied to it.

And as demonstrated in our written submissions, international law as well as domestic law is clear on this point. No expropriation claim may be made until a challenged measure is actually applied to a Claimant. This is not an academic point. Unless and until a measure is actually applied, it's impossible, for example, to gauge the economic impact

of that measure on the Claimant.

Now, as the Tribunal knows, the price of gold has more than doubled since the challenged California measures were adopted. Clearly, the economic impact of the reclamation requirements contained in those measures would be quite different if the impact, as measured as of 2002, or at a later date on which Glamis might actually have been denied approval of any Reclamation Plan that it submitted and when the price

09:08:51 of gold would have been significantly higher and the economic impact lower. Glamis would have you simply ignore the fact that neither measure has been applied to it.

Neither was it applied in 2002, neither has been applied since. But this the Tribunal cannot do. It must choose a date of the alleged expropriation and calculate the economic impact of the measure as of that date. And the date of expropriation cannot predate the time when the measure was applied to the Claimant and, therefore, the claim must be dismissed.

It's not enough for Glamis to insist that the application of the measure or measures was inevitable. Domestic courts and international tribunals require a strong showing before making any exceptions to the ripeness rule, for otherwise, Claimants would simply run to court or to international arbitration to challenge any law which they deem distasteful.

In this case, Glamis cannot meet its burden

of showing futility. Indeed, on numerous occasions, Glamis has argued to the Department of Interior and to this Tribunal that the California measures were

09:10:01 preempted by Federal law, although I note that in their very latest round of submissions they appear to have dropped this argument.

Nevertheless, if Glamis did believe, as vigorously as it argued to the Department of the Interior, that California's reclamation requirements were preempted by Federal law--and it was not a foregone conclusion that they would ever have been subjected to those requirements. But instead of seeking to establish in court that those measures were preempted, it instead ran to international arbitration to challenge the requirements.

Now, I doubt there's any serious question that had it, instead, gone to domestic court to challenge the measures as expropriatory, that claim would have been dismissed for lack of ripeness. United States submits that this Tribunal should dismiss Glamis's expropriation claim on ripeness grounds alone.

Our remaining expropriation arguments apply only to the extent that the Tribunal does not dismiss the claim on ripeness grounds. These arguments assume

09:11:07 1 that both of the California measures have been applied
2 to Glamis. In such a case, we would ask you to keep
3 another point in mind. If the United States
4 shows--let me restate it another way. If Glamis fails
5 to show that both of the California measures are
6 expropriatory, then the Tribunal must dismiss Glamis's
7 expropriation claim in its entirety, and this is for
8 the following reason.
9 Although the SMGB regulation and Senate Bill
10 22 were adopted by different branches of the
11 California Government to address different problems,
12 they both impose the same types of reclamation
13 requirements on the mining companies subject to them.
14 The SMGB regulation has far broader coverage. It
15 applies to all open-pit metallic mines in the State of
16 California. Senate Bill 22, as you know, applies only
17 to those open-pit mines that are located near a Native
18 American sacred site. Any mine that is subject to
19 Senate Bill 22 will be necessarily subject to the SMGB
20 regulation, but not vice versa.
21 Glamis claims that it is the subject and,
22 indeed, has been subjected to both measures, but it is

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09:12:37 1 necessary, however, for Glamis to show that both
2 measures were expropriatory. Even assuming the
3 expropriatory nature of one of the two measures,
4 Glamis still would have been subject to the exact same
5 reclamation requirements under the other

nonexpropriatory measure.

With these points in mind, I will now turn to our defense to Glamis's expropriation claims. In connection with that defense, we have distributed a binder of documents which reflects all of the exhibits which are in the record to which we may make reference during our oral presentations.

We will also be referring to slides during our presentations and will distribute hard copies of those slides before we do so.

We will begin our defense by showing that the California measures cannot be deemed expropriatory because they merely specified background principles already present in California law.

Ms. Menaker will discuss the legal principles involved and show why those measures need not be applied retroactively to previously approved mines in

09:13:44 order to constitute expressions of background principles.

Mr. Feldman will then demonstrate in detail how the SMGB regulation specifies preexisting requirements of the Surface Mining and Reclamation Act. And Ms. Thornton will then explain why Senate Bill 22 merely specifies the preexisting prohibitions of the Sacred Sites Act.

Mr. President, we will then turn to a showing of why, even if those measures did not specify preexisting background principles, Glamis has failed

to prove the elements of an indirect expropriation.

Now, the parties agree, on a general level at least, on what those elements are. First is the question of the measures' economic impact.

Now, much of the testimony presented by Glamis in the last few days addressed that issue. Unfortunately, little was heard from Glamis's witnesses about the most important evidence on this issue, Glamis's own internal analyses. It was not a little surprising to hear Glamis's expert, Mr. Guarnera, completely discount the value of

09:14:57 Glamis's detailed and confidential internal analyses when he was all to ready to accept as absolute proof of industrywide cost increases the Web site reports of a few companies' quarterly statements.

On Monday I stressed the overriding probative value of Glamis's internal valuation analyses. This week we heard a lot about gravel and swell factors, which do impact the valuation, and got a chance to view maybe three out of the estimated 30,000 feet of core samples that were taken at the site. But we heard nothing to explain away the detailed conclusions as it--detailed conclusions reached by Mr. Purvance about the swell factor based on his analysis of the results of all the core samples.

Mr. Guarnera failed to point out any deficiencies in Mr. Purvance's analysis when asked if he had any reason to believe those conclusions were

wrong.

Mr. Sharpe will show how Glamis has failed to overcome the implications of its own documents, the conclusions of which have been corroborated by our own expert Navigant. Navigant, who we learned from

09:16:05 Glamis's counsel the other day, is considered by Behre Dolbear to be qualified enough to conduct metallic mine valuations, to join it in a valuation of Alcan Company's aluminium assets, just as it joined Norwest in the valuation of Glamis's mine claim.

Mr. Sharpe will show how Glamis has failed to explain away the numerous deficiencies in Mr. Guarnera's reports and that Glamis's mining claims retain significant value and retained such value after the California measures were adopted, even assuming that Glamis had to comply with the reclamation requirements.

Then Ms. van Slooten will address the second element of an indirect takings analysis and show that Glamis could not have had any protected reasonable expectation that it could mine without complying with the California measures, even if that meant full backfilling.

Then Ms. Menaker will return to demonstrate that the character of both California measures is regulatory in nature and not expropriatory. After that, we will turn to address Glamis's claim that the

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09:17:16 Federal Government's actions expropriated its mining claims.

Now, you have no doubt noticed that this claim has received rather short shrift in Glamis's submissions. That's because Glamis itself has pegged itself the date of expropriation to the date to the SMGB regulation that was adopted on an emergency basis.

Now, as of that date, Glamis had a request pending with the Department of Interior to suspend processing of its Plan of Operations and, according to Mr. Jeannes, never even took a position after the commencement of this arbitration on whether DOI should continue processing its plan, much less asked it to do so, that, despite faulting the Department of Interior in its briefs and in this hearing for failing to do just that. As Ms. Menaker will show in detail, all of Glamis's actions underscore the weakness of this claim, which requires dismissal.

Now, with that, Mr. President, I would like to turn the floor over to Ms. Menaker, who will set forth our defense, initial defense, based upon

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09:18:18 background principles of law.

Thank you.

MS. MENAKER: Thank you. Good morning,

Mr. President, Members of the Tribunal.

As Mr. Clodfelter noted, we'll now demonstrate that the California measures challenged by Glamis, namely the SMGB regulation and Senate Bill 22, did not interfere with Glamis's interest in its unpatented mining claims and, thus, are not expropriatory. And specifically we will show that the scope of Glamis's property interest is limited by certain background principles of California law that circumscribed the property interests that it held in its unpatented mining claims.

Both the United States and Glamis agree that when considering a claim for expropriation under international law, a first step in that analysis is the review of domestic law to determine the scope of the property interest at issue.

Glamis also agrees with the United States that property rights are subject to legal limitations existing at the time that the property rights are

09:19:23 acquired, and any subsequent burdening of those property rights by such limitations cannot be expropriatory.

When a State raises a background principles defense, it is saying that the law prohibiting certain conduct or use does not impose a new restriction on the property at issue. A background principle of law can define the nature of a Claimant's property interest in such a way as to make certain uses of that

property unlawful. Accordingly, a State does not effect a taking when it adopts a subsequent measure that merely applies such a background principle to prohibit a property owner from using its property in that unlawful way.

If a State shows that an objectively reasonable application of a background principle would prohibit the property use at issue, then that prohibition cannot be a taking, and Glamis doesn't contest this. Yet, in its opening statement, Glamis posited a test for a background principles defense that would write this concept out of the law altogether.

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09:20:32 First, as you can see on the screen, Glamis correctly noted, and I quote, "That for these two California statutes to be background principles restricting the 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 existing law without the need of the regulation."

But then Mr. Gourley states--and this is on the next screen--that, "Finally, and most basically, if the Sacred Sites Act provides 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."

But Glamis can't have it both ways. The very

thing that proves the existence of a background principle cannot preclude a State from applying it, and the Supreme Court has been clear on this point. A State does not effect a taking if it enacts a measure that achieves the same results that the State could have achieved through its courts, and the fact that the State chooses to clarify a background principle in

09:21:50 a particular piece of legislation or in a regulation, rather than going to court to achieve that same results through judicial processes, does not and cannot demonstrate the nonexistence of the background principle or necessitate the conclusion that the same results could not have been achieved in the courts.

In fact, as Professor Sax noted in his first report, and I quote, "Whether particular conduct constitutes a nuisance ordinarily has to await ascertainment of particular facts and circumstances in a judicial proceeding or specification in legislative form."

Mr. Sax then went on to note that, "The California Supreme Court has noted a preference under California law for specification of violation and of remedy to be articulated by the legislature in a statute rather than left to common law adjudication."

And that's what the legislature and the SMGB did here. They both adopted measures specifying the application of a background principle to the operation of open-pit metallic mining, and both of those

measures reflect a reasonable application of the

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background principles identified by the United States, and those background principles are the following, which I've also put on the screen.

The first one is the requirement that mined lands be reclaimed to a usable condition and pose no danger to public health or safety under the Surface Mining and Reclamation Act which was enacted in 1975.

The second background principle is the prohibition against interfering with Native American religious practices on public property under the Sacred Sites Act, which was enacted in 1976.

And the third background principle at issue in this case is the prohibition against causing irreparable damage to Native American sacred sites absent a showing of necessity, also under the Sacred Sites Act.

Now, before turning over the floor to my colleagues, who will describe exactly how each of the California measures reflects an objectively reasonable application of the background principles that I've just set out, I'm going to address a few of the preliminary points in response, or make a few

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preliminary points in response to the rebuttal

statement that Glamis's expert Mr. Olson submitted.

So, as an initial matter, Glamis, in its last round of pleadings, has abandoned any argument that the United States's background principle defense fails because the California measures are preempted by Federal law; and that is, Glamis now concedes that California is not prohibited by virtue of Federal law from imposing the types of reclamation requirements at issue on Federal lands.

And as we have shown in our written submissions, the U.S. Supreme Court in the Granite Rock case expressly recognized States' rights to impose environmental regulations on unpatented mining claims that are located on Federal lands. And I have shown that on the screen as well.

Also, BLM's 3809 regulations likewise provide that State laws and regulations that relate to the conduct of operations or reclamation on Federal lands are not preempted, even if those State laws are more stringent than Federal law. And the Federal Government has expressly recognized that SMARA does

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09:25:22 apply on Federal lands in California.

In his latest expert report, Mr. Olson says that he found it unnecessary in his original report to reach a conclusion about whether the challenged California measures were, "like the kinds of regulations upheld by the Supreme Court in Granite Rock and sufficient to affect the definition of a

property interest under Federal law."

So, Mr. Olson does not seek to preserve the viability of Glamis's preemption argument by attempting to distinguish the regulations at issue at Granite Rock from those measures that are challenged by Glamis in this arbitration. Instead, Mr. Olson makes an alternative argument. He argues that the challenged California measures cannot be articulations of preexisting background principles because the reclamation requirements that are contained in the SMGB regulation and in Senate Bill 22 apply to future, but not to existing mines.

And in support of this argument, Mr. Olson seizes on language from the Lucas decision that says that permitting--and he claims that language states

09:26:36 that permitting similarly situated landowners to continue the use that has been denied to the Claimant, "ordinarily imports a lack of any common law prohibition on that use."

But this similarly situated argument is unavailing for several reasons. First, as Professor Sax has observed in his rebuttal statement, the language from Lucas that Mr. Olson quotes constituted evidentiary guidance for determining the existence and content of common law principles, and that language should not be elevated to a legal rule applicable to background principles that are codified in statutes.

Second, future and existing mines are not

necessarily similarly situated, and they need not be subject to the same controls.

Third, operators remain subject to a background principle, even when, in any given instance, the principle is not applied to them.

And fourth and finally, a failure to apply a background principle to an operator does not constitute a grant of a property right to that operator to continue to engage in the activity that

09:27:50 the State has previously chosen not to disturb. And I will go through each of these in a little more detail.

On the first point, as Professor Sax made clear in his supplementary report, the similarly situated language in Lucas appears in the context of the Court's providing guidance on when certain facts ordinarily would indicate a lack of a common law background principle prohibiting the conduct at issue.

So, in other words, if faced with an argument that there is a common law background principle that restricts the owner's property interest, the Court sets out factors for consideration in determining whether such a common law restriction on certain property rights exists. But the background principles at issue here concern statutory and not common law rules. Those background principles, you will recall, are contained in SMARA and the Sacred Sites Act. Both of those are codified statutes.

So, those statutory rules raise no

evidentiary concerns because their content is clear. In other words, this Tribunal need not look and try to determine whether there is a common law background

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principle because we are pointing you to the very statute which we claim constitutes the source of the background principle for the measures at issue in this arbitration.

So, as Professor Sax notes in his latest report, the similarly situated language in Lucas that's cited by Glamis isn't applicable in cases like this one, where a tribunal does not need to ascertain the content or the existence of the alleged background principle.

Second, future and existing mines are not necessarily similarly situated, and thus they need not be subject to the same controls. This consideration applies with particular force where, as here, the challenged measures concern reclamation requirements; while existing mines may have already have had such plans approved and, in fact, existing mines may have already finished mining altogether, they may be fully reclaimed and abandoned.

And the State of Montana recognized this very consideration when it enacted its ban on cyanide heap-leach mining, which in that ban it exempted all

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mining operators that had approved permits.

So regulatory decisions concerning how best to balance the application of a new regulatory requirement with impacts on existing operations are questions of judgment which do not affect the content of a property right.

On the third point, operators remain subject to a background principle, even when that background principle is not applied to them in a particular instance. And on this issue, Mr. Olson relies on language from the Palazzolo decision, where the Supreme Court stated, and I quote, "A regulation or common-law rule cannot be a background principle for some owners but not for others."

But here, the background principles that the United States has identified apply to all property owners considered by Mr. Olson to be similarly situated. They apply to everyone that has acquired a property interest after the enactment of SMARA or the Sacred Sites Act.

The rule ultimately endorsed by Mr. Olson would extend well beyond the scope of Lucas or

Palazzolo. It would require that when applying a background principle in any particular instance, a State would have to apply that background principle, without exception, to all similarly situated owners. But, as Professor Sax noted in his last report, the

Federal circuit's decision in the American Pelagic case clearly illustrates that an owner remains subject to a background principle, even when that background principle is not applied to that owner in a particular instance.

In American Pelagic, the governing background principle was Congress's assumption under the Magnuson-Stevens Act of "sovereign rights and exclusive fishery management authority over all fish in the Exclusive Economic Zone in the United States in the Atlantic Ocean known as the EEZ." The Court found a valid application of that background principle when, in response to concerns over the large size of American Pelagic Fishing's vessel, Congress canceled American Pelagic's existing permits to fish in the EEZ.

Now, importantly, the Court found that that

09:32:45 cancellation was a valid implementation of the background principle, even though Congress opted not to disturb the fishing activities of many other commercial fishermen in the EEZ.

Now, as Professor Sax noted, "Notwithstanding Congress's decision not to disturb their fishing activities, those commercial fishermen plainly remained subject to Congress's authority over the EEZ. The fishermen remain subject to Congress's authority because their mere use of the EEZ did not give rise to any property right to fish in the EEZ."

And that brings me to the fourth point in response to Mr. Olson's similarly situated argument, which is his argument that a failure to apply a background principle constitutes a grant of a property right to that operator to continue to engage in activities that the State previously has chosen not to disturb. And this is not the case. A failure to apply a background principle to an operator does not constitute a grant of a property right to that operator to continue to engage in those activities.

And this point again was directly addressed

09:33:56 by the Federal Circuit in American Pelagic, and I have also put that language on the screen. There, the Court said, "Simply because many commercial fishermen continued to fish for Atlantic mackerel and herring in the EEZ, it does not follow that those fishermen had a property interest in the use of their vessels to fish in the EEZ. They simply were enjoying a use of their property that the Government chose not to disturb. In other words, use itself does not equate to a cognizable property interest for purposes of a takings analysis."

And this is not at all a surprising result. We noted in our written submissions other cases where this was also found to be the case. And the NAFTA Chapter Eleven case of Feldman versus Mexico is another example.

There, the Mexican law required that in order

to receive tax rebates on cigarettes, the tax must be stated separately from the purchase prices on the producer's invoices, but there was no question that that requirement had not been enforced consistently. Resellers of the cigarettes like the Claimant in the

09:35:07 Feldman case had received rebates without presenting the itemized invoices, but nevertheless, the Tribunal rejected Claimant's expropriation claim, finding that the Claimant never possessed a right to obtain rebates without presenting the required invoice. The fact that the law was not consistently enforced did not create a right to those payments.

And the same analysis applies here. Mines that came into existence after the enactment of SMARA and the Sacred Sites Act plainly remain subject to those statutes, regardless of whether the SMGB or the California legislature decides in a particular instance to grandfather such mines from certain reclamation requirements. As clearly illustrated by American Pelagic and other cases, a property owner remains subject to governing background principles, even when a State decides for equitable reasons or for whatever other reasons not to disturb a certain activity on a certain occasion. The property use is distinct from the property right.

In his report Mr. Olson characterizes Glamis's right as a property interest, and I'm

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09:36:20 quoting, "a property interest in being able to extract minerals from the area of its mining claims." But that property interest is not at issue here because the challenged California measures do not proscribe Glamis's use of the Imperial Project's site for mineral extraction. The property interest at issue here instead concerns whether Glamis holds a property right to mine in a manner that, one, fails to reclaim the land to a usable condition or to a condition that does not threaten public health or safety; two, to mine in a manner that interferes with Native American religious practice; or, three, to mine in a operator that irreparably damages Native American sacred sites.

And Glamis cannot establish such a property interest under State law, given the clear statutory background principles that the United States has identified; namely, SMARA and the Sacred Sites Act.

And by distancing itself from its preemption argument, Glamis has foregone any attempt to demonstrate that such a property right exists under Federal law.

So simply put, the prescribed--the uses that

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09:37:31 have been proscribed by the California measures were never part of Glamis's property interest in its unpatented mining claims.

So, if the Tribunal has any questions, I'm happy to entertain them; and otherwise, I'll turn the floor over to Mr. Feldman, who will address the first of the two California measures, the SMGB regulation, and he'll show that that regulation merely articulates a background principle of law and, therefore, cannot be deemed expropriatory.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR HUBBARD: Ms. Menaker, I have just one question. Could you address the issue of whether or not the Sacred Sites Act had ever been applied to Federal land before this case.

MS. MENAKER: And if it would be okay with the Tribunal, my colleague, Ms. Thornton, is going to address that point in detail because we recognize that one of the arguments that Glamis has made is that the Sacred Sites Act cannot constitute a background principle for purposes of this case because--

ARBITRATOR HUBBARD: That's fine, if she's

09:38:41 going to address that issue.

MS. MENAKER: Thank you.

ARBITRATOR CARON: Ms. Menaker, I'm not sure I can articulate the first question. I'm just--I'm a little confused, and that's why it's difficult to articulate it.

You were saying the--under the first of these four reasons that Professor Sax puts forward, that the similarly situated language in Lucas does not apply in

this case because the background principle is in a statute rather than an attempt to ascertain it in common law. Is that correct?

Now, the difficult--the part I'm confused about is when you started your discussion, you referred to two statements the Respondent made in their opening argument, and the second statement dealt with that--and this is my typical part--that, since they could not have used the Sacred Sites Act--am I correct here?--but the question I have is, there seemed to be a different interplay in that situation between common law and the statute, the way you described it. In other words, in answering that

09:40:06 question, you said there is a certain relationship between the background principle in common law and in the statute, and then in the similarly situated language, you then talked about common law and the statute. So, can you just compare those two for a moment?

MS. MENAKER: Sure.

In the first situation, when I was referring to the statements that Glamis made in its opening argument, the very nature--when we're talking about a background principle of law that limits the nature of a property right, what we're saying is that the law always proscribed that use. And so, in essence, what you're saying is, you didn't necessarily need to promulgate a regulation or a statute prohibiting the

use because that was just an articulation of it, an application of the prohibition in a particular circumstance.

You could have, instead, gone to court and also prohibited that use. And if I just provide an example, maybe that would help.

Nuisance is a recognized background principle

09:41:17 of law. When you--typically you have property, you cannot use that property in a manner that constitutes a nuisance. And if you are doing so, perhaps you are doing something noxious. In that case, there may be a particular regulation that prohibits that type of use, or maybe there isn't, but the State could force you to stop that use by taking you to court and arguing that your use constitutes a nuisance. So, in that sense, the fact that you could obtain the same result by going to court shows that--that there is a background principle.

So, what I was saying in response to Glamis's argument, at one point it recognized this, and that was the first slide where it states that in order for these to be background principles, the United States would have to show that California would have had--been able to go into court to impose those requirements under existing law. Later, it seemed to suggest that if the Sacred Sites Act actually did what we say S.B. 22 did, then there was no need for S.B. 22 and, therefore, it could not be an articulation of a

22 background principle. And those two statements

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09:42:45 1 inherently contradictory because the fact that you
2 could have achieved the same result in court, for
3 instance, in my prior example, if the State actually
4 enacts a regulation that specifies what type of
5 noxious use is not permitted, it doesn't make it any
6 less of a specification of a background principle.
7 The fact that you chose to do that by regulation or a
8 statute rather than litigating each and every
9 different type of nuisance that arises is perfectly
10 fine.
11 ARBITRATOR CARON: I see.
12 MS. MENAKER: But now when I was talking
13 about Professor Sax's point, that was in relation to
14 language in the Lucas decision, where it says that if
15 a court is trying to determine if there is a common
16 law background principle, and you can take the
17 nuisance example, or--I don't know if I will be able
18 to carry this analogy out--but if you're trying to
19 determine if there is a background principle, one of
20 the things the Court might do is to see whether
21 similarly situated owners are treated differently. If
22 they're treated differently, then that--the Lucas

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09:43:53 1 Court said that that might be evidence that there is

no background law principle that prohibits the conduct.

But what we are saying here is that you don't have to undertake that evidentiary analysis to discover or ascertain the content of some common law background principle, like to define the scope of nuisance, for instance, because we are pointing you to the very rule or law that we say constitutes the background principle. We are showing you the statutes, SMARA and the Sacred Sites Act, so you don't have to engage in that evidentiary analysis.

ARBITRATOR CARON: So, if I can follow on that, the--there is an evidentiary process of ascertaining it in common law. The statute itself probably does not say--I will stand corrected--probably does not say this is a background principle per se, or does it say that?

MS. MENAKER: No, I don't know of any statutes that do. Of course--

ARBITRATOR CARON: So, I'm just saying there is an evidentiary process of deciding whether a

09:45:03 statement in this statute or that statute is also a background principle?

MS. MENAKER: Yes. I wouldn't call that an evidentiary process. I mean, that's your ultimate determination, is to determine whether the principles that we pointed out in these two statutes, whether those are background principles. That's what you need

to decide, but you don't have to engage in an evidentiary analysis to determine the scope or the content of that background principle because we have already showed you the statute.

In Lucas, there was no statute.

ARBITRATOR CARON: I understand that.

MS. MENAKER: Okay.

ARBITRATOR CARON: Perhaps this is best left for the next, but the question I would have, the second and third principle you had on the screen, the first operative term is "prohibition." And if there were an example where the principle was not--the prohibited act was not prohibited, what is the significance of that?

MS. MENAKER: I'm sorry, I'm not sure I

09:46:15 understood.

ARBITRATOR CARON: Well, there is a background principle. You shall not--it's prohibited from interfering with religious activity, and we are then presented with an example where, in fact, there is on land--there is an activity where religious activity was interfered with.

Now, it would be two different cases, I suppose. One is it just happened with no affirmative act from the State. Another one would be where it was permitted by the State.

And does that somehow affect our interpretation of the statute as to whether, as you're

saying, the determination that it is a principle?

MS. MENAKER: I think that it's--it might be helpful in the other presentations if we're talking about more specific facts, but at least in the example you offered, if there is an example, what we are saying with respect to religious accommodation is that Glamis had no right to mine in a manner that interfered with Native Americans' free exercise rights, that that was not part of their bundle of

09:47:42 rights.

The fact that--I mean, the converse is not necessarily true. The Government--I think what you had said there was if the Government places restrictions on those rights elsewhere, I mean, that would be a different analysis, I believe. I don't know that I'm really answering your question.

ARBITRATOR CARON: Well, I'll just bear this. I will have this question as we go along, perhaps, so maybe we can stop with that one more a moment.

MS. MENAKER: Okay.

ARBITRATOR CARON: The last question I have is, you were careful to say--the last question I have is, you were careful to say that Glamis has distanced itself from the preemption argument, and so do I take from that that the Respondent is saying we need not, ourselves, state whether it is preempted or not because they have done that themselves?

MS. MENAKER: I think it's always been our

position that it was not the proper role for this Tribunal to decide that question, in any event, because as an international tribunal, you are to take

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09:48:55 the law as a fact, so to speak. And so here you're faced with what we're saying is the law of the United States, and the proper forum for determining any preemption claim, you know, must be a domestic court and not this international tribunal. Your determination is just whether the law, as we say it is, which is the California measures, whether those violate international law, but not to determine whether those are somehow constitutionally or preempted or whether they're preempted under domestic law.

So, that's always been our position, but now, in like, as I stated in Mr. Olson's latest rebuttal report, he clearly seems not to address that and, in fact, to say that he's not even addressing the question of whether these regulations or measures are preempted.

So, we see--we don't see that as--it's even less of a live issue.

ARBITRATOR CARON: Even an issue.

MS. MENAKER: Yes.

ARBITRATOR CARON: Thank you.

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09:50:00 PRESIDENT YOUNG: Ms. Menaker, I just want to follow up with what--with I think just one question which continues to confuse me a little bit.

I understand we're not here to decide the notion of preemption, thank heavens, on the one hand. On the other hand, it would seem to me that the definition of "property rights" is in the case of mining quite clearly not merely a State matter; that the Federal Government has historically defined what a mining claim is, actually even more than the States. So, it's not exactly a preemption issue, or one might define it differently. It seems that what you claim as a property interest in a patented or unpatented mining claim is defined in some measure by property rights, that the Federal Government has chosen to define.

Don't we have to decide that?

MS. MENAKER: I don't think so because the nature of the property right is as you say. It was defined by Federal law inasmuch as the 1872 Mining Law creates the right. But that right, and we will show this throughout, is a right that's created by Federal

09:51:23 law that is always subject to State environmental regulations. So, it's a right that is subject to both Federal and State law.

And so, here again, I think the question is, we are saying that this is the law, this is the State

law; and, to the extent that Glamis did have a preemption argument, that that State law doesn't somehow work to define the nature of its property right. Again, it's our position that that is a question that this Tribunal should not entertain.

PRESIDENT YOUNG: Thank you.

You can proceed.

MR. FELDMAN: Good morning, Mr. President and Members of the Tribunal. I will be addressing whether the SMGB regulation interfered with any property right held by Glamis.

Simply put, it did not. Accordingly, with respect to Glamis's unpatented mining claims, the SMGB regulation cannot be expropriatory.

Like any property interest, Glamis's unpatented mining claims are subject to the legal limitations existing at the time of their creation.

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09:52:55 Glamis's unpatented mining claims were staked no earlier than 1980. Among the laws in existence in 1980 was the Surface Mining and Reclamation Act, known as SMARA, which had been enacted by the California legislature in 1975.

The SMGB regulation, adopted as an emergency measure in December 2002, and subsequently as a permanent regulation in April 2003, merely clarified how the preexisting SMARA reclamation standard applies to open-pit metallic mines.

Nevertheless, Glamis challenges the SMGB

regulation as expropriatory. But Glamis's unpatented mining claims conferred no right to mine in violation of SMARA in 1980, and they confer no such right today. Glamis's claim that the SMGB regulation expropriated its unpatented mining claims is baseless and should be dismissed.

From their inception, Glamis's unpatented mining claims have been subject to preexisting reclamation requirements under SMARA. These reclamation requirements expressly contemplate the use of backfilling. As you can see on the screen, SMARA's

09:54:15 definition of reclamation makes clear that, "Reclamation may require backfilling or other measures."

That definition further provides that mined lands must be, "reclaimed to a usable condition which is readily adaptable for alternate land uses and create no danger to public health or safety."

The reclamation definition reflects the express intent of the California Legislature which, when enacting SMARA, sought to assure that, "mined lands are reclaimed to a usable condition which is readily adaptable for all alternative land uses," and that, "residual hazards to the public health and safety are eliminated."

SMARA also empowers the SMGB to adopt State policy for the reclamation of mined lands. This mandate expressly contemplates the use of backfilling

to meet reclamation requirements. Specifically, as you can see on the screen, the Board's mandate includes the adoption of, "measures to be employed in specifying backfilling and other reclamation requirements."

09:55:37 Furthermore, SMARA leaves no doubt that particular reclamation requirements may be modified over time as it provides that, "State policy shall be continuously reviewed and may be revised."

Accordingly, from the time of their inception, Glamis's unpatented mining claims have been subject to SMARA's reclamation requirements that mandate the restoration of mined lands to a usable condition which does not threaten public health and safety and specifically contemplate the use of backfilling to help achieve such reclamation. As I will discuss next, the Board expressly relied on those limitations when promulgating the regulation. Such reliance on preexisting SMARA limitations by the Board is reflected throughout the administrative record.

For example, as you can see on the screen, in the addendum to the Final Statement of Reasons for the rulemaking, the Board observed that, "To date, no large, open-pit metallic mines in California have been returned to the conditions contemplated in SMARA, and these sites remain demonstrably dangerous to both human and animal health and safety."

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09:56:59 1 The Board also observed in the Final
2 Statement of reasons for the rulemaking that the
3 regulation, "clarifies and makes specific the
4 conditions under which the backfilling of open-pit
5 excavations for metallic surface mines must be
6 undertaken pursuant to the Surface Mining and
7 Reclamation Act of 1975."
8 In addition, the Board stated that the
9 regulation, "is necessary in order to protect the
10 California landscape and environment by requiring the
11 Reclamation Plan for an open-pit metallic mining
12 operation to comply with the requirements set forth in
13 PRC Sections 2711, 2712, 2733, and 2773."
14 Furthermore, the Board observed that, "Where
15 open-pit excavations remain on the landscape, it often
16 is difficult to envision how the remaining open pit is
17 readily adaptable for a beneficial and alternate use
18 as envisioned in PRC Section 2711."
19 As part of its analysis, the Board
20 specifically considered alternate end uses that
21 frequently had been identified by local lead agencies
22 when approving open-pit metallic mining projects;

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09:58:23 1 namely, open spaces, wild lands, and recreational
2 lakes. The Board observed since SMARA became
3 effective, "Large, open-pit excavations from metallic

mines have not been reclaimed to uses other than open spaces, wild lands, or recreational lakes."

The Board then stated that, "In reality, the open pits have remained open holes in ground, with large piles of waste rock surrounding them, and with toxic or hazardous water collecting in the pit bottoms."

The Board then observed that, "Demonstrably, the land remaining after the mining process is completed has not been reclaimed to a condition readily adaptable to an alternate end use. Nor have residual hazards to the public health and safety been eliminated."

Notably, the Board also had invited proposals for potentiality alternate end uses other than open spaces, wild lands, and recreational lakes, observing that, "Local lead agencies have not been able to find other overriding benefits to their communities for these mine pits."

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09:59:45 No proposals, however, were offered. As stated by the Board, "In considering the alternate reclamation issue, the SMGB requested from interested parties that language be proposed to address other potential reclamation scenarios. No proposed language was volunteered."

The lack of support for alternate end uses commonly cited by lead agencies was also addressed by Dr. Parrish in his supplemental declaration, when he

stated that prior to the adoption of the SMGB regulation, "Many open-pit metallic mines in California had reclamation plans approved by local lead agencies that did not fully satisfy the existing reclamation standards," under SMARA.

Dr. Parrish continues: "These inadequately reclaimed mines underscored the need to clarify how the existing reclamation standards under SMARA should be applied to future open-pit metallic mines."

The SMGB regulation clarified those standards by requiring for all future open-pit metallic mines in California that mine reclamation include the backfilling of open pits and recontouring of waste

mounds remaining on the surface.

And, as Miss Menaker will later address in our discussion of Glamis's minimum standard of treatment claim, the Board, when promulgating the regulation, relied on hundreds of public comments as well as detailed evidence presented to the Department of--by the Department of Conservation's Office of Mine Reclamation, outlining the environmental and public health and safety problems posed by inadequately reclaimed open-pit metallic mines. Both the emergency and permanent regulations were reviewed and approved by the California Office of Administrative Law, as consistent with the California Administrative Procedure Act.

As demonstrated throughout the administrative

record, the SMGB relied on preexisting SMARA reclamation standards when promulgating the challenged regulation. Furthermore, consistent with the Lucas framework for a background principles defense, the SMGB regulation reflects an objectively reasonable application of those preexisting SMARA requirements.

Under Lucas, if a State shows that an

objectively reasonable application of a background principle would prohibit the property use at issue, then that prohibition cannot be a taking. Here, the SMGB regulation meets that standard. The regulation reflects an objectively reasonable application of preexisting SMARA requirements, indeed, precisely for the reasons set forth in the administrative record and Dr. Parrish's declarations.

Specifically, the SMGB confronted a clear problem: The existence of large open pits and waste mounds on open-pit metallic sites throughout California which were not consistent with the SMARA usable condition reclamation standard. That problem was due in many instances to project approvals by local lead agencies that relied on inadequately supported end uses, such as undefined open space. The solution to the problem was equally clear: Require mains to backfill their open pits and recontour their waste mounds.

Also clear was the statutory support for those requirements. SMARA requires mined lands to be

returned to a usable condition and expressly

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10:03:21 contemplates the use of backfilling to achieve that end. For all of these reasons, the SMGB regulation reflects an objectively reasonable application of the SMARA reclamation standard.

Notably, the SMGB regulation is consistent with ongoing efforts in California to improve local lead agency enforcement of SMARA. For example, in its analysis of the 2001-2002 budget bill, the California Legislative Analysts' Office, or LAO, a nonpartisan Government entity that provides fiscal and policy advice to the California Legislature, found that provisions of SMARA were not being enforced at a potentially significant number of mines, and that the Department of Conservation, "has seldom determined whether reclamation plans and financial assurances substantively comply with SMARA."

The need to improve lead local agency enforcement of SMARA also has been recognized by the California Legislature, which decided to amend SMARA in 1990 to address deficiencies of lead agencies in carrying out their responsibilities under the statute. The 1990 amendments provide for various types of

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10:04:33 enforcement mechanisms against both mine operators and

lead agencies.

More recently, in 2005, the Legislature documented Senate Bill 668, which requires a lead agency to specify in detail why the lead agency proposes in a given instance not to adopt comments on a Reclamation Plan provided by the Office of Mine Reclamation.

The administrative record of the SMGB regulation, as well as the findings by the LAO and the California Legislature, illustrate the recurring need to address local lead agency enforcement of SMARA. As confirmed by Mr. Leshendok in his testimony before the Tribunal, under SMARA it is the local lead agencies who are responsible for making permitting decisions and inadequate enforcement by those local lead agencies gave rise to the need to clarify how the reclamation SMARA reclamation standard applied to open-pit metallic mines.

The SMGB made that clarification, relying on clear statutory provisions in adopting backfilling and recontouring requirements that directly address the

10:05:40 problem presented to them. Accordingly, the SMGB regulation reflects an objectively reasonable application of preexisting SMARA requirements and, thus, is not expropriatory.

Glamis attempts to avoid this result by asserting that post-SMARA mining activities which had not been subject to complete backfilling requirements

in the past somehow create a property right to continue such activities in the future. But as Ms. Menaker demonstrated, the failure to apply a background principle in a given instance does not create a property right to continue engaging in activities that the State previously has chosen not to disturb. American Pelagic and the Feldman case both illustrate this point.

And the point is particularly straightforward in this matter, given the State of California has had to take steps repeatedly to improve local lead agency compliance with SMARA. The inadequate enforcement of SMARA by local lead agencies in no way gives rise to a property right to continue to act in a manner inconsistent with SMARA in the future.

10:06:58 Glamis also raises another response which has not been endorsed by Mr. Olson that only legal proscriptions or prohibitions may qualify as background principles under Lucas. This argument is also unavailing. As demonstrated in detail in the United States Rejoinder, the background principles at issue in the takings cases cited by the United States are quite general in nature, and certainly no more specific than the preexisting limitations at issue here; namely, SMARA's reclamation requirements which expressly contemplate backfilling.

In the M&J Coal case, for example, the background principle, as you can see on the screen,

was a prohibition on activity creating, "an imminent danger to the health or safety of the public," under the Surface Mining Control and Reclamation Act of 1977, commonly known as SMCRA. The Department of Interior's Office of Surface Mining, Reclamation and Enforcement or OSM acted pursuant to that broad provision of SMCRA when ordering M&J to stop its existing mining operations which were creating a risk of injury from large cracks in the ground, collapsing

10:08:09 structures, and breaks in gas, water, and electrical lines. The Court found that any State authorization to mine held by M&J, "was subordinate to the national standards that were established by SMCRA and enforced by OSM."

In American Pelagic, as Ms. Menaker noted, the background principle was Congress's general assumption under the Magnuson-Stevens Act of "sovereign rights and exclusive fishery management authority over all fish," in the EEZ.

Congress acted pursuant to that broad provision when in response to concerns over the large size of American Pelagic's fishing vessel, Congress cancelled American Pelagic's existing permits to fish in the EEZ and prevented any further permits from being issued to the ATLANTIC STAR.

The Court found no taking concluded that at the time the ATLANTIC STAR was purchased by American Pelagic, the Magnuson-Stevens Act, "precluded any

permitted fishermen from possessing a property right in his vessel to fish in the EEZ."

In the Kinross Copper Case, the background

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principle was the severance of water rights from mining rights under the Desert Land Act of 1877 [sic]. The Court observed that when the unpatented mining claims at issue were created in 1976, no water rights were conferred with them, and plaintiff had not identified any independent source of law establishing a right to discharge wastewaters into a State waterway. Accordingly, the Court found that denial of Kinross's application for a pollutant discharge permit on grounds that Kinross held no right to discharge wastewaters into a State river did not interfere with any property right held by Kinross, even though without such a permit Kinross could not mine economically.

The background principles in M&J Coal, American Pelagic, and Kinross Copper were quite general in nature and certainly no more specific than the clear reclamation requirement under SMARA to return mined lands to a usable condition that poses no threat to public health and safety, where such reclamation, "may require backfilling or other measures."

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10:10:20 1 Accordingly, Glamis's purported specificity
2 requirement for background principles is baseless.
3 And as we have demonstrated in our introduction to the
4 background principles discussion, Glamis's assertion
5 that the SMGB regulation is untenable as an
6 articulation of preexisting background principles
7 because it does not apply retroactively to existing
8 mines is also unavailing.
9 It is therefore under U.S. law, which in this
10 matter governs questions concerning the scope of
11 Glamis's property interest, that the SMGB regulation
12 did not interfere with any property right held by
13 Glamis. Glamis's unpatented mining claims from their
14 inception have been subject to SMARA reclamation
15 requirements, which serve as background principles
16 limiting the scope of Glamis's property interest. The
17 SMGB expressly relied on those preexisting
18 requirements when promulgating its regulation, and
19 consistent with U.S. Supreme Court jurisprudence, the
20 SMGB regulation reflects an objectively reasonable
21 application of those preexisting SMARA requirements.
22 Accordingly, the SMGB regulation is not expropriatory.

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10:11:22 1 If the Tribunal does not have any questions,
2 my colleague, Ms. Thornton, will now address the
3 second of the two California measures, S.B. 22, and
4 will show how that measure merely articulates
5 background principles of law and thus is not

expropriatory.

PRESIDENT YOUNG: Mr. Feldman, thank you.

I suspect we may have a few questions.

Mr. Caron?

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR CARON: Thank you, Mr. Feldman.

I just want to clarify something on the regulation for a moment. We saw certain charts that indicated that this--am I correct this regulation applies to new mines and that relates to a figure of 3 percent of all mines in California?

MR. FELDMAN: That's correct.

ARBITRATOR CARON: And what does that 3 percent reflect, if you could just--how do you know what the new mines are?

MR. FELDMAN: I believe the 3 percent was referring to the percent of metallic as opposed to

10:12:30 nonmetallic mines.

ARBITRATOR CARON: I see. Okay.

So, only 3 percent of the mines are metallic?

MR. FELDMAN: Correct.

ARBITRATOR CARON: And this regulation applies to new metallic mines?

MR. FELDMAN: Correct.

ARBITRATOR CARON: And if it's an existing mine, does it apply to the expansion of the mine?

MR. FELDMAN: No, it does not. It only applies to new mines.

ARBITRATOR CARON: New site.

MR. FELDMAN: That's correct.

ARBITRATOR CARON: So, even if it's a new pit at an existing project site, it does not apply?

MR. FELDMAN: As addressed by Dr. Parrish in his declaration, there can be an issue as to when an expansion takes on such a scale and is so separate from the existing mine that it may be considered a new mine. If an expansion does rise to that level, then it would be subject to the regulation.

ARBITRATOR CARON: And as a question of fact,

10:13:21 in this ques--could you for a moment--am I correct that--I'm trying to avoid this preemption question that we just were discussing for a moment, but California could not prohibit a mine per se. That is not in their power. They can regulate the mine, but they cannot prohibit it.

MR. FELDMAN: Correct.

ARBITRATOR CARON: Okay. Something I was unclear on that perhaps you have come to understand in studying this statute. Dr. Parrish described that in applying the regulations, it would--then there would be a plan of reclamation submitted to the county, to the lead agency, and he was--he used the word "variance." He seemed to indicate perhaps that actually means more requirements.

Could you describe that process, or do you have any sense of that process?

MR. FELDMAN: Right. In terms of the variance referred to by Dr. Parrish, that would be an instance in which there was not enough material on the surface to completely backfill the pit, and in such an event, the operator would not be required to obtain

10:14:30 material from another mine site in order to completely backfill the pit. You would only need to use the materials that are available on the surface.

ARBITRATOR CARON: Okay. That's all the questions I have.

PRESIDENT YOUNG: Go ahead.

ARBITRATOR HUBBARD: Thank you, Mr. Feldman.

Do you have--let me ask you a question about SMARA as it was originally enacted. Would it be your position that the agencies that were charged with construing SMARA could have required complete backfilling from the very beginning? That's the nature of the background principle?

MR. FELDMAN: Yes, that would have been within their authority.

ARBITRATOR HUBBARD: But as we have seen, that was not what happened.

I guess my question is: Is the--is Glamis really saying that it's right to not completely backfill as a property right, or is it saying more that it's a reasonable expectation that it would not be required to completely backfill, based on how SMARA

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had been construed in the past?

MR. FELDMAN: It's an interesting point because, at bottom, the argument that Glamis is making is an equitable argument. Mr. Olson in his statement refers to the vested rights doctrine under California law, and under that doctrine, if you have formal Government permission to undertake an activity in the form of a permit and if you substantially relied to your detriment on that assurance from the Government, then you can bring a vested rights claim in equity in an attempt to be grandfathered from any new rules that may adversely affect your mine.

And, in essence, that's Glamis's argument in this case, is that they have an equitable right to continue with a use that in the past has been tolerated by the State of California, but that is not a property right argument. That's an argument in equity.

ARBITRATOR HUBBARD: Is the upshot of that that the Tribunal should not consider equitable arguments in reaching its decision?

MR. FELDMAN: Certainly on the issue of

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background principles, the analysis is whether or not Glamis holds a property right to engage in the proscribed use.

ARBITRATOR HUBBARD: Thank you.

PRESIDENT YOUNG: Mr. Feldman, thank you.

I have just a couple of questions, one of which is sort of factual and legal. Let me give actually the factual part of it.

You and Ms. Menaker both keep referring to the failure to apply the background principle in an given instance does not create a property right. I'm correct in that; right?

MR. FELDMAN: That's correct.

PRESIDENT YOUNG: Are there any instances in which this principle, this background principle, complete backfilling, has been applied in California?

MR. FELDMAN: I believe at certain aggregate mines, pits have been completely backfilled.

PRESIDENT YOUNG: Required to be completely backfilled?

MR. FELDMAN: I don't know if it was an actual requirement, but I'm aware that certain

10:17:59 aggregate mines have been backfilled. That may have been a discretionary decision by the lead agency.

PRESIDENT YOUNG: Okay. Then let me ask sort of a related question, given the uncertainty on that.

You keep using the words "given instance." Is it the U.S. Government's legal position that--let me rephrase your statement and see if you still would agree with that.

Failure to apply a background principle in

every instance does not create a property right. Would you agree with that, or not agree with that? Is that the U.S. Government's position?

MR. FELDMAN: I think that's where you have to look to the objectively reasonable standard. There needs to be a nexus between the background principle and the prohibited use. If the background principle is clear and if there is a clear nexus between that principle and the prohibited use, then no property right would obtain, notwithstanding the failure to enforce that principle.

PRESIDENT YOUNG: So the fact that it's never been enforced, it would not be relevant in your

10:18:59 judgment?

MR. FELDMAN: It's certainly relevant to a claim in equity.

PRESIDENT YOUNG: But not to a property right?

MR. FELDMAN: Correct. So long as the background for the principle is clear and so long as there is a clear nexus between that principle and the prohibited use.

PRESIDENT YOUNG: Thank you.

Ms. Menaker, if you want to step in.

(Pause.)

PRESIDENT YOUNG: Second question is, you seem very converse with these regulations and the process of enacting those, and I appreciate that.

It's not clear to me--with the exception of the possibility of some water at the bottom mine pits which may actually relate to the acidity in the rock and not the actual mining process itself, I'm not entirely clear on what the difference is in terms of any of the SMARA principles between metallic and nonmetallic mines. Could you educate that me on that.

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10:20:05 Why would you pass a regulation that only applies to metallic open-pit and not nonmetallic open-pit, given everything you just read?

MR. FELDMAN: I think it comes down to factual distinctions, and Dr. Parrish has laid out several. One is that aggregate mines tend to be closer to urban areas, and because they're closer to urban areas, for economic reasons, pits tend to be backfilled because the land is so valuable and needs to be put to another use.

Another reason is that with aggregate mines, the surface material tends to be hauled away, and so there wouldn't be the material on the surface to backfill the pit available.

PRESIDENT YOUNG: So, as a practical matter, they may do it, but there is no fundamental difference in terms of public use. In fact, what I'm hearing you say is exactly the same. Am I correct in that?

MR. FELDMAN: I think, as a factual matter, the Board saw that in terms of enormous open pits and waste mounds scarring the landscape in California that

22 those were largely a function of metallic mines.

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10:21:00 1 There may be certain outlier nonmetallic mines that
2 also raise those problems.
3 PRESIDENT YOUNG: Do they--you didn't refer
4 to anything in those regulatory process dealing with
5 nonmetallic mines that they actually referenced. Do
6 they have a discussion of nonmetallic mines in that
7 process?
8 MR. FELDMAN: Certainly in the record there
9 are discussions of whether or not the regulation would
10 apply to aggregate mines, and it was considered by the
11 Board. But as Dr. Parrish testified, the Board saw
12 distinctions between the two and realized that their
13 charge was to address the issue of metallic mines, and
14 that was the charge that they took up.
15 PRESIDENT YOUNG: And it's in the record that
16 there's a--they sort of indicate the difference?
17 MR. FELDMAN: I'm aware of certain
18 correspondence in the record discussing the issue of
19 aggregate versus metallic mines.
20 PRESIDENT YOUNG: Do they make any formal
21 minings in the record or those were just submissions
22 that were made?

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10:21:56 1 MR. FELDMAN: I would need to review the

Final Statement of Reasons to see whether that was actually set out.

PRESIDENT YOUNG: Thanks.

ARBITRATOR CARON: I want to follow up with a question, and this may not be the right time to ask it, and it may not be to your presentation, but rather, to the overall presentation.

We were told--we were--looking at this question, in part the background principle, but we are also talking about that international law directs us to national law to understand the scope of the property right.

MR. FELDMAN: Right.

ARBITRATOR CARON: And so, this is following on the question raised by my colleague, Mr. Hubbard.

And in that, we--the topic of vested rights and compensation came up, and there may be a distinction under U.S. law about an equitable right versus a property right at law.

And the question I guess I would like answered at some point is: Simply because

10:23:00 international law is referring to property doesn't mean we necessarily look at only what the national law calls "property." Or is that simply what it is, or are we somehow--do we need to ascertain the character of the expectation domestically?

MS. MENAKER: I think that both parties agree that the nature of the property right is defined by

domestic law, and we have cited ample authority for that proposition in our written submissions, which I'm happy during the next break to review or at least point you to those portions in our written submissions where numerous international authorities have recognized that for the definition of the property right or property interest, you do look to domestic law for that.

There's--as far as the reasonable expectations, I mean, many of the points that we are making now we will again reference in our alternative argument, which is if the Tribunal doesn't find that Glamis's property right was restricted by these background principles and we, instead, engage--or you, instead, engage in an indirect expropriation analysis,

10:24:21 one factor in that analysis is whether Glamis had reasonable expectations, investment-backed expectations.

And, of course, the preexisting law will factor heavily into whether such expectations could have existed.

But I also just want to note so as to leave no misimpression in the Tribunal's mind, when we're talking about Glamis has no property right and what they're making is an equitable argument, we are in no way conceding that they have any sort of equitable argument or equitable claim. And, indeed, the Tribunal should not lose fact--lose sight of the fact

that they did not have an approved Plan of Operations or approved Reclamation Plan. It's in instances like that when you look at the vested rights doctrine where courts find that a regulation should not be applied to a particular individual because that individual already has a permit, has already received sort of Government approval to go ahead in a certain manner and, therefore, you have some sort of expectation.

And, you know, I would point again to the

10:25:27 Feldman versus Mexico case that I referred to before where the Tribunal found that the Claimant had no right to these tax rebates, even though it had been given them in the past, and there the Tribunal noted specifically that he had no right, notwithstanding the fact that there had been considerable evidence in that case of some sort of agreement or understanding between the Claimant and Government officials that he could receive these invoices. Even that didn't create a right. Here, we have nothing that even approaches that, you know.

As we have explained, at the time these regulations were passed, Glamis did not have even a pending, you know, Reclamation Plan waiting for approval for Imperial County. It was not acting on its Reclamation Plan. And at the time the regulation was passed, at that point in time it had a direction to the Department of Interior to suspend processing its Plan of Operations.

So, in essence, to take Glamis's equitable argument would be, in essence, to adopt an argument that a regulation could never apply to any--could

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never apply prospectively because everybody would always have some sort of equitable vested right, so to speak, to have the same--the regulations informed--enforced in the same manner as they have always been enforced. You could never change your regulations, and that simply cannot be the law.

PRESIDENT YOUNG: Ms. Thornton, as you start, I might ask how long you intend to take.

MS. THORNTON: Twenty-five minutes.

PRESIDENT YOUNG: Twenty-five minutes.

Perhaps we will take our break now, then, if that would be appropriate. We will meet back here at three minutes to 11:00. Thank you.

(Brief recess.)

PRESIDENT YOUNG: Thank you. We are ready to resume.

Mr. Clodfelter, as I understand it, you'd like to start?

MR. CLODFELTER: Mr. President, we just have a couple of follow-up answers to the questions that have been posed before the break.

I'd just like to make a brief additional

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11:01:38 response to the question posed by Mr. Hubbard about whether or not the Tribunal is available to listen to equitable arguments.

The first one I'd like to make is if under domestic law an equitable principal affected a property right, obviously you could in determining what that property is under domestic law. As it happens here, the vested rights doctrine in California does not affect the property rights, as I think both parties agree. Certainly their legal experts agree, as in Mr. Olson's opinion as well.

Therefore, it would not be relevant as an application of domestic law here.

On the more general question on whether equitable arguments in general can be considered, we would argue they could not be considered. Under Article 33(2) of the UNCITRAL Rules, the Tribunal may act amiable compositeur or ex aequo et bono only with the express consent of the parties, and neither one of which has given consent in this Tribunal, so the rights and obligations have to be determined here strictly by the application of legal principles.

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11:02:50 We would note, by the way, just to go back on the vested rights doctrine that we don't think there would be an argument, even under domestic law, for equitable relief under the vested rights doctrine in this situation, as Ms. Menaker explained.

Mr. Feldman also wanted to supplement an earlier answer on another question.

MR. FELDMAN: Thank you. I did not fully address Professor Caron's question concerning the relationship between local lead agencies, the OMR, and the State Mining Board.

As Dr. Parrish testified, California is a home rule state in which local agencies have the primary responsibility for permitting decisions. There is oversight through the OMR, and draft reclamation plans are sent to OMR for their review, but the final decision rests with the local lead agency.

SMARA does empower the Board when appropriate to step in on behalf of the local lead agency when the lead agency is not properly enforcing SMARA's provisions.

11:03:47 And I would also draw the Tribunal's attention to the 2005 Supreme Court of California decision, Department of Conservation versus El Dorado County. This 116 P 3rd 567 in which the Court found that the Director of Conservation also has standing to enforce SMARA in the Courts by bringing a writ of mandate.

Thank you.

PRESIDENT YOUNG: Thank you.

MR. CLODFELTER: I would ask you to turn the floor over to Ms. Thornton for her presentation.

MS. THORNTON: Mr. President, Members of the Tribunal, as my colleague Mr. Feldman has demonstrated with respect to the SMGB regulation at issue in this proceeding, I'm now going to demonstrate how the second California measure which Glamis challenges, Senate Bill 22, did not expropriate Glamis's interest in its mining claims.

Senate Bill 22 did not expropriate Glamis's investment because it, like the SMGB regulation, merely articulated a background principle of California property law that circumscribed Glamis's

11:04:56 property interest in its unpatented mining claims.

In brief, Glamis never possessed a right to mine on Federal land in California in a way that obstructed Native American religious practice or that severely or irreparably damaged Native American ceremonial sites.

Governor Gray Davis signed Senate Bill 22 into law on April 7, 2003, some four months after the SMGB emergency regulation, which Mr. Feldman discussed, was adopted. Senate Bill 22 prohibits California lead agencies from approving reclamation plans or the financial assurances required to back them for surface metallic mines if the proposed operation is located on or within a mile of a Native American sacred site and is located in an area of special concern within the CDCA, unless the following conditions are met. The Reclamation Plan requires

that all excavations be backfilled and graded to do both the following: Achieve the approximate original contours of the mined lands prior to mining, and grade all mined materials that are in excess of the materials that can be placed back into excavated areas

11:06:07 to achieve the approximate original contours of the mined lands prior to mining.

The statute also states that a mine proponent must provide financial assurances sufficient to comply with those backfilling and regrading requirements.

Furthermore, the statute expressly defines a Native American sacred site as a specific area that is identified by a federally recognized Indian tribe, rancheria or mission band of Indians, or the Native American Heritage Commission as sacred by virtue of its established historical or cultural significance to, or ceremonial use by, a Native American group.

Although Senate Bill 22 added specific requirements for particular reclamation plans to those already enumerated in SMARA, we think California did not accomplish anything that it could not have otherwise achieved under preexisting legislation. That preexisting legislation which California passed years before Glamis's predecessors in interest acquired the unpatented mining claims at issue here was designed to prohibit any private party operating on public property from interfering with Native

American religious practice or causing severe or irreparable damage to Native American religious or ceremonial sites.

In 1976, the California Assembly attempted to specifically address the unique Historic Preservation concerns of the Native American community in the State. It recognized that neither the State Historical Resources Commission, nor the U.S. Park Service, two agencies responsible for managing public property in the State, were statutorily mandated to ensure the historic preservation of Native American cultural and religious sites.

To address this problem, the Assembly passed the Native American Historical, Cultural, and Sacred Sites Act, which I will be referring to in this presentation as the Sacred Sites Act, and with it established a nine-member Native American Heritage Commission, referred to as the NAHC, to identify and catalogue areas of religious or cultural significance to Native Americans within the State.

With the Sacred Sites Act, the California Assembly expressly prohibited all public agencies or

private parties using, occupying, or operating on public property from, "in any manner whatsoever interfering with the free expression or exercise of

Native American religion as provided in the United States Constitution and the California Constitution, or from causing severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property except on a clear and convincing showing that the public interest and necessity so require."

The Sacred Sites Act empowers the NAHC to enforce this provision by conducting investigations whenever it learns that a proposed action on public property might interfere with Native American religious expression or cause severe or irreparable damage to a Native American sacred site. More specifically, the Sacred Sites Act provides that the NAHC may hold public hearings to determine if a proposed action would cause such interference and, "recommend mitigation measures for consideration by any public agency proposing to approve such an

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11:09:44 action." This section further provides that if a public agency rejects the mitigation measures proposed, the NAHC may ask the California Attorney General or other counsel it appoints to, "take appropriate legal action pursuant to subdivision G of Section 5097. 94 of the statute."

Section 5097.94 Subsection G of the Sacred Sites Act empowers the Attorney General to, "bring an action to prevent severe and irreparable damage to, or

assure appropriate access for Native Americans to a Native American religious or ceremonial site." Furthermore, it instructs Courts to issue injunctions if they find such damage or appropriate access will be denied, and appropriate mitigation measures are not available, absent clear and convincing evidence that the public interest would require otherwise.

Now, if I could break here just to address Professor Caron's question to Ms. Menaker this morning, which I believe was that if you are presented with--if the Tribunal is presented with an example in which someone demonstrates that there has been severe and irreparable damage to a Native American sacred

11:10:57 site in California, must--and the Sacred Sites Act was not invoked to prevent it, must the Tribunal then conclude that the Sacred Sites Act is not a background principle of California law? And I would urge the Tribunal to understand that it need not conclude that.

What I've tried to demonstrate here is that the Sacred Sites Act provides a very complex enforcement regime that the Native American Heritage Commission must comply with in order for its prohibitions to obtain. The fact that an action preceded and the Native American Commission was not able to enjoin it might simply be a function of the fact that the Native American Heritage Commission proposed mitigation measures to a public agency that were accepted.

Furthermore, it may also be the case that the Attorney General took a look at the action and decided that the Attorney General could not meet the evidentiary burden under the statute of proving that a given Sacred Sites Act was actually historically regarded as a sacred or sanctified place by a Native American--California Native American people.

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So, I would urge the Tribunal not to conclude that because the Sacred Sites Act has not been presented to it as applied, that it wouldn't apply in this instance.

Senate Bill 22, one of the measures that Glamis challenges in this arbitration prohibits lead ages from approving reclamation plans for surface mining operations that do not ensure reclamation adequate to allow for future Native American use of the public property. This legislation thus seeks to prohibit unreasonable interference with, and severe and irreparable damage to, Native American religious and ceremonial sites within a mile of surface metallic mining operations.

With Senate Bill 22, the California Assembly merely eliminated the need for the NAHC to hold hearings and its counsel to initiate actions for injunctive relief to prevent lead agencies from approving surface mining reclamation plans which threaten to do that kind of damage. Thus, Senate Bill 22 applies the Sacred Sites Act general prohibitions

to a specific class of undertakings.

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As the Supreme Court instructed in Lucas, if a challenged measure does, "no more than duplicate the result that could have been achieved in the courts," it can be viewed as articulating a background principle of law. Because the NAHC could have sought to enjoin any surface metallic mining operation that did not adequately mitigate damage to Native American sacred sites, pursuant to the Sacred Sites Act provisions, Senate Bill 22 merely specified a limitation on the use of public property in California that inhered in Glamis's unpatented mining claims.

The prohibitions set forth in Senate Bill 22 are not unlike the challenged measures in Hunziker v. Iowa, a case decided by the Iowa Supreme Court in 1994. In that case, the Supreme Court of Iowa did not find a compensable taking when the discovery of a Native American burial mound on a residential housing lot resulted in denial of a necessary building permit because an Iowa historic preservation statute abrogated any right to, "disinter the human remains and build in the area where the remains were located."

Like the Sacred Sites Act, the operative

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background principle in Hunziker was a State statute

designed to protect the Native American heritage. That statute provided, among other things that, "The State Archaeologist shall have the prime responsibility to deny permission to disinter human remains that the State Archaeologist determines have State and national significance from an historical or scientific standpoint for the inspiration and benefit of the people of the United States."

Because the denial of the municipal building permit in Hunziker was merely the specific application of this general prohibition to the Claimant's interests in a particular residential housing lot, the Iowa Supreme Court found no taking.

This case illustrates how a preexisting State statute can impact the nature of a Claimant's property right in such a manner as to make the State's subsequent regulation of it noncompensable. Glamis nonetheless contends that the Sacred Sites Act is not an applicable background principle capable of circumscribing the nature of its property right for three reasons:

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11:15:51 First, Glamis asserts the Sacred Sites Act is not a relevant principle of California property law because it does not apply to Federal land.

Second, Glamis and its expert, Mr. Olson, questioned whether the background principle of religious accommodation, which the Sacred Sites Act reflects, is even capable of redefining the Federal

property interest that Glamis possesses.

And third, Glamis contends that there is no preexisting use prohibition that Senate Bill 22 can be said to have specified and, thus, that it is not an objectively reasonable application of any background principle.

Each of these arguments is without merit.

The plain language of the Sacred Sites Act, its legislative history, and the manner in which the Act has been interpreted necessitate the conclusion that it applies on Federal land. The primary provision of the Sacred Sites Act specifically prohibits public agencies and private parties who are "using or occupying public property or operating on public property from interfering with Native American

11:17:02 religious expression or severely damaging a Native American sacred site."

The statute uses the broadest language available, "public property," to explain its reach; and insofar as it excludes any such property, it does so explicitly by exempting municipal property located within municipal boundaries and county property of less than 100 acres.

As I've previously mentioned, when considering the need for a statute to protect Native American resources within the State, the California Assembly Committee on Resources, Land Use, and Energy noted that neither the State Department of Parks and

Recreation nor the U.S. Park Service were statutorily obligated to consider the particular Historic Preservation concerns of Native Americans. Thus, when contemplating the need for the Sacred Sites Act, the members of this legislative committee were concerned to give Native Americans, "a significant role in the preservation and protection of sites," located on Federal land administered by the U.S. Park Service, as well as on lands administered by the State Department

11:18:18 of Parks and Recreation.

This concern is not unsurprising, as you will see, given the extent of land the Federal Government and its agencies actually manage in California. And I think this slide clearly demonstrates that fact.

Moreover--

MR. GOURLEY: Is that in the record?

MS. THORNTON: It should be in the PowerPoint presentation.

MR. GOURLEY: But does it--is it an exhibit that is in the record?

MS. THORNTON: It's a demonstrative exhibit. We have not introduced this map before my presentation today.

MR. GOURLEY: Or the facts underlying it; is that correct?

MS. THORNTON: I think we have contended that the Federal Government manages large--a large portion of the State of California in its control of the CDCA.

MR. GOURLEY: You might well have contended it. My question was only whether there were facts put into the evidence that would support this

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11:19:21 demonstrative exhibit.

MS. MENAKER: Given the fact that Glamis has introduced a number of documents which it has sought to introduce on the basis of their publicly available and have--of this nature, we would ask that the Tribunal likewise consider this.

(Tribunal conferring.)

PRESIDENT YOUNG: Ms. Thornton, you have raised--the Government has raised on a previous occasion issues relating to the extent of Federal holdings in California, so you are perfectly welcome to talk about that. We would prefer that you not use the map. Thanks.

Thank you.

MS. THORNTON: Moreover, when the BLM published its Final Environmental Impact Statement for the CDCA, it entered into a formal memorandum of agreement with the NAHC which specifically acknowledges that both the Sacred Sites Act and CEQA, California's Environmental Quality Act, "direct the identification and protection of cultural values" in the CDCA.

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11:22:06 1 And the State of California, when challenging
2 the U.S. Forest Service's determination to permit
3 timber harvesting and road construction on Native
4 American sacred sites on Federal forest land in Lyng
5 v. Northwest Indian Cemetery Protective Association,
6 specifically referenced the Sacred Sites Act in its
7 brief to the Supreme Court. In that filing,
8 California spoke of the NAHC as having an obligation
9 to, "protect the right to practice traditional Indian
10 religion on public land," in the State.
11 Glamis argues that the NAHC brought the
12 action in Lyng on the basis of the First Amendment and
13 the American Indian Religious Freedom Act because it
14 could not have done so under the Sacred Sites Act.
15 But the fact that the NAHC made a strategic decision
16 to assert the constitutional and statutory rights of
17 Native Americans in an effort to impose duties on
18 Federal officials that would have had nationwide
19 impact cannot be construed to imply that the NAHC
20 could not also have asserted the claim under the
21 Sacred Sites Act.
22 Furthermore, the NAHC brought that action to

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11:23:19 1 protect a sacred site indisputably located on Federal
2 land. Neither the Federal Government as Respondent in
3 that proceeding nor any Court reviewing that case
4 challenged the standing of the NAHC to bring such an
5 action, even though the Sacred Sites Act is the source

of the NAHC's jurisdiction.

As such, the very fact that the NAHC brought such an action establishes that the Sacred Sites Act can apply on Federal lands.

California courts have been asked to interpret the provisions of the Sacred Sites Act in only a few instances and have never considered the statute's application to Federal lands. According to the well accepted maxim of statutory construction, however, expressio unius est exclusio alterius, which the Supreme Court of California recognized when interpreting California statutes, "Where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed," absent discernible and contrary legislative intent.

This principle of construction has been invoked by international tribunals when interpreting

Treaty provisions as well.

Given the existence of an explicit exemption in the plain language of the Sacred Sites Act for certain municipal and county property and the absence of any such exception for Federal lands without a showing of discernible and contrary legislative intent, a United States Court would not read into the statute an implied exception for Federal land. Quite simply, there is nothing in the plain language of the Sacred Sites Act or its legislative history which suggests that the California Assembly intended to

exclude Federal lands from the statute's application.

First, the statute expressly empowers the NAHC to assist state agencies in negotiations with the Federal Government to ensure the preservation of sacred places on Federal land. While this language demonstrates that the California Legislature expected the NAHC to assist State agencies in relevant negotiations with the Federal Government involving Federal lands, it does not, as Glamis suggests, provide any evidence of a legislative intent to limit the NAHC's jurisdiction to State lands.

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11:25:49 Second, the statute contemplates more generally that the NAHC will request and utilize the advice of all Federal, State, and local and regional agencies in enforcing the provisions of the Sacred Sites Act. Thus, the Assembly instructed the NAHC to draw upon the resources of the Federal Government when enforcing the Act's provisions. If the Assembly intended to restrict the NAHC's jurisdiction to State-owned property, as Glamis suggests, there would have been no need for it to instruct the NAHC to consult with agencies of the Federal Government in its determinations.

Third, as I mentioned, the legislative history evidences a contrary intent. The statute was enacted, in part, to protect Native American cultural resources on Federal land managed by the U.S. Park Service. And contrary to Glamis's suggestion,

statements in Enrolled Bill Reports indicating that some California agencies feared the bill would give the NAHC strong control over state and local Government properties do not constitute a discernible intent on the part of the California Assembly that

this statute should not apply on Federal land.

Nor does the addition of the term, "public lands" in a specific provision of the Archeological Paleontologiable and Historical Sites Act enacted in 1965 evidence any intent regarding the provisions of the Sacred Sites Act. That statute was passed more than 10 years prior to the Sacred Sites Act, and the Assembly limited the definition of public lands which it contains to a particular section of that statute. Therefore, Glamis can't contend that the definition of that term is at all indicative of the Assembly's intent regarding the Sacred Sites Act applicability to Federal lands.

Finally, the fact that the Sacred Sites Act was not specifically referenced in the environmental review documents for the Imperial Project is also no indication that the relevant reviewing agencies did not believe it could be applied to Glamis's project. Those documents clearly indicate the need for compliance with California's Environmental Quality Act, or CEQA, and the California Court of Appeals has interpreted that statute to require consultation with

the NAHC whenever the provisions of the Sacred Sites Act might be triggered.

For these reasons, Glamis cannot contend that the Sacred Sites Act is incapable of circumscribing the nature of its property interest on Federal land.

Glamis has also implicitly questioned whether the Sacred Sites Act is capable of redefining the bundle of rights it possesses in its federally created mining claims.

Glamis and Mr. Olson do so while insisting that they're not implying that the legislation is preempted by the Federal Mining Law. But Glamis questions whether California's discretionary ability to accommodate religion, which is reflected in the Sacred Sites Act, can alter the nature of its federally created property rights, if the United States Congress did not expressly reserve its discretion to accommodate religion when creating those rights.

The Supreme Court has long held that absent a clear conflict between state and Federal law, "The State is free to enforce its criminal and civil laws,"

on Federal land within its borders. As I have already explained, the Sacred Sites Act prohibits the use of public property in any manner that interferes, "with

the free expression or exercise of Native American religion as provided in the United States Constitution and the California Constitution." Thus, with this statute, California exercised its authority to accommodate Native American religious practice on public property in the State, and any person operating, using, or occupying public property pursuant to a grant made on or after July 1, 1977, did so subject to that authority.

Glamis and Mr. Olson suggest that only an affirmative exercise of the Federal Government's intent to accommodate religious practice in the Mining Law could, "trump Glamis's property rights." But the United States Supreme Court opinion in Kleppe v. New Mexico instructs that absent any evidence of a clear intent to preclude accommodation of religious practice on public lands in the Mining Law, a State civil statute like the Sacred Sites Act, will apply to mining claims on Federal land. Glamis has not pointed

11:30:30 to anything in the Mining Law or in FLPMA which evidences such congressional intent.

Glamis's or its predecessors in interest located the first of the unpatented mining claims at issue in this arbitration no earlier than 1980. All federally created unpatented mining claims established in California at that time were thus subject to the background principle of discretionary accommodation reflected in the Sacred Sites Act. Just as the

developer in Hunziker took title to the residential housing lot subject to the State Archeologist's power to prohibit the disinterment of human remains there, so too did Glamis acquire its interest in the Imperial Project unpatented mining claims subject to the NAHC's power to accommodate religious practice during their development.

Therefore, the Sacred Sites Act is an applicable principle of discretionary religious accommodation that circumscribed the nature of Glamis's property interest in its unpatented mining claims.

Finally, Glamis is also wrong to suggest that

11:31:37 even if the Sacred Sites Act is an applicable principle of California property law, Senate Bill 22 is not an objectively reasonable application of it.

Glamis contends that Senate Bill 22 is not an objectively reasonable application of the Sacred Sites Act because the legislature's stated rationale for promulgating Senate Bill 22 did not invoke the background principles' specific prohibitions. As an initial matter, Glamis has not shown that doing so is necessary in order for legislation to be deemed an articulation of a background principle. In any event, Glamis erroneously asserts that the only rationale for Senate Bill 22 offered by the Assembly was, "the preservation of the public peace, health, or safety within the meaning of Article IV of the California

Constitution."

What Glamis ignores is language in the bill indicating that the Assembly believes Senate Bill 22 was necessary, "to prevent the imminent destruction of important Native American sacred sites threatened by proposed strip mining."

The Assembly considered the facts

11:32:48 constituting this necessity for some time prior to drafting Senate Bill 483, which was the precursor to Senate Bill 22. In April 2002, the California Research Bureau informed Senator Burton, President Pro Tem of the California Senate and one of the authors of Senate Bill 22, that, "An extensive evaluation of the cultural resources located within and surrounding the Imperial Project area found 88 cultural resource sites, including 54 archeological sites eligible to be included in the National Register of Historic Places and that the mining project would have a major adverse effect on the area of traditional concern. Traditional cultural concern, excuse me.

The same memorandum also took notice of the following facts regarding the proposed project site established during the environmental review process. The Quechan contended that the Project jeopardizes their present and future ability to travel along trails, especially the Trail of Dreams, both in a physical sense and during dreams. The area is a strong place, being a final resting place for

22 ancestors, including the likelihood of being

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11:34:02 1 designated by the spirits as the final resting place
2 of the Quechan still living, and that the area
3 represents a critical learning and teaching center for
4 future generations.
5 In response to this information, as well as
6 information about potential adverse impacts to other
7 Native American sacred sites in California, the
8 Assembly proposed Senate Bill 1828, the piece of
9 legislation that was initially joined to Senate Bill
10 483.
11 Governor Davis ultimately vetoed that
12 legislation, and one of the criticisms leveled against
13 it was that additional legislation designed to protect
14 Native American sacred sites was not necessary, given
15 existing provisions of CEQA and the Sacred Sites Act.
16 After Senate Bill 1828 was vetoed, however,
17 the Assembly determined that without the adoption of
18 appropriate mitigation measures, imminent damage to
19 Native American cultural resources in the vicinity of
20 surface metallic mining operations would ensue. When
21 codifying those mitigation measures by statute, the
22 Assembly merely eliminated the need for the NAHC to

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11:35:09 1 conduct investigations, hold hearings, and seek

injunctive relief to enforce them. In this way, Senate Bill 22 did no more than accomplish a result that could have been attained in the Courts, and as such, Senate Bill 22 reflects an objectively reasonable application of the Sacred Sites Act prohibition against severe and irreparable damage to Native American sacred sites.

For all of these reason, the Tribunal should find that California's prohibition against interference with Native American religious practice and irreparable damage to Native American sacred sites inhered in Glamis's unpatented mining claims. When the California Assembly later specifically applied those general prohibitions to surface metallic mining operations located in the vicinity of the Native American sacred sites with Senate Bill 22, it merely prescribed use interests that the background principles of California law already prohibited.

For these reasons, Senate Bill 22 did not effect an expropriation.

PRESIDENT YOUNG: Thank you.

11:36:18 Mr. Hubbard?

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR HUBBARD: Ms. Thornton, thank you for your presentation. Can you help me? Is there anything in the National Historic Preservation Act that could be read to be in conflict with the--with SMARA?

MS. THORNTON: Are you trying to get at the fact that the National Historic Preservation Act is a statute merely instructs that historic properties need to be identified in the event of an potential undertaking on Federal land?

ARBITRATOR HUBBARD: Isn't there some language about mitigation is acceptable, prohibition is not?

MS. THORNTON: Well, I think the NHPA, like NEPA, is not an outcome determinative statute. What the NHPA requires is that historic properties potentially eligible for the National Register of Historic Places be identified when any undertaking is proposed on Federal property.

But what the NHPA does also not provide is

that the Federal Government cannot take severe adverse impacts to historical properties into account when making determinations about the kinds of uses it will allow on its property.

So, I would say that the NHPA is not outcome-determinative.

ARBITRATOR HUBBARD: No, I'm just questioning whether there is a conflict between any of its provisions, the ones that seem to speak in terms of not being able to prohibit a project and what SMARA would allow, which is, in some instances, the prohibition of a project.

MS. THORNTON: I think it's important for the

Tribunal to bear in mind that Senate Bill 22 did not prohibit mining on Federal land in California. It merely required that if an entity was going to undertake a mining project within a mile of a Native American sacred site, that it do so in a manner that ensured that Native Americans could use the area in the future for religious and ceremonial purposes.

So, there is really no prohibition on mining at issue in Senate Bill 22.

11:38:48 ARBITRATOR HUBBARD: But if it was impossible to do that by mitigation, was the State then allowed to say you can't do it?

MS. THORNTON: Well, what Senate Bill 22 outlines is the manner in which the continued use of the area for Native American religious practice can be obtained through mitigation. The Senate Bill provides that if you reclaim the lands to its approximate original contours, then Native Americans can use the area in the future for their ceremonial practices.

ARBITRATOR HUBBARD: But there is nothing that says if you can't mitigate in a satisfactory manner, we can step in and say you can't do the Project?

MS. THORNTON: If you allow me one minute to confer with my co-counsel.

(Pause.)

MS. THORNTON: I think the Court--the Supreme Court's decision in Granite Rock is instructive on

this question. In that case, the Supreme Court determined that nothing in the Federal Mining Law or in FLPMA prevented states from imposing their

11:40:38 reasonable environmental measures on unpatented mining claims.

In fact, the unpatented mining claims at issue in that case were in California, and California was allowed to impose its environmental protection measures on those claims. That is simply what's going on in Senate Bill 22. It's the imposition of a reasonable environmental regulation to ensure the preservation of Native American sacred sites.

Both NEPA and CEQA discuss the need to preserve the human environment, and in so doing, they expressly include in the definition of environment historical and archeological properties.

So, I think the Tribunal can take comfort in the fact that this is just the kind of reasonable environmental regulation that the Supreme Court allowed in the Granite Rock case.

ARBITRATOR HUBBARD: And that ultimately you're suggesting could result in the prohibition of a particular project, if there is no way to mitigate in a satisfactory manner as far as the State's concerned?

MS. THORNTON: The--there are no prohibitions

11:41:56 1 in this statute. The statute simply requires that
2 lands be reclaimed to their approximate original
3 contours. It's not a prohibition on mining.
4 And, in fact, in the legislative history of
5 Senate Bill 22, the California Legislature expressly
6 stated our object here is not to prohibit mining
7 within a mile of a Native American sacred site. Our
8 object here is simply to require that mine operators
9 reclaim their land to a usable condition so that they
10 make the land whole when they are done with it, and
11 Native Americans can continue to use it in the future.
12 ARBITRATOR HUBBARD: Okay. Well, I won't
13 press the point. Thank you.
14 PRESIDENT YOUNG: Ms. Thornton, I actually
15 want to follow up on that a little bit and put it in a
16 little--slightly more pointed way. I mean, I
17 appreciate your saying it's not a prohibition, but let
18 me go back to the Historical Act, the National
19 Historical Act which basically does distinguish
20 between environmental claims with respect to
21 endangered species which can--where mitigation,
22 regardless of technical or economic feasibility, is

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11:43:00 1 required, and supposedly the historic act where it
2 says mitigation is required if technically and
3 economically feasible.
4 Assume for a moment under the State act,
5 Sacred Sites Act, that or Senate Bill 22 that

mitigation is not economically and technically feasible. It is your contention it could still--in those circumstances, that they would not approve a plan. Mitigation is possible. It's always possible, to be sure, but it's not technically or economically feasible. The law would then be interpreted to stop the Project; is that correct?

THE WITNESS: Well, I think my colleague, Mr. Sharpe, will demonstrate quite clearly that mitigation and what's feasible in this instance.

PRESIDENT YOUNG: That's not my question.

I appreciate that. That's a factual issue to be decided later. I'm trying to--you're talking about the law, and I'm trying to get clear on the law on what your position on the law is.

MS. THORNTON: Right. I think what you're actually referring to is the preamble to the 3809 regs

11:44:03 which indicate that the National Historic Preservation Act cannot be used as a basis for denying a Plan of Operation.

PRESIDENT YOUNG: Right. It's language with respect to economic and technical feasibility, but that's not what I'm referring to. What I'm referring to is your interpretation of Senate Bill 22.

If it is factually true--and we'll--that's another issue, that it's not economically and technically feasible to mitigate so that it can be used appropriately for Native American religious

practices, is it your position then that that bill would require it not be approved?

THE WITNESS: I don't think Senate Bill 22 considers feasibility at all.

PRESIDENT YOUNG: So, the answer is no, it would not be approved?

MS. THORNTON: I think Senate Bill 22 requires that the mitigation plan that's submitted under SMARA, if the mine is a surface metallic mine within a Native American sacred site, comply with the mitigation measures set forth in the statute. If the

11:45:07 reclamation plan did not comply with those mitigation measures, I think it would be denied.

PRESIDENT YOUNG: But my point is if it's not economically and technically feasible to do so, which is precise legal language used in other statutes, then it would not be considered compliant and not approved?

MS. THORNTON: I think so.

MR. CLODFELTER: Let me just--maybe I can help in this, Mr. President. The Act doesn't require a review for economic feasibility. It's up to the applicant to submit a plan that complies with the requirements of the Act. If the applicant cannot submit a plan that meets the requirements of the act because to do so they wouldn't be able to produce, that is not a question or determination by the State. It's just a fact that they won't be able to go forward. If the plan doesn't meet the requirements of

the statute, it will not be approved. So, the economic feasibility is not for the State to decide.

I just note, though, I don't think you should draw too much from that because at some level marginality of a mine operation, even the reclamation

11:46:03 requirements that local lead agencies had imposed before these changes might make it economically infeasible for some projects to go forward. That doesn't make the imposition even of a partial reclamation requirement invalid. Economic enterprises have a whole huge range of economic feasibility.

PRESIDENT YOUNG: I understand that.

MR. CLODFELTER: And a small--even a small requirement might make some project economically infeasible. It's not for the State to decide under the Act. The application simply has to comply with the requirement.

PRESIDENT YOUNG: Thank you. I'm just trying to get clear on what your legal position is. We will discuss the economics later, but I'm just trying to get clear on what the legal position is.

Ms. Thornton, let me ask you a related question to that, too, which is in terms of background principles, is it the Government's contention that the National Historical--the Native American Historical Commission could have stepped in and stopped the landfill project?

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11:47:10 MS. THORNTON: Yes.

But, excuse me, I might add, you know, as I have tried to demonstrate through my presentation, and I have reiterated, there is a complex enforcement mechanism there. So, you know, the Native American Heritage Commission would have had to conduct an investigation, hold public hearings, then propose mitigation measures to the relevant public agency that was reviewing that Plan of Operations. And only if those mitigation measures were not accepted by the public agency could the NAHC have then asked the Attorney General to bring an injunctive action under the provisions of the Sacred Sites Act.

And finally, one thing I don't want to you lose sight of, I didn't put it up on the screen, but the Sacred Sites Act in that provision which empowers the Attorney General to bring these injunctive actions requires a demonstration--I can read you the statute--showing that such cemetery place, site, or shrine has been historically regarded as sacred or a sanctified place by Native American people and represents a place of unique historical and cultural

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11:48:18 significance to an Indian Tribe or community.

And what I would proffer to the Tribunal is that that showing could not have been made in relation

to the Mesquite Landfill project. It could be--it could have been met here.

PRESIDENT YOUNG: It's the Government's position that that showing couldn't have been made in the case of the landfill project?

MS. THORNTON: It's the Government's position that there is no evidence in the record that the NAHC attempted to apply the provisions of the Sacred Sites Act to the landfill project.

MS. MENAKER: If I may just clarify, it's--in other words, there is no evidence that the Sacred Sites Act was not enforced with respect to any other particular mining project or, say, the landfill project, for example, because we don't know whether that Act's requirements would have been met, but this is not the case like an analogous case when we were talking about the SMGB regulation where there their--it's clear that with respect to those other mining projects, this same SMARA's requirement was

11:49:54 always the same--always applied with respect to all of those other mining requirements, even if local lead agencies had not--had been approving reclamation plans that did not comply with SMARA's requirement. With the Sacred Sites Act, we are in a bit of a different situation because, from where we are standing now, we don't have any evidence that the Sacred Sites Act, for instance, was not enforced with respect to these other projects and is seeking to be enforced with respect to

Glamis's proposed projects pursuant to S.B. 22 because there is no evidence that the requirements of the Sacred Sites Act would have been met with respect to those other requirements.

We are not concluding that they would not have been, you know, with respect to the landfill, but nobody has analyzed that. We are saying that we have looked at the cultural resources at issue with respect to the Imperial Project, and that the Sacred Sites Act would have applied there.

PRESIDENT YOUNG: Just so I would be clear in the record, and maybe I will read back something and just have you respond again, then.

11:50:59 Ms. Thornton, you said what I would proffer to the Tribunal is that showing could not have been made in relation to the Mesquite Landfill project. It could be and it could have been meant here. That, I understand.

MS. THORNTON: I request to strike that from the record.

But can I add simply just to elaborate?

PRESIDENT YOUNG: Please.

MS. THORNTON: You know, the question of whether the Sacred Sites Act has been applied, you know, if the Tribunal wants instruction on that, it should look to the case of the NAHC against the Board of Trustees of the California State University. In that case, the Native American Heritage Commission

attempted to enjoin the construction of a shopping mall on property owned by the State University. It was a complicated case. The area had been deemed a sacred site by a Native American Tribe, and the Native American Tribe indicated that this was the only place where they could continue to practice their sacred site--their traditional religious practice.

11:52:01 In that case, the Board of Trustees challenged the NAHC's authority to bring the statute on establishment clause grounds. It's convoluted and complicated, but what eventually happened is the NAHC reached a negotiated settlement with California State University, and the California State University decided not to allow development on that land.

So, that's an instance in which the full enforcement mechanism of the Sacred Sites Act was not, you know, called into play because the NAHC was able to arrive at a sort of a negotiated resolution to the problem with California State University.

ARBITRATOR CARON: Thank you, Ms. Thornton. I just had a general comment. It would be helpful if we referred to the exhibits in the subtly colored binder just as I'm slow in finding them. It would just be helpful if I could look at them here and not have to turn away from you up there.

Secondly, you started by identifying the background principle, and so I just want to understand this for a moment more. And you read part of Section

22 1597.9, Tab 1, where the prohibition exists, where no

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11:53:27 1 person shall.
2 MS. THORNTON: Right.
3 ARBITRATOR CARON: And similarly, Mr. Feldman
4 pointed to language in the other statute.
5 And the question I have is: Is that all--is
6 that all that's required to identify a background
7 principle? Are there just lots of background
8 principles out there? Any prohibition in any statute,
9 or are they of a certain type of seriousness, or is
10 there an expression that this is somehow more of a
11 principle?
12 MS. THORNTON: You know, I think that the
13 Sacred Sites Act is not unlike the background
14 principle at issue in Hunziker, which was a cultural
15 resource preservation statute that empowered the Iowa
16 State Archaeologist to prevent the disinterment of
17 human remains on property within the State. It was
18 a--it's a valid existing principle of Iowa property
19 law that had been in place over 12 years before the
20 property holder in that instance acquired the title to
21 the property in question. And the Iowa Supreme Court
22 held that it circumscribed the nature of that property

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11:54:41 1 right simply by virtue of the fact that it was in

existence 12 years before.

Furthermore, the fact that the developer in that case didn't know that this, you know, housing lot contained a Native American burial ground was irrelevant, you know. The Iowa statute that was the operative background principle gave the Iowa State Archaeologist the power to prohibit development on those residential housing lots.

MS. MENAKER: If I may just elaborate on that, there--any law of state property law that limits an owner's use of the property can serve as a background principle. It does not need--there is no kind of qualitative analysis like is this a serious enough law or is this--does this restriction somehow represent a serious enough concern or something like that. All we are saying is that when you receive your property right, you take that, but you only take what the law has given you.

So, if there is a preexisting law that limits the scope of that property right, that preexisting law becomes a background principle for all subsequent

11:56:04 owners or all subsequent acquirers of that property right.

ARBITRATOR CARON: Thank you.

And I take your answer to be and there is a specific case in another state that affirms this particular one as a background?

MS. THORNTON: (Nods head.)

ARBITRATOR CARON: The second question, you identified Claimant as having three objections concerning this act, and then later you went to what is at Tab 21, the letter, the memorandum to Senator Burton.

MS. THORNTON: Right.

I actually don't have the tab--the binder in front of me, but I will find it.

I've got it, thank you.

ARBITRATOR CARON: There may be a question of whether this is a concern of Glamis or not, but I want to just raise the question just for a moment, and that is the application of the Sacred Sites Act to this project; right? It doesn't apply to every piece of land. It doesn't apply to every cultural property.

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11:57:36 It applies to certain pieces of land; correct?

MS. THORNTON: That's correct.

ARBITRATOR CARON: Or interferences with certain practices.

And the language you pointed to in the memo at page 2-3, starting at the bottom, you said 88 cultural resource sites, 54 archeological sites within and surrounding the Project area.

And then the conclusion is major adverse effect on the area of traditional cultural concern. I mean, that particular sentence doesn't talk about--paragraph doesn't talk about ceremonial uses, which I think--or religious practice, which I think is

the key element here.

And similarly, in the middle of that page, page 2, is it says the project area also includes other sacred places, which goes more to what you're saying, I think, containing or what the Act is saying, containing important power circles and geoglyphs, for example, although I'm by no means sure--I'm sure, but my impression was that might be in the ATCC, but not within the actual project area, as indicated here.

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11:59:00 MS. THORNTON: Professor Caron, I think the 1997 KEA survey report clearly indicates the presence of ceremonial features within the Project mine and process area.

ARBITRATOR CARON: Thank you. Thank you very much.

PRESIDENT YOUNG: Thank you.

MS. MENAKER: Mr. President, Members of the Tribunal, we are now going to move on to the next set of arguments that we have with respect to Glamis's arguments that the California measures expropriated its mining claims; so, in other words, you need only look to these arguments if you find that our background principles defense does not succeed, or if you find that Glamis did have--acquire a right when it acquired its mining claims to mine in a manner that contravened both the SMARA and the Sacred Sites Act as later specified through the SMGB regulation and S.B. 22.

As we set out previously, we are going to address each of the three factors that tribunals regularly look at, beginning with the economic impact

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of the action, and I just remind the Tribunal again of the comments we made in our opening statement where we noted that in Glamis's analysis, it really skipped over this aspect altogether. It essentially argued that if the Tribunal finds that there the measures at issue did not deprive the mining claims of all value, then it moves on to this analysis and measures or balances the character of the action against Glamis's reasonable investment-backed expectations. And as we pointed out, they left one factor out. The major factor is the economic impact of the measure, and we intend to spend quite a bit of time going through that because I know you have heard from valuation experts throughout the week, but those experts, because of the questioning, have spent very little time talking about the substance of their reports, and we think this is of critical concern for the Tribunal, so I just wanted to give you an indication of what we have planned.

So, Mr. Sharpe will discuss the economic impact of the measures, and we anticipate that this will take approximately an hour or take us right up until--to the lunch break.

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12:01:49 I also--when the Tribunal was conferring, our law clerk sought to give other binders that contain the hard copies of the PowerPoint presentations. We didn't want to disturb you, so they're down there, and for this one in particular, Mr. Sharpe will be referring to the documents.

MR. SHARPE: Yes, and in particular the documents in the red binders.

Mr. President, Members of the Tribunal, I will now address Glamis's failure to prove that the Government measures it challenges destroyed the economic value of its investment.

I would ask the Tribunal to bear in mind three preliminary facts. First, the Tribunal should remember that Glamis always intended to backfill and recontour two of the three pits at the Imperial Project. Glamis also contemplated partially backfilling the third pit, the East Pit.

The only relevant valuation issue, then, is the marginal increase in costs of completely backfilling this third pit, as well as spreading the waste material.

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12:03:19 Second, despite the parties' divergent valuation figures, there are relatively few issues in dispute between the parties' valuation experts. The disputes that do exist principally involve general valuation principles and not valuation issues that are

specifically related to mining.

The principal mining-specific issues in dispute concern the amount of material that Glamis would have been required to backfill and the cost per ton of doing so. And that data was provided to Navigant by Norwest, which is based upon Glamis's own data, which I will be referring to.

Now, Glamis's attempts to denigrate Navigant's credentials are not only baseless, but completely irrelevant. Navigant has not been called upon to evaluate the mining-specific aspects of this valuation. It is not asked to calculate, for instance, the amount of reserves, the amount of resources, the grade of the gold ore, the strip ratio of waste to ore, the mine life, or any other mining-specific issue.

In any event, none of those issues are even

12:04:37 disputed in this case. It's about a volume of material to be backfilled and the cost per ton of doing so. That information was provided by Norwest. No site visit was required by either Navigant or Norwest to make determinations about the volume of material and the cost per ton of moving that material. No special valuation techniques, no special certifications were required.

Rather, Navigant was simply asked to value an income-producing investment, which it did, based on Glamis's own valuation model and with technical input

from Norwest. This task, Mr. Kaczmarek testified, is much like the valuations that he and his team have performed for scores of valuations, including in many investor-State arbitrations such as this one.

Now, third, and most importantly, the valuation evidence that Glamis has put forward in this arbitration directly contradicts the contemporaneous evidence that Glamis itself prepared during the ordinary course of business and prior to this party--these parties' disputes.

The United States has produced two valuations

12:05:52 of the Imperial Project that Glamis prepared contemporaneously with the California reclamation requirements. Those documents expressly confirm the Imperial Project's positive net value, even with complete backfilling.

Now, I want to spend a few minutes discussing these contemporaneous documents because, we submit, they dispose of Glamis's expropriations claim.

If you can refer to the first document in your red binder, it's Tab 22. It's also up on the screen, if that's more convenient.

This is a valuation memo, a Glamis valuation memo, dated April 28, 2002. Now, this is well before the California reclamation requirements went into effect. This valuation is a product of Glamis's computer-valuation model. As you can see from the first sentence, "Utilizing the Imperial economic

model, we calculate the following discounted net values."

Now, the memorandum, as you can see in the red binder, attached detailed spreadsheets to evidence the methodology and conclusions. You'll also note

12:07:16 that this memorandum was prepared by and presented to Glamis's top executives in the ordinary course of business. This memo was sent by Glamis's President and CEO, Mr. McArthur, to Glamis's Senior Vice President and General Counsel, Mr. Jeannes. You will note that Mr. McArthur has initialed the memorandum. At the bottom, the very bottom of the page, we see that Mr. McArthur copied JSV, presumably James S. Voorhees, the company's Chief Operating Officer.

Now, if you look at the sensitivity analysis, using a 325 per ounce of gold and a 10 percent discount rate, Glamis valued the Imperial Project at $26 million.

Now, I want to remind the Tribunal that both parties agree that the appropriate gold price in December 2002 is $325 to $326 per ounce. The other gold prices that were referenced are the current valuation gold prices, and I will revert to that later.

Also, the Tribunal should note that this valuation is for a two-pit mine. It does not include the value of the third pit, the Singer Pit, which

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12:08:29 1 Behre Dolbear itself valued at $6.4 million or valued
2 the gold reserves.
3 ARBITRATOR CARON: I'm sorry, could you
4 repeat that last?
5 MR. SHARPE: Yes. This is the valuation for
6 a two-pit mine. It does not include the valuation,
7 the value of the gold--the mineralization of the
8 Singer Pit which Behre Dolbear, in its
9 probability-adjusted additional gold reserve, valued
10 at $6.43 million. Now if we ask--
11 ARBITRATOR CARON: Let me just ask, how do
12 you know that?
13 MR. SHARPE: If you look at the very bottom,
14 you see the ounces of reserves, 1.1 million ounces.
15 That is the--that's the gold reserve for the east and
16 west Pit. I will refer to this later, but Behre
17 Dolbear has taken the 500,000 ounces of exploration
18 potential and probabilized that to a probability
19 adjusted additional gold reserve of 250,000 ounces.
20 This is just a 1.1 million ounces for the two pits.
21 Now, if we add the value that Behre Dolbear
22 calculated for the Singer Pit, the Project would be

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12:09:37 1 valued at $32.4 million, as this next table shows.
2 26 million for the fair market value of the East and
3 West Pits, and $6.4 million for what Behre Dolbear has

described as the fair market value of the third pit, the Singer Pit.

Now, I want to turn to the next document in that binder. This is the January 9, 2003, valuation memo, and this is of absolutely critical importance in this arbitration. This valuation also is expressly based on the company's computer-valuation model. It says, "These economics were run using the same base case as in Kevin's April 28, 2002, analysis." That's the document we were just looking at.

And as you can see, this memo also attached detailed spreadsheets to evidence the methodology and conclusions.

And again, this memo was prepared by and presented to Glamis's top executives in the ordinary course of business. This one is from Mr. Voorhees, the COO, to the President and CEO, Mr. McArthur, and to the Senior Vice President and General Counsel Mr. Jeannes.

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12:10:53 Unlike the earlier memo, however, this one was prepared specifically to estimate the cost of complying with the California reclamation requirements, and you can see that from the text beginning, "To meet the requirements of section 3704.1, Title 14, California Code of Regulations, not only are the pits required to be backfilled, but all other mined materials are to be graded and contoured to a surface consistent with the original topography,

with a height restriction of 25 feet above the original elevations."

Now, you heard Mr. Guarnera testify that Glamis--that this valuation memo accounted only for the cost of backfilling and not for grading and recontouring, which is why he had an additional $7.7 million to his valuation. But as you can see, that's plainly false. Glamis is accounting for backfilling, recontouring, and regrading.

Again, using a gold price of $325 per ounce and a 10 percent discount rate, Glamis valued the Imperial Project, not including the Singer Pit, and assuming compliance with the California reclamation

12:11:59 regulations at $9.1 million.

Now, we heard Mr. McArthur earlier this week say that Glamis used a $300 gold price and not $325. Well, this is both legally irrelevant and factually wrong. It's irrelevant because the experts for both parties have agreed that 325 to $326 per ounce is the appropriate gold price for a fair market valuation on December 12, 2002.

In any event, it's also wrong. This document is a sensitivity analysis. The sensitivity analysis sets forth a base case, an optimistic case, and a pessimistic case. $300 is not the base case. It's the pessimistic case.

The two spreadsheets that are attached to that document clearly uses the gold--used the gold

price $325 on the first one and $350 on the second one.

In fact, that is why the internal Glamis model that both parties' experts had to rely on for their calculations is not called the $300 base case model. It's called the $339 base case model.

So, Glamis concluded in January 2003 that the

Imperial Project had significant positive value even with complete backfilling, regrading, and recontouring, in full compliance with the California regulations.

Now, Glamis does not deny the existence or provenance of this memoranda. Rather, it questions their reliability. It dismisses them as preliminary estimates and back-of-the-envelope calculations. That's simply not credible.

This is nothing about these documents at all suggesting that they're somehow unofficial, informal, or incomplete. They are very similar to Glamis's other valuations for the Imperial Project performed over the years.

And, in fact, when Glamis discusses draft or preliminary valuation figures, it says so explicitly. As you can see from the next document in your binder or up on the screen.

This memo from June 1998 illustrates the point. As you can see, it's from the General Manager of the Imperial Project, Steve Baumann, to

Mr. McArthur. The first line states, "Tom Negleman

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was recently given the task of reviewing the Imperial Mine model to engineer new phased $300 pit reserves. The results of that analysis are enclosed as a draft of the economics spreadsheet you are familiar with."

Then if you'll go just below the bullet points--

ARBITRATOR HUBBARD: Excuse me, Tom Negleman is who again?

MR. SHARPE: He doesn't feature very prominently in the documents that we have seen, so I'm not sure what his position is.

If you look following the bullet points, it says, "These numbers are still preliminary, but I have looked them over a number of times and they should now be very close."

Now, again, whoever Tom Negleman is, this document was sent by Steve Baumann, the Imperial Project Manager, to Mr. McArthur, the CEO and President. I think at that he was--yes, that was his position at that time, I believe.

If you'll also notice on the page that follows this valuation, the spreadsheet is clearly

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marked draft. The memos from 2002 and 2003 do not

claim to contain draft information or preliminary numbers. There is no reason, then, for this Tribunal to treat those memos as anything other than what they purport to be, ordinary business records.

Nor is there any reason to believe that those memos are inaccurate, as Glamis would have you believe. During congressional testimony, in fact, Mr. Jeannes stated that estimating reclamation costs is quite simple.

Let me read from his testimony. I will put it up on the screen. It's the document that follows. He said, "We actually have quite a bit of experience at reclamation. Because Glamis operates only heap-leach oxide,"--it should say mines--"above the water table, no pit lakes, no acid drainage, it is quite simple to estimate the costs of reclamation because you're simply talking about the time of rinsing a heap and then of moving a certain number of yards of dirt and then receding and revegetating. So, we have done a lot of it, and we think we're very good at estimating cost, yes."

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12:16:38 Now, given this admission, there is no reason for this Tribunal to accept the suggestion that Glamis simply didn't know what it was doing in 2003, when it calculated how much it would cost to comply with California's backfilling regulation.

Let me briefly address Glamis's new argument, that even if the project were profitable, which is

beyond doubt, it would not be sufficiently profitable to be worth Glamis's while.

First, this is simply irrelevant as a matter of international law. A compensable taking requires a full or very nearly full deprivation of the investment at issue. The United States cited ample authority for that proposition in its Counter-Memorial and Rejoinder.

Here, Glamis's own contemporaneous document puts the fair market value of the Imperial Project at $9 million at least, and that doesn't even include the value of the Singer Pit gold mineralization, which Behre Dolbear put at $6.4 million.

Just as important, though, Glamis's new argument is factually wrong. Indeed, Glamis's

12:17:49 argument is, once again, proven wrong by its own documents.

Now, I will put up on the screen--it's also the next document in your binder a memorandum from October 17, 2000--

PRESIDENT YOUNG: Mr. Sharpe, I'm going to interrupt you for just one second and ask you to give us numbers.

MR. SHARPE: Sure. This is number 26 in your binder.

This is a memorandum from October 17, 2000, which is well before the California reclamation measures took effect. Subject line, as you can see is

Imperial Project economics. It was prepared by Mr. Voorhees, the COO, and sent to Mr. McArthur, the CEO. And again, it contains a spreadsheets supporting the valuation.

This memorandum lists the Project's net present value at a mere $1.1 million with an internal rate of return of 5.9 percent, and that's using a 5 percent discount rate. Nevertheless, the first line states, "The Imperial Project economics have been

12:18:52 updated by Gary Boyle to reflect current equipment and supply costs. The Project remains economic at a gold price of $275 per ounce, although the rate of return is marginal."

So, the Project was economic at $1.1 million but is now uneconomic at $9.1 million? That obviously cannot be correct. And I remind the Tribunal that gold prices have now shot up to $675 an ounce, and I'll discuss that a little bit more later.

The key issue for this Tribunal, then, is determining the legal effect of Glamis's contemporaneous documents. There can be no dispute that contemporaneous documents produced in the ordinary course of business are more reliable than post hoc evidence offered to bolster a party's arbitration claims. Nor can there be any dispute that contradictory statements of an interested party should be construed against that party. United States cited ample authority for these propositions in its

Rejoinder, and they remain unrebutted this week.

Nor is there any reason to believe that the information in Glamis's contemporaneous valuation is

12:19:59 incorrect, as Glamis admits that it is, "quite simple to estimate the cost of reclamation."

The effect of the contemporaneous valuations, we submit, is to prove that the Imperial Project retains significant value, even with complete backfilling, and an investment that retains significant value for the investor cannot legally be deemed to have been expropriated. The United States submits that the Tribunal can and should end its inquiry here and on the basis of these documents dismiss Glamis's expropriation claim.

Given these contemporaneous documents, the contemporaneous documentary evidence, there is no reason for this Tribunal to resort to the Behre Dolbear valuation that Glamis commissioned for this arbitration. But even if this Tribunal were to inclined to consider that valuation, it would not change the result in this arbitration as that valuation contains serious and fundamental errors, and the expert reports prepared by Navigant and Norwest discuss those errors in detail, and I won't try to summarize every issue here, but I do want to highlight

12:21:02 1 the principal differences in the experts' valuation
2 scenarios, as they were not elicited, as Ms. Menaker
3 noted, during expert testimony during this week or
4 during witness testimony.
5 So, let me flash up on the screen the
6 different valuation scenarios. For convenience,
7 Navigant has dubbed them the pre-backfill scenario,
8 post-backfill scenario, and current valuation
9 scenario.
10 The pre-backfill scenario is the value on
11 December 11, 2002, with complete backfilling of the
12 pits and partially backfilling of the East Pit.
13 The post-backfill scenario is the value on
14 December 12, 2002, with complete backfilling of all
15 three pits.
16 And the current valuation scenario is the
17 value in 2006, also with complete backfilling. These
18 are the scenarios that I will be referencing
19 throughout the remainder of this presentation.
20 So, the expert's task is to ascertain for
21 each scenario the Imperial Project's fair market
22 value.

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12:22:08 1 In the pre-backfill scenario, Navigant
2 applied three separate valuation methodologies. You
3 see the DCF, 9.2 discount rate comparable transaction,
4 and the adjusted 1994 Imperial Project transaction.
5 These are the results. I will briefly explain how

Navigant obtained them.

First, Navigant used a discounted cash flow approach. Navigant calculated a 9.2 percent discount rate using the capital asset pricing model or the cap M, which is a standard way to value an income-producing investment such as the Imperial Project.

Navigant confirmed its discount rate by comparing it to discount rates used in similar projects.

Navigant further confirmed its discount rate by comparing the results of its DCF analysis with the results obtained using other valuation methods.

Navigant's DCF analysis led it to value the Imperial Project in the pre-backfill scenario at $35.3 million.

Second, Navigant applied a comparable

12:23:17 transaction approach. We then put from Norwest Navigant examined six contemporaneous transactions involving reasonably similar gold mining properties in order to calculate a valuation multiple of $20.08 per ounce of gold. Navigant then multiplied the $20.08 by the Imperial Project's estimated gold reserves to reach a figure of $34.5 million.

Now, third, extrapolating from a 1994 transaction in which Glamis acquired 35 percent of the Imperial Project from another company, Navigant valued the Project in 2002 at $30.1 million.

Each of these three methodologies produced reasonably consistent results, providing a high degree of confidence in Navigant's conclusions. Navigant then weighted each of these transactions in accordance with their reliability, as you can see up on the screen. DCF 60 percent, $21.2 million. Comparable transaction, 30 percent, $10.3 million. Prior transaction, 10 percent, least reliable, $3 million. Total, $34.5 million.

Now, the Tribunal will recall that this figure is very close to the $32.4 million that Glamis

12:24:30 calculated for the Imperial Project as adjusted for the value of the Singer Pit mineralization.

Now, Behre Dolbear, by contrast, valued the Imperial Project at $49.1 million, or 30 percent higher than Navigant's weighted valuation. Rather than applying individual valuation methodologies as Navigant has done, Behre Dolbear opted to pick and choose different valuation methodologies for different parts of the Imperial Project. Behre Dolbear first performed a DCF of the gold reserves in the East and West Pits using a 6.5 discount rate. Behre Dolbear then applied a comparable transaction valuation of the Singer Pit's exploration potential.

As Navigant observed, though, there is no justification for Behre Dolbear to have performed two partial valuations instead of two complete valuations using different methods. And as we noted in our

Rejoinder, the Iran-United States claims Tribunal has criticized this kind of piecemeal valuation.

There are three principal reasons for the expert's different valuations in the pre-backfill scenario, as you can see. First, Behre Dolbear

12:25:41 miscalculated the discount rate; second, Behre Dolbear ignored the lead time required to begin production, thus artificially increased the Project's present value; and, third, Behre Dolbear used an unsupported and inflated transaction multiple of $25.71. I will discuss each of these briefly in turn.

First, Behre Dolbear miscalculated the discount rate. This accounts for the biggest difference between the parties' valuations in the pre-backfill scenario. Behre Dolbear initially calculated a 9.28 percent discount rate using the risk buildup model. This figure is nearly identical to Navigant's 9.2 percent discount rate.

Behre Dolbear, however, reduced that rate by nearly a third to 6.5 percent in order to account for corporate taxes, but as Navigant has explained, corporate taxes are no different from any other expense facing a corporation. Project owners, like owners of shares of shock, only have access to the cash flow of their business after corporate taxes have been paid, so reducing a discount rate for corporate tax assumes that the investor's return is on the

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12:26:52 pre-tax cash flow, which it is not.

Behre Dolbear's approach, thus, makes no sense. It contradicts the most basic valuation principles. Navigant introduced ample evidence showing the error in Behre Dolbear's approach. Behre Dolbear, by contrast, has introduced nothing to support its approach.

Let me read an expert--an excerpt from an industry white paper that clearly exposes Behre Dolbear's error. I will put this up on the screen. It's number 27, if you prefer to read along in your binder, but it says, "Like the cap M, which Navigant used, the buildup model which Behre Dolbear used, estimates a cost of equity capital. Therefore, a discount rate derived from the buildup model corresponds to the measure of income available to an investor in equity securities. In order to be consistent in our matching of, one, the discount rate, and, two, the stream of economic income, it is crucial that the discount rate derived from the buildup model be applied to the appropriate income stream (i.e., after tax cash flow)."

1183

12:28:05 So, by applying a tax adjustment to the discount rate calculated from the buildup model, Behre Dolbear has made an obvious and crucial error in its

DCF valuation.

Let me turn to the second issue in the pre-backfill scenario, and that's the Project development time.

Behre Dolbear adopts Glamis date of expropriation, as you can see, as December 12, 2002. Behre Dolbear then selects January 1, 2003 as the date that gold production could begin. That is just 19 days later.

But Glamis's own contemporaneous documents show that Glamis would require at least six months to begin mining operations after obtaining the necessary permits. Documents include the EIS and EIR, the internal production schedule of Glamis, and the final Feasibility Study.

Behre Dolbear simply ignored this issue in its second report.

In its third report, as you can see, Behre Dolbear has addressed it, but it suggests that it

would take at least one year to develop the Project. It stated, once permits were issued, a minimum of 12 months will be required to complete construction.

By Behre Dolbear's own admission, then, the Imperial Project could not have begun production in just 19 days. It would have taken at least a year. So, by assuming that Glamis could begin mining almost immediately, Behre Dolbear has inflated the present value of the Imperial Project's cash flow and thus has

exaggerated the Project's overall praised value.

The third issue in the pre-backfill scenario relates to the transaction multiple. Now, Navigant and Behre Dolbear each calculated a transaction multiple in order to value the Imperial Project's estimated gold reserves. As I noted, Navigant examined six contemporaneous sales involving reasonably similar gold mines in order to value the Imperial Project on a transactional basis. Navigant then multiplied the Project's estimated gold reserves by a transaction multiple of $20.08 to reach a figure of $34--$34.5 million.

Now, as you can see on the screen, Behre

12:30:20 Dolbear has calculated a $25.71 transaction multiple purportedly by relying on a database in its possession that it failed to produce. Navigant and the United States repeatedly criticized Behre Dolbear for failing to produce that database. Behre Dolbear, however, never produced that database. It now claims in the rebuttal statement of Mr. Guarnera that it is the United States's fault that Behre Dolbear did not produce that database because the United States did not specifically ask for it.

That's simply wrong. It is the Claimant that bears the burden of proof in this case, and it is not the Respondent's obligation to ensure that the Claimant has produced the evidence required to do so.

Because Behre Dolbear has failed to introduce

any evidence whatsoever supporting its calculation, this Tribunal should disregard its conclusions as the Iran-United States Claims Tribunal has done in similar circumstances.

Let me shift gears here and move to the post-backfill scenario. I would ask the Tribunal again to bear two facts in mind initially. The first

12:31:35 is that the parties' experts have calculated reclamation costs based on Glamis's existing mine plan. As Norwest has explained--that is, Mr. Houser testified this week--any rational mining company facing new reclamation requirements such as total backfilling would redesign its mining plan to maximize project efficiencies and to minimize the costs of complying with those regulations. This is, in fact, precisely what Golden Queen has done in connection with its Soledad Mountain Project, after the California reclamation requirements were applied to that project, as you can see from this screen, and this is your binder in 28 if you prefer to follow along. Let me read. "Every element of the Soledad Mountain Project has been rethought and reengineered in the past three years in an effort to find sound technical and cost-effective solutions that would allow the Project to proceed with a robust internal rate of return, or IRR. Norwest showed that simply changing the pit design can yield significant cost savings. But, because Behre Dolbear has relied on

Glamis's existing mining plan, and because it has

1187

refused to rethink or reengineer anything, its reclamation costs necessarily are exaggerated."

Second preliminary point. The amount that Behre Dolbear estimated it would cost Glamis to comply with the California reclamation requirements is nearly twice what Glamis's own contemporaneous calculations were. Before this dispute, Glamis estimated that complete backfilling and recontouring of the Imperial Project would cost about $52 million. You see from the screen, this is the January 9, 2003 valuation memorandum which is critical to this arbitration. Let me read. "For the Imperial Project, this, the California reclamation requirements, requires the rehandling of approximately 206 million tons of overburden and spent ore at the end of the Project. With an estimated cost of 25 cents per ton for transport and grading of the material, this equates to a total additional expenditure of about $52 million over a four-year period."

ARBITRATOR HUBBARD: Mr. Sharpe, is this document in the binder?

MR. SHARPE: It should be. Let me see.

1188

It is number 28, I believe. It should be 28.

ARBITRATOR HUBBARD: 28 is the--

MR. SHARPE: Oh, I'm sorry, I'm looking the at the valuation memorandum. It is in the binder. Let me direct you to that.

That is 23. My apologies.

Now, the Tribunal will recall that Mr. Jeannes's has touted Glamis's experience estimating reclamation costs which he notes is, "quite simple."

As you can see from this table on the screen, BLM similarly calculated $47.8 million in its 2002 Mineral Report as the cost of backfilling.

Norwest has independently performed its own detailed analysis of the reclamation costs and reached a conclusion very much in line with Glamis's contemporaneous estimate. $55.4 million. Norwest has added $7.7 million in equipment rebuilding just to be conservative.

By contrast, Behre Dolbear performed what it calls a, "order of magnitude" calculation. That is, it simply estimated reclamation costs. I will address

12:35:27 the manner in which it did so shortly, but as you will see, Behre Dolbear's estimate of $95.5 million is nearly twice Glamis's contemporaneous estimate of $52 million.

Now, Behre Dolbear included this 95.5 million dollar figure in its DCF analysis for the post-backfill scenario.

There are many errors in Behre Dolbear's analysis, and Norwest and Navigant have highlighted those in detail. I'm just going to touch on a few of the most significant ones.

Let me begin with the issue of financial assurances which have been discussed this week.

Behre Dolbear's greatest error was to assume that Glamis would be required to post up front a 61.1 million dollar cash bond to cover reclamation costs at the Imperial Project. Now, Glamis does require, as you heard from Mr. Craig, that mining companies obtain financial assurances to cover the risk of their defaulting on reclamation obligations, but the State allows companies to meet their obligations with cash bonds, surety bonds, or Letters of Credit, as again

Mr. Craig testified.

By assuming that Glamis would post a cash bond, Behre Dolbear has managed to find the most expensive means for Glamis to meet its financial assurance obligation for the Imperial Project.

Navigant has shown how Glamis could have increased the Project's net present value by approximately $12 million simply by obtaining a Letter of Credit in lieu of a cash bond, as Glamis and other mining companies routinely have done. Correcting for this single error would put the Imperial Project significantly in the black, even accepting all of Behre Dolbear's other estimates and assumptions.

Now, Behre Dolbear claims that Glamis had no option but to put up 100 percent cash. It cites Mr. Jeannes's claim that in recent years Glamis has met its financial assurance obligations by using cash-backed Letters of Credit, in values ranging from a few thousand dollars up to $2 million.

But there are some obvious problems with this testimony. First, there is no evidence in the record to support this, no documentary evidence.

1191

12:37:43 Now, considering the vital importance of this issue to Glamis's expropriation claim, Glamis's failure to introduce any documentary evidence whatsoever is simply inexplicable.

Second, the issue is not how Glamis has met its financial assurance obligations in the past for lesser amounts. The issue is what a reasonable operator in Glamis's position would do if it were facing up to $95.5 million in reclamation costs as Behre Dolbear claims that it was. Would it, in fact, post cash? Absolutely not. The unrebutted documentary evidence shows that Glamis would do what it and other mining companies consistently have done, and that is obtain noncash-backed financial assurances.

This document is probably difficult to read, but it's 29 in your binder.

The United States introduced documentary evidence showing dozens of surface mining operations

with financial assurances in excess of a million dollars that were backed either by a Letter of Credit or by a surety bond and not by a cash bond.

1192

12:38:52 There are a few more examples up on the screen. You can see Kinross Gold Corporation obtained a $125 million noncash-backed credit facility in 2003, primarily to allow for the issuance of Letters of Credit for reclamation assurance.

The Cameco Corporation, a uranium and gold mining company, obtained a $294 million noncash-backed Letter of Credit facility in 2002, solely to provide financial assurance for reclamation.

The Ag-Nico Eagle Mine, a gold mining company, obtained a $125 million credit facility in 2004 that was secured by its mineral properties, not by cash. This credit facility has been used to issue Letters of Credit for reclamation assurance.

Now, as Navigant pointed out, Glamis itself obtained a $20 million noncash-backed Letter of Credit, and that was back in 1994. This is what Glamis stated in its 10(k): "At December 31, 1996, the company had a banking facility of $20 million that is secured by all precious metals in any form, all tangible and intangible personal property, and any and all inventory, and all indebtedness to the company.

1193

12:40:14 Now, skipping down a little bit, it says, "As at December 31, 1996, there were no cash borrowings under the existing banking facility but the lender has provided letters of credit for $4,754,976, and that was to provide security for future reclamation cost. So, Glamis was able to obtain a $20 million noncash-backed banking facility for reclamation.

So, Behre Dolbear's statement that, "All Letters of Credit Glamis has used are backed 100 percent by cash," is simply false.

Mr. Jeannes testified this week that Glamis could not obtain a noncash-backed Letter of Credit in 2002 in the 50 to $60 million range, but as Mr. Kaczmarek testified, that is simply not believable, and Glamis certainly has introduced no documentary evidence of any kind in support of that contention.

In any event, let's have a look on the screen at Glamis's financial position in 2002 as compared to 1994 when it obtained a $20 million noncash-backed Letter of Credit. As you can see, by 2002, Glamis had a market capitalization of over $1 billion, up from

12:41:38 175 million. Glamis had $160 million in cash and cash equivalents up from 12.8. Glamis had zero debt.

It also had, according to Mr. McArthur's testimony this week, an unbroken track record of success in its gold mining operations. The

suggestion, then, that Glamis could not obtain a $50 million contingent loan to cover the unlikely event of its inability to pay reclamation costs is simply not credible.

Today, in fact, as you can see up on the screen, Goldcorp, which has acquired Glamis, reports that of the $135.5 million in outstanding Letters of Credit for reclamation costs in 2006, only 11.9 million, or 8 percent, is collateralized by cash.

It's also important to note that the contemporaneous valuation of the Imperial Project that was prepared for Glamis's top executives in January 2003, makes no mention of the cost of a $61 million cash bond for reclamation. And as I noted earlier, Glamis provides itself on being able to accurately assess reclamation costs, and yet Glamis would have this Tribunal to believe that its top executives

1195

12:42:57 simply overlooked the single largest expense that Glamis would ever make over the entire life of the mine, a $61 million cash outlay in year one of the Project.

Again, this is simply not credible.

But even if Glamis had put in documentary evidence to support Mr. Jeannes's statement, there is a separate and further problem with Behre Dolbear's approach. That is, even assuming that Glamis had to pledge cash in order to meet its financial assurance obligations, it would not have had to post the entire

amount up front as Behre Dolbear claims. Under California law, mining operators are required to provide financial assurances for the costs of reclamation for disturbances only for that particular year. As Mr. Craig testified, the amount of financial assurance required changes annually, based on how much new land would be disturbed and how much of the old disturbances have been reclaimed.

This is a quotation from the SMGB Financial Assurance Guidelines. It's also at Tab 32 in your binder. It's a short quotation. I will read it:

12:44:10 "The financial assurance mechanism need not be for the life of the mine, so long as a sequence of mechanisms is maintained which provide continuous coverage without lapse."

There was no reason, therefore, for Behre Dolbear to tie up $61.1 million in Glamis's cash in year one of the Project.

To illustrate with Golden Queen again, it is estimated $10 million in reclamation costs for the Soledad Mountain Project, but it's pledged only $258,894 in financial assurances for 2007.

Now, the economic impact of Behre Dolbear's mistake is massive, as this chart shows. Assuming a cash bond in year one, Behre Dolbear valued the Imperial Project in the post-backfill scenario at a negative $8.9 million. By substituting the Letter of Credit without changing anything else, Behre Dolbear's

valuation--in Behre Dolbear's valuation, the Project is worth a positive $2.8 million, and that's just the value of the East and West Pits. Adding the value that Behre Dolbear has described to the Singer Pit puts the Imperial Project at a positive $9.2 million

12:45:31 in December 2002, even with complete backfilling. That's just changing one assumption in Behre Dolbear's valuation.

Let me turn now to the second issue, and that is the volume of material that Glamis would be required to backfill into the East Pit. Behre Dolbear has calculated 227.2 million tons of material to be backfilled, whereas Norwest has calculated 186.7 million tons.

Now, two factors account for the approximately 40-million ton difference. First, Behre Dolbear assumes that Glamis would be required to backfill all the material stockpiled in the waste dumps and above the West Pit, but the SMGB regulations require along with backfilling of the pits, reducing the waste piles only if they exceed 25 feet above the original topography. So, by planning to move stockpiled waste that is situated less than 25 feet above the original topography, Behre Dolbear unnecessarily assumes that Glamis would backfill an approximately 25 million tons of material.

Second, Behre Dolbear overestimated by an

12:46:43 1 additional approximately 15 million tons the overall
2 volume of backfill material at the Imperial Project
3 principally by inflating the material's swell factor
4 which we've heard a bit about this week. The greater
5 the swell factor, the greater the volume of material
6 that requires backfilling, and hence the greater the
7 cost of reclamation.
8 Now, throughout this week, Glamis has shown
9 numerous experts and witnesses a single core sample
10 from the Imperial Project in an effort to prove
11 somehow the swell factor for the Imperial Project.
12 There are, however, three obvious problems with
13 Glamis's approach.
14 First, as Mr. Houser testified, simply
15 looking at a single piece of rock tells us nothing
16 about the volume of the rock once it has been blasted.
17 Second, even if we could tell the swell
18 factor of that piece of rock, it would tell us nothing
19 about the weighted average swell factor of the
20 material at the Imperial Project. That is the only
21 relevant issue here.
22 Third, and most importantly, although Glamis

12:47:44 1 has pointed these various witnesses and experts to the
2 contemporaneous data that Glamis produced concerning
3 this rock, it never once pointed them to the

contemporaneous conclusions that Glamis reached concerning this data.

Let me just step back and start from the beginning to lay the groundwork here. Both parties accept that 79 percent of the waste material at the Imperial Project is called gravel or conglomerate or something of that sort. Here is a quote from Behre Dolbear's first report: "According to Glamis, 79 percent of the waste material in both the East Pit and the West Pit is classified as gravel."

Second, the parties recognize that this gravel can be consolidated; that is, it can be cemented in some form or it can be simply unconsolidated, simply loose gravel. Let me read from the Imperial Project Plan of Operations which makes this point clear. This is Tab 33 in your binder.

"The overburden thickness above the ore zones ranges from 40 to 350 feet and consists mostly of alluvial gravels, both unconsolidated and cemented,

12:48:57 and minor amounts of volcanic rock. Mining of the unconsolidated gravels may not require blasting. However, the cemented gravels are expected to require blasting prior to excavation."

Clearly not everything was the kind of rock that Behre Dolbear would have us believe. Some of this material doesn't even require blasting. One can simply scoop it up.

Now, the WESTEC Report that was produced also

does not appear to contradict Glamis's plan of operations in this respect. This is the end, however, of the common ground between the parties with respect to the swell factor. Behre Dolbear has calculated a 30 percent swell factor for the Imperial Project in this arbitration. This figure, however, is two-thirds greater than the 23 percent weighted average swell factor determined by Norwest, by BLM, and even by Glamis on seven separate occasions, as you can see from this slide.

Prior to this arbitration, in fact, Glamis consistently calculated a weighted average swell factor of 23 percent. This contemporaneous evidence

12:50:06 spans nearly a decade.

Let me touch on each one of these very briefly starting with Tab 34 in your binder, a memorandum from 1994 November, from Project Geologist, Dan Purvance, who was here to testify on this document, to Mr. McArthur, in which Glamis specifically reported a weighted average swell factor of 23 percent.

If you go to the last page, I believe it's the last page, yes, look to the top right-hand corner. Mr. McArthur has written his initials next to, CKM, C. Kevin McArthur. These initials match those from the other documents that we've looked at, including the April 28, 2002 valuation memo.

So, here we have Glamis's President and CEO,

who apparently was then Chemgold's Vice President and Operations Manager, signing off on a 23 percent weighted average swell factor. This document was not shown to any witness this is week.

If you will turn to Tab 35, the evidence continues. We have a document attached to a 1995 memorandum from Project Manager Gary Boyle to

Mr. McArthur, copying Project Geologist Dan Purvance. If you turn to the second to the last page, you will see that Glamis again calculated and stated a weighted average swell factor of 23 percent.

Now, third, if you turn to Tab 36, you'll see--

ARBITRATOR CARON: Could we pause for a second.

MR. SHARPE: Sure.

(Pause.)

MR. SHARPE: If you will look at Tab 36, in the documents attached to this memorandum, again, this is a letter from Project Geologist, Dan Purvance, to Glamis's consultant, Mine Reserves Associate, and copied to General Manager Steve Baumann. Glamis states a 23 percent weighted average swell factor on the second to last page.

Now, you may recall that Mr. Houser was shown this document and various data about gravel and rock and conglomerates and core sample, but he was not asked his opinion about the weighted average swell

22 factor. That was stated in that very document.

1203

12:53:17 1 If whenever you're ready, if you'll turn to
2 Tab 37, that's the next document stating a swell
3 factor. This one you may have to look at on the
4 screen because of the way that it's been produced.
5 It's a large spreadsheet, but the individual pieces
6 are difficult to see. But this is Glamis's March 1996
7 bankable feasibility sensitivity analysis, and as you
8 can see, Glamis has stated a 22.65 percent or
9 23 percent weighted average swell factor. I would
10 draw the Tribunal's attention to the fact that this is
11 a bankable feasibility analysis which indicates the
12 great confidence Glamis had in the figures supporting
13 that analysis.
14 I'm afraid the remainder of these documents
15 are in a similar disaggregated form, so it may be
16 easier to look at them on the screen, but we have the
17 fifth document is the Imperial Project's budget for
18 1998, in which Glamis states a 23 percent weighted
19 average swell factor, 22.65 percent.
20 And again, in the--
21 ARBITRATOR CARON: Put the last slide up,
22 please.

1204

12:54:42 1 MR. SHARPE: If you'll notice also on these

documents, the very first document that was prepared by Mr. Purvance on November--in November of 1994 that was signed by Mr. McArthur, you can see this being replicated in Glamis's documents over this 10-year period. This figure is not changing. It even says 11/94 CKM. These documents continue over a decade.

Okay. '98 is the next one also stating 23 percent weighted average swell factor.

And the same as with 1999, 23 percent weighted average swell factor.

Finally, in the 2003 valuation model that served as the basis of Behre Dolbear's own DCF valuation, Glamis states a 23 percent weighted average swell factor. Again, you can see 1194 CKM swell factor 22.65 percent.

ARBITRATOR CARON: What does the 1194 mean?

MR. SHARPE: The 1194 was the date of the original memorandum that Dan Purvance sent. It's the earliest indication we've seen of a weighted 23 percent--a weighted average 23 percent swell factor. We have not seen any indication in any of the

12:56:16 thousands of documents that have been produced in this case indicating anything other than a 23 percent weighted average swell factor until the parties' dispute arose.

So, there is no reason for this Tribunal to reinvent the wheel and try to calculate its own swell factor from a piece of rock that was introduced a few

days ago. For 10 years Glamis relied on a 23 percent weighted average swell factor. There is no indication in any of the documents that we have seen or that have been produced that suggest that somehow they realized they were wrong, that their budgets were wrong, that their bankable feasibility analysis was wrong. There is no memo from Mr. Purvance saying I made a gross error in 1994 which replicated itself over a decade in our documents. And, in fact, I meant to say a 35 percent swell factor. Mr. Purvance was here. He did not state: "I think I was wrong in 1994 and these documents are wrong over a decade." He was asked a question about the swell factor. His answer was nonresponsive.

There is an additional point. You will

12:57:33 recall from the testimony of Mr. Guarnera from Behre Dolbear that he stated that he relied on the information provided in Mr. Purvance's documents, and yet he reached a different conclusion. I will discuss how he got there in just a moment, but just--the final contemporaneous value--statement is from BLM, and BLM calculated 22.3 percent swell factor in its 2002 Imperial Project mineral examination, which was based on Glamis's Imperial Project drill logs, metallurgical work, and published rock density data including--you may be able to see. If not, you can look at 41 in your binder. They relied on the Church Handbook. That's how that handbook made its way into this

arbitration.

Now, let me address how Behre Dolbear calculated its swell factor. Behre Dolbear simply sets aside this entire 10-year history of documentary evidence and proceeds from what it calls first principles. This is what it states: "The swell factor of 35 percent used in the final Feasibility Study was developed from first principles, based upon the ratio of the density of the in-place material, 13

12:58:45 cubic feet per ton determined from multiple samples to the density of the loose mine materials, 17.7 cubic feet per ton.

So, let's look at this table regarding how Behre Dolbear was forced to make its swell factor calculation. As you can see, this is the loader productivity chart from the final Feasibility Study. It does not state a swell factor. It states the loose density of the material. 3,050 pounds per cubic yard.

Now, apparently Behre Dolbear has located in the same document the in-place density of the material and then made a calculation to determine the Imperial Project's swell factor. Now, Behre Dolbear apparently did not introduce that relevant portion into evidence, and so this Tribunal, it would appear, could not replicate Behre Dolbear's swell factor, even if it were inclined to set aside the entire history of the contemporaneous evidence stating a 23 percent swell factor and to proceed from first principles.

In any event--excuse me.

So, the effect of Behre Dolbear's mistaken swell factor is that is overstated by approximately

1208

15 million tons, the amount of material that Glamis would have been required to backfill had the California reclamation requirements actually been applied to it.

What does this mean in dollars and cents? Not that much, actually, despite all of the testimony that we heard this week about that piece of rock. At 25.5 cents per ton and 15 million tons, that's about $3.8 million about a dozen years out into the project. The impact on the net present value is less than a million dollars.

In other words, despite the inordinate amount of time that Glamis spent on this swell factor issue, the financial impact is quite marginal.

Glamis apparently did not realize this because it was asked what the financial impact of the different swell factors was, and it didn't have an answer. That might explain why this rock sample and the issue of swell factor featured so prominently over the past week.

If I might, I will turn to the third major problem in Behre Dolbear's post backfill valuation,

1209

13:01:11 and that relates to the estimated reclamation costs.

PRESIDENT YOUNG: Mr. Sharpe, may I interrupt you for a moment and just ask a procedural question. It is 1:00. How much longer do you anticipate?

MR. SHARPE: I probably have 15 minutes.

We are not opposed to breaking if the Tribunal prefers to take the lunch break at the scheduled time.

PRESIDENT YOUNG: I think we will break at this point and reconvene at 2:15. Thank you very much.

(Whereupon, at 1:01 p.m., the hearing was adjourned until 2:15 p.m., the same day.)

1210

AFTERNOON SESSION

PRESIDENT YOUNG: Counsel ready to proceed?

MR. SHARPE: Yes.

PRESIDENT YOUNG: Thank you.

We will recommence the hearing. Mr. Sharpe,

the floor is yours.

MR. SHARPE: Thank you, Mr. President and Members of the Tribunal. I would propose turning to the third major problem in Behre Dolbear's post-backfill valuation, and that is that Behre Dolbear has mistakenly estimated reclamation costs at 35.3 cents per ton.

Now, unlike the swell factor, this actually has important implications for the valuation conclusions reached.

Behre Dolbear's figure is almost 30 percent higher than 25 cents per ton that Glamis calculated and the 25-and-a-half cents per ton that Norwest calculated.

Again, the Tribunal should remember that Behre Dolbear has set aside Glamis's own contemporaneous calculations in favor of estimates

14:20:31 performed for this arbitration.

I would direct the Tribunal to the screen. The contemporaneous documents are once again instructive.

Prior to this arbitration, Glamis calculated that it would cost approximately $52 million to comply with the California reclamation requirements. That's 25 cents per ton, 206 million tons of material, and no additional capital costs for rebuilding equipment.

Norwest similarly calculated that it would cost $55.4 million for reclamation. That's

25-and-a-half cents per ton, and 187 million tons of material plus $7.7 million for rebuilding equipment just to be conservative.

Behre Dolbear, in marked contrast has calculated $95.5 million, or nearly twice Glamis's contemporaneous estimate. That's 35.3 cents per ton and 227 million tons of material with $15.4 million for rebuilding equipment.

Now, Norwest has pointed out two problems with Behre Dolbear's calculation, aside from the fact that it contradicts Glamis's contemporaneous

14:21:54 documentary evidence.

First, there is a problem with Behre Dolbear's "order of magnitude" calculation methodology. For the most important cost calculation in this arbitration, Behre Dolbear has simply made an estimate. Behre Dolbear assumes that reclamation costs is basically excavation costs in reverse. That is, it claims that reclamation costs are equal to excavation costs minus blasting and drilling costs. That may be a convenient shorthand, but it is certainly not the most accurate method as Norwest has shown with its detailed zero base, bottom-up calculation.

In fact, curiously, Behre Dolbear purports to rely on Glamis's own numbers when making this calculation, but somehow reached a figure nearly one third higher than Glamis's own calculation. Clearly,

something is wrong with Behre Dolbear's methodology.

Second, there is a problem with Behre Dolbear's interpretation and application of the California reclamation regulation. Behre Dolbear assumes that Glamis would have to haul the waste

14:23:05 material to the pit bottom and then compact each layer of waste material, which obviously increases the costs. Mr. Guarnera testified to that assumption this week.

But as the United States explained in its Rejoinder and as Dr. Parrish has explained in his witness statement, the SMGB regulations do not require compacted backfilling except when backfilling is proposed for urban uses. The Imperial Project is not in an urban area. It is in the desert. It is on land designated for limited use.

So, the requirements for bottom-up backfilling with layered compacting simply do not apply to this kind of project.

In fact, neither Glamis nor Behre Dolbear contemplate employing these onerous engineered backfilling requirements in their plans for the West and Singer pits which Glamis, I remind the Tribunal, always intended to backfill. Let me read from Glamis's Plan of Operations. "We struck an overburden placed in the excavated pits would be end dumped in a single lift which would remain at the angle of repose,

1214

Figure 6."

And turning to Figure 6, you can see a schematic of end dumping from the pit crest. Now, this is a method that Behre Dolbear emphatically rejects.

So, it makes no sense to argue that the California regulations engineering backfill provision requires bottom-up compacting of one pit, but not for the other two pits in the same mining project. Because Behre Dolbear has misinterpreted the requirements of California law, it has exaggerated reclamation costs at the Imperial Project by millions of dollars.

Behre Dolbear's fourth major mistake in the post-backfill scenario was its failure to account for the Imperial Project's Real Option Value, which we heard about this week. The Real Option Value is the value to Glamis arising from its ability to defer mining operations until the price of gold or other economic factors have improved, as they have. Behre Dolbear again categorically rejects real options as, "not applicable to the valuation of mineral

1215

properties." It even chastises Navigant for a lack of expertise in valuing mineral properties and the mineral industry by making this argument seems to be a

common theme from Glamis.

But this criticism is entirely misplaced. Navigant cited abundant authority proving the importance of Real Option Value in mining. Behre Dolbear did not produce any response.

Mr. Jeannes himself has highlighted the Real Option Value of Glamis's mines. Let me put this up on the screen. This is what he said about valuing mineral properties before this dispute arose.

He says, "It's a harder business to value for a fundamental investor. It takes a while to get your arms around the traditional earnings and cash flow multiples that we trade at because our underlying commodity as has an optionality built into it. People aren't just buying gold companies based on what our cash flow will be. They also buy us because want to participate in increase in margins if the price of gold goes up. To get that option, they're willing to pay multiples of cash flow, earnings and net asset

14:26:40 value that you don't see getting paid in the other sectors."

This is a clear recognition of the Real Option Value of mineral properties.

This is--if you're looking for this in your binder, I'm sorry, it's Exhibit 43. Just to give you some assistance--this is a long document--if you turn to the third page, the very top of the third page, about five lines down, it starts in the middle of that

paragraph.

Now, Glamis's own Cerro Blanco mine in Guatemala further illustrates the Real Option Value of a mining company. To remind the Tribunal, Glamis acquired that mine in 1998, and gold prices slumped, and Glamis wrote it off in 2001. When gold prices increased, Glamis revived the mine.

I will put up Exhibit 44 on the screen. We have a press release from Glamis Gold. If you look down toward the bottom of the page, the third bullet point--second bullet point, sorry, it says, "The $8 million carrying value of the Cerro Blanco project has been written down. The asset was acquired in 1998,

14:28:32 when gold prices were much higher than today. While the company will continue to hold and work to improve the value of this project, its economics are such that it will require higher gold prices to justify a development decision."

And now, with gold prices pushing $700 an ounce, Goldcorp has revived the Cerro Blanco project and has spent millions of dollars developing it. The company recently announced--this is Tab 45--"Cerro Blanco, work on internal Feasibility Study will be completed in the first half of 2007. Just over $5 million was spent on project development and approximately $3 million on exploration in 2006."

The Cerro Blanco project precisely shows the Real Option Value of a mining property. The issue of

whether or not Glamis found a gold vein is irrelevant. The Project was put on hold when the gold prices were low and was revived when gold prices improved.

In fact, undoubtedly, when gold prices improve, new exploration is done, and veins may be found or other aspects of the Project may improve that justify a development decision.

14:29:54 So, what does the Real Option Value mean for the Imperial Project? Let's assume for the sake of argument that the California reclamation measures made the Project uneconomic in 2002. Glamis or a purchaser of project retained the option to delay production until the price gold or other factors made the Project economic again. This means that the Imperial Project, like the Cerro Blanco project, retained value, even if it was uneconomic in 2002, which, as we have shown, is not the case.

And incidentally, Glamis and Professor Wälde claim that the write-down of the Imperial Project in 2001 provides objective evidence of its lack of market value. But as the Cerro Blanco Project shows, a write-down is simply an accounting measure. It has nothing to do with actual market value, or may have nothing to do with actual market value. So, Glamis and Professor Wälde's write-down theory is simply not correct.

Let me turn to the fifth major mistake in the post-backfill scenario, and that's Behre Dolbear's

failure to account for the Singer Pit's

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probability-adjusted additional gold reserves. As we mentioned, the January 9, 2003 valuation referenced the 1.1 million ounces of gold reserves, and then there were 500,000 ounces of additional gold resources, so to prove--Behre Dolbear wants to have it both ways in this arbitration: To prove the Imperial Project's value before the California reclamations took, Behre Dolbear converted the Singer Pit's 500,000 ounces of gold resources into 250,000 ounces of probability-adjusted gold reserves. It then valued those reserves at $6.43 million.

Now, Behre Dolbear claims in the rebuttal statement of Mr. Guarnera that it did no such thing, but reading from page 19 of its first expert report, which I will put up on the screen, "Behre Dolbear believes that on a probabilized basis, half of the 500,000 ounces would be produced and has valued the probability-adjusted additional gold reserve additions as a development-stage project. The adjusted additional gold reserve is thus 250,000 ounces of gold."

Now, to prove the value of the Imperial

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Project after the California reclamation measures took

effect, Behre Dolbear claims that these reserves are too speculative to value. It simply ignores them.

But as Navigant has shown, Behre Dolbear's approach cannot be justified. Having converted those resources to probability-adjusted additional gold reserves and having valued the Singer Pit as a development stage project and not an exploration stage project, in the pre-backfilled scenario, Behre Dolbear's failure to account for the Singer Pit's reserves in the post-backfill scenario simply cannot be justified.

Now, this has enormous financial consequences for the Imperial Project. Navigant has shown that the Singer Pit reserves had two distinct elements of value, as you can see from the slide.

First, the income accruing from the additional gold reserves themselves which even Behre Dolbear valued at approximately $6.4 million, but also the incremental or what the mining valuation codes and standards call strategic value that's created by the fact that mining the additional reserves would delay

14:33:30 backfilling of the large East Pit by approximately two years, and this would reduce the present value of backfilling costs of the East Pit by approximately $6 million.

So, by ignoring the Singer Pit and its post-backfill valuation, Behre Dolbear has understated the Imperial Project's fair market value by millions

of dollars.

If I may, let me turn to the current or 2006 valuation. This is the final scenario. Navigant has shown that the value of the Imperial Project continues to increase to this day, driven by the exceptional rise in gold prices. As the Tribunal has heard, gold prices have more than doubled in recent years, from $325 an ounce in 2002, to approximately $675 an ounce today.

In fact, industry experts, including Glamis's own CEO, have predicted that gold prices will rise to $1,000 an ounce by 2009, and this is what Mr. McArthur stated. This is also in your binder at Tab 46. This is the last paragraph of that document on the second page. He said, "Personally, I see four-figure gold

14:34:50 prices because of supply and demand issues plus the falling U.S. dollar. In 2007, I think gold will trade above $700 an ounce, and between 2008 and 2009, $1,000 an ounce.

But despite the meteoric rise in gold prices, Behre Dolbear claims that the Imperial Project continues to decrease in value from a negative $8.9 million in 2002, to a negative $23.8 million in 2006.

Now, how is that possible? Well, without providing any evidence whatsoever, Behre Dolbear claims that costs have risen in lock-step with gold prices. As Navigant has shown, however, the average

gold mining company's share price has doubled from 2002 to 2006. This belies Behre Dolbear's unsupported cost assumptions. Clearly something is wrong with Behre Dolbear's cost or price assumptions. We submit that both assumptions are wrong.

Let me start with the costs. Behre Dolbear claims that mineral commodity prices are too volatile to base on anything other than historic averages. Behre Dolbear thus assumes a $337 gold price for 2006,

14:36:08 based on 10-year historic averages.

Behre Dolbear further claims that it has used a standardized 10-year average price approach in its valuation, as it has for all other similar mineral appraisals over the past decade. But this is not true. In a valuation performed outside of this arbitration, which you can see reference to at Tab 47--I'm sorry, I think I may have copied the wrong page here, but let me read it off the screen. "Behre Dolbear typically uses historic prices over a 10-year period as the basis for the prices used in cash flows. The strength being exhibited in the present metals market and the projected continuation of that strength, however, can not be ignored. The metal prices utilized in the income approach valuation cash flows--the metal prices utilized in the income approach valuation cash flows accordingly are derived from the average of the 10-year historic prices for gold, silver, copper, lead, and zinc, and the average

of the prices for these commodities over the first six months of 2004."

Just for your reference, this should be at

page 36 that I should have copied here.

So, Behre Dolbear has relied on 10-year averages and current prices, and not always on 10-year averages as it claims. As you heard this week, Behre Dolbear criticizes Navigant for using a spot price in the current valuation scenario. Again, to remind the Tribunal, there is no dispute about the price of gold in 2002. 325 to 326, the parties have both agreed on those numbers. However, in the current valuation scenario, there is a dispute about the proper gold price.

Mr. Guarnera called Navigant's use of the spot price "laughable." This criticism, again, is misplaced. Glamis, in fact, has valued its properties above the spot price. If I could direct your attention to Tab 48. You have a valuation memorandum from Mr. McArthur, the President and CEO, to Gary Boyle and to Chuck Jeannes from June 16, 1999.

As you can see from the paragraph 5, the numbered paragraph 5, Mr. McArthur stated, "Recent experience has shown that an average of $40 to $50 over spot market gold price is readily achievable over

14:38:54 long-term mine lives such as Imperial."

And this would seem to answer Mr. Guarnera's rhetorical question of how anyone could expect to make money purchasing Gold Properties at the spot price.

Interestingly, Navigant's $159 million valuation, in the current valuation scenario, is a $92 per ounce of the contained reserves for the Imperial Project. And that you may recall yesterday Mr. Kaczmarek demonstrated that gold is trading at $200 an ounce for these contained goals. So Navigant used less than 50 percent of the price that was demonstrated in these documents.

Goldcorp bought Glamis at $233 an ounce for its contained gold.

So, the fact that Behre Dolbear would claim Navigant's $92 per ounce is laughable suggests some misunderstanding.

Let me turn to Behre Dolbear's cost assumptions, and these are equally wrong. Behre Dolbear asserts that mine production costs have increased 85 percent since 2002, but it introduced no evidence whatsoever to support its claim.

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14:40:11 Mr. Guarnera testified that everybody knows these figures. He said, "Ask anybody in the industry."

Well, Navigant did look to industry figures, published industry figures, not Web sites, as Mr. Guarnera directed this Tribunal to. Navigant

looked at the Western Mine Engineering Cost Index. What those industry figures show is that between 2002 and 2006, mining companies' average capital cost increased by 18.1 percent, and average operating costs increased by 26.4 percent. These are a far cry from 85 percent.

Indeed, Mr. Kaczmarek testified that if mining costs actually had increased 85 percent, as Behre Dolbear claims, the Imperial Project today would be a worth a negative $119.8 million, even if California regulation measures had never been--even without the California reclamation requirements.

Likewise, using Behre Dolbear's new figures, it should have valued the Imperial Project in the current scenario at a negative $242.5 million instead of a negative $23.8 million as it claims. Now, contrast these figures with the result that would be

14:41:30 obtained if Behre Dolbear used in this arbitration the cost and price assumptions it has used in valuations outside of this arbitration. I will put this up on the screen.

The first, you have Behre Dolbear's baseline. This is their first expert report. $337, 10-year average gold prices, and an unreported cost inflation index. Value that it reached? Minus $23.8 million.

Now, the second one is the Behre Dolbear baseline in their second expert report. $337, 10-year average gold price, and 85 percent cost inflation.

The value? Minus $242.5 million.

Now, let's look at the Behre Dolbear modified. That's the gold price methodology that Behre Dolbear has used in its other valuations in the Western Mine Engineering Cost Index, positive $43.7 million.

Mr. Kaczmarek pointed out, Navigant is not criticizing Behre Dolbear as a company. It's just recognizing that this valuation was not performed with the rigor that its other valuations were performed at.

These discrepancies cast serious doubt, we

14:42:44 submit, on the integrity of Behre Dolbear's entire valuation methodology. There is no reason, therefore, for this Tribunal to accept any of Behre Dolbear's conclusions, we submit.

In fact, we believe there is no reason for this Tribunal to go beyond Glamis's own contemporaneous documents. Those valuations demonstrate that the Imperial Project retains significant value even with complete backfilling. The Navigant and Norwest Reports confirm that conclusion.

For this reason alone, Glamis's expropriation claim should be denied. Now, let me just make one final point concerning valuation.

When considering Glamis's claims, the Tribunal should not lose site of a crucial fact. Glamis continues to this day to hold its mining claims to the Imperial Project, and it continues to pay

annual fees to the U.S. Government to maintain those supposedly worthless claims. Now, you might ask, why would a company continue to pay to maintain worthless claims? I submit there are three possibilities.

First, it recognizes that those claims are

14:43:53 not worthless, which is, in fact, exactly what Glamis concluded in January 2003 and what Navigant has confirmed.

Second, even if those claims were deemed worthless at the time, the company would want to preserve the option to mine those claims after economic conditions such as the price of gold improved.

If Glamis were to begin mining the Imperial Project today, it would be more profitable than ever, even with complete backfilling. Why? Because the price of gold has more than doubled.

Now, Mr. Jeannes testified that Glamis recently received an expression of interest possibly to purchase the Imperial Project. He testified that the prospective purchaser was directed to the U.S. State Department Web site, which contains the pleadings of this case, and fully informed of the so-called stigma attached to the Imperial Project and undaunted by the current arbitration, that prospective purchaser nonetheless traveled to Vancouver to discuss face-to-face a possible purchase. Parties reportedly

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14:44:59 1 signed a confidentiality agreement.
2 Now, Mr. Jeannes declined to detail the
3 content of those negotiations, but he did confirm, "I
4 told him everything was for sale."
5 Now, just hours earlier, Mr. Gourley claimed
6 that the California measures effected a complete and
7 full deprivation of Glamis's mining claims. We would
8 ask what precisely, then, is Glamis intending to sell?
9 I'm happy to entertain questions now.
10 Otherwise, the United States will move on to the
11 second prong of the Penn Central test, which my
12 colleague, Ms. Van Slooten will address.
13 PRESIDENT YOUNG: Thank you.
14 QUESTIONS FROM THE TRIBUNAL
15 ARBITRATOR CARON: Mr. Sharpe, I have a few
16 questions. I'm going to try and tie them to some of
17 your slides, so that's going to be a little confusing.
18 First question goes to the pre-backfill part
19 of your presentation. You talked about the Project
20 development time.
21 MR. SHARPE: Yes.
22 ARBITRATOR CARON: And you had a slide that

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14:46:13 1 said, "Behre Dolbear miscalculates project development
2 time."
3 MR. SHARPE: That's correct.

ARBITRATOR CARON: And so I'm just trying to--this question is just more to get a better appreciation for the calculation here.

To assume that it starts 19 days later is to inflate the value of the company because money is realized earlier. Then two numbers are given first on this page, six months, there was an earlier estimate, and on the next page there's an estimate of 12 months.

MR. SHARPE: Correct.

ARBITRATOR CARON: To get the permit.

MR. SHARPE: To begin construction once the permits were obtained.

ARBITRATOR CARON: I see. That estimate--that assumes there is no other delay?

MR. SHARPE: That's correct.

ARBITRATOR CARON: That's just my--so, it could--if anything, that would be conservative in that sense?

MR. SHARPE: That's correct.

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14:47:24 ARBITRATOR CARON: The next slide is the one that is headed "Total Estimation Reclamation Costs." This is on the second part of your post-backfill discussion.

MR. SHARPE: Right.

ARBITRATOR CARON: The question I have here is Mr. Guarnera's testimony, the last line of this shows additional capital costs of 15.4 million; correct?

MR. SHARPE: Correct.

ARBITRATOR CARON: He stated that he had added two tranches of 7.7, and the first one, 7.7 was to rebuild the equipment because of the backfill. The other 7.7 million was because he felt Glamis had overlooked the cost of rebuilding the equipment at the start of the project, that it was coming over from Picacho Mine and would have needed to be rebuilt.

Do you remember that testimony?

MR. SHARPE: Yes.

ARBITRATOR CARON: If that's the case, I mean, just to be accurate, then on reclamation costs, this table should say 7.--he would say this table

14:48:44 should say 7.7 on the bottom line, to be consistent with his testimony.

In other words, on the page before this there is the January '03 valuation. He would say that the valuation itself was incorrect. There should have been an additional charge of 7.7 million, and then he would have added another 7.7 to the reclamation.

MR. SHARPE: I think it might be best if I referred to Navigant's expert report. I know they address this precisely, and I don't have it on hand, but--

ARBITRATOR CARON: That's fine. Take your time.

(Pause.)

ARBITRATOR CARON: You may also recall from

Mr. Guarnera's testimony yesterday that he thought that $7.7 million in rebuilding costs would be necessary because Glamis had not accounted for the cost of spreading and recontouring at the Imperial Project. Mr. Guarnera testified that the January 9, 2003, valuation memorandum solely contemplated backfilling costs. I read that out, and it's clear

14:50:10 that Glamis contemplated backfilling and recontouring and spreading.

So, to the extent that Behre Dolbear is adding additional $7.7 million in capital costs because it feels that Glamis somehow missed this information when it was estimating its own costs of backfilling, we would submit that that can't be correct. It reflects a misunderstanding on Behre Dolbear's part about what Glamis assumed at that time.

MR. SHARPE: Yes, Thank you. My colleague was just reminding me. I think this is consistent with what I was saying.

The equipment is coming over used from Picacho; and, therefore, Behre Dolbear is anticipating refurbishment costs $7.7 million. And then there is this additional cost because it feels that it needs to calculate some new refurbishments for spreading and recontouring. But as I just indicated, Glamis has already calculated this cost themselves, and it would suggest that Behre Dolbear's use of an additional $7.7 million in capital costs is quite unnecessary.

22 Now, Norwest assumed that it may very well be

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14:51:42 1 the case that after finishing up mining at Picacho,
2 this equipment would need some rebuilding, even though
3 Glamis itself didn't calculate that into its cost, and
4 even though BLM didn't take into that into account,
5 but just to be conservative it did add in one of these
6 tranches of $7.7 million.
7 ARBITRATOR CARON: Let me just ask you, are
8 you saying you are correcting my understanding of
9 Mr. Guarnera's testimony and methodology that 7.7 was
10 for rebuilding, but that would have been on the
11 bringing the equipment over? The second 7.7 would not
12 be for a second rebuilding, but rather for
13 recontouring; is that what you said?
14 MR. SHARPE: I might have to refer you to the
15 Navigant Report, but I understand that Navigant was
16 suggesting--I mean Behre Dolbear was suggesting that
17 7.7 million dollar costs would be necessary after the
18 equipment had come over from Picacho but prior to
19 backfilling, and then another 7.7 million would be
20 required post-backfill and pre-recontouring.
21 ARBITRATOR CARON: Okay.
22 MR. SHARPE: But I can find this precise

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14:53:06 1 description in the Navigant Report and its critique of

Behre Dolbear on this issue, if that would be of help.

ARBITRATOR CARON: Perhaps you could give the citation tomorrow morning, show the report where we should look. Or at the break, that's fine.

Mr. Guarnera had also mentioned the leach pad. Mr. Sharpe, Mr. Guarnera had also mentioned the leach pad.

MR. SHARPE: Yes.

ARBITRATOR CARON: That he felt that had been overlooked. So, it says recontouring and backfilling on the January 9th, 2003 valuation.

Is it your position that that would have necessarily included the leach pad or--

MR. SHARPE: Yes. Mr. Guarnera has assumed that all of the material is going back in the East Pit just because it could. As Navigant and Norwest had pointed out, the material only needs to be brought down to 25 feet above the original contour, so some of the material can be left on the leach pad. Some of the material can be left on the waste stockpiles. There is an additional 25 million tons that Behre

14:54:14 Dolbear unnecessarily assumes would be hauled back and piled onto the East Pit. That's completely unnecessary. So the costs associated with that for equipment rebuild or anything else are unnecessary. They're extraneous.

Certainly they're--

ARBITRATOR CARON: Let me just ask a slightly

unrelated question to valuation from this January 9, 2003 valuation. That is in the last paragraph. There is at that time, in their view, there is a consistency with their later statement that they thought the backfilling/recontouring would lead--to meet the 25-foot limitation would lead to an increase in disturbance.

MR. SHARPE: In contrast to Norwest which suggested there would not be an increase in disturbance?

ARBITRATOR CARON: Yes.

MR. SHARPE: Well, unfortunately, although the valuation methodology itself is well supported, this particular estimate is not well supported. We don't have access to Glamis's daily calculations, so

14:55:32 it's not clear how Glamis actually calculated its 206 million tons, 25 cents. It's close to Norwest's calculation of 25 and a half cents and 187 million tons, but we simply don't know how they reached this figure.

ARBITRATOR CARON: Can we go just to the next two slides, the financial assurances. You have the Craig database report.

MR. SHARPE: Yes.

ARBITRATOR CARON: And then on the next page you have the three examples of noncash-backed Letters of Credit.

Do you have that?

MR. SHARPE: Yes.

ARBITRATOR CARON: The question is, what was--are you familiar with what was Navigant's source for these three examples?

MR. SHARPE: Those are documents in the Navigant exhibit binders. I will give them to you.

ARBITRATOR CARON: Let me just be more particular. The question is, they are not related to the Craig.

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14:56:37 MR. SHARPE: Oh, no. Those are independent. Those are financial documents from those companies.

ARBITRATOR CARON: That's fine.

So I'm going to skip quite a few pages and go to the page that was headed "Behre Dolbear erroneously calculates the volume of material to be backfilled," and I just wanted to make sure I had the numbers correct that you described.

Are we putting these things up?

MS. MENAKER: Trying.

ARBITRATOR CARON: All right. The--this was the number that said 227.2 million tons.

MR. SHARPE: Correct.

ARBITRATOR CARON: And I just want to get the rough division approximate down for the record.

So you indicated as far as the top bullet, that this is 40 million--approximately 40 million tons different from the Navigant conclusion.

MR. SHARPE: Correct.

ARBITRATOR CARON: And then under the first bullet are separated--that 40 is split between the next two bullets, 25 to the top and 15

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14:57:41 tons--15 million tons to the swell factor. Is that approximately--

MR. SHARPE: That's approximately correct, yes.

ARBITRATOR CARON: All right. Thank you.

If you could go to the--about three slides further, the Project's gravel is both unconsolidated and consolidated, and you're making a reference here to the Plan of Operations revised in September 1977.

MR. SHARPE: 1997?

ARBITRATOR CARON: 1997, yes, sorry.

When you presented this at the very end of your presentation, you said, "and the WESTEC Report does not contradict this," but we did not actually look at the WESTEC Report, and Claimant spent some time saying that it did contradict that implicitly in the angle of the pit that's involved.

MR. SHARPE: I don't think there is, in fact, any contradiction between these two documents. I think the suggestion requires a leap of logic, that it can't all be unconsolidated gravel because it would slump. But it's not all unconsolidated gravel. Much

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14:59:01 1 of it is consolidated. Much of it is strongly
2 cemented, some of it is moderately cemented, but there
3 is a mix, as you can see from the report.
4 What the WESTEC Report was suggesting, if I
5 understand it correctly, is there was sufficient
6 cementation of this material to sustain this pit wall
7 at the angle that Glamis was intending to drill it.
8 So, amidst all of this gravel material is conglomerate
9 material that is of sufficient density and
10 cementation.
11 ARBITRATOR CARON: Let me phrase my question
12 a different way and we can just--I take what you're
13 saying as a matter of argumentation, but is there a
14 sentence in the WESTEC Report that says the overburden
15 consists mostly of alluvial gravels and both
16 unconsolidated and cemented?
17 MR. SHARPE: That's my recollection.
18 ARBITRATOR CARON: That there is, okay.
19 MR. SHARPE: I'm sorry, I was just reminded,
20 I don't think the WESTEC Report is addressing this
21 issue, and it's certainly not addressing the swell
22 factor issue. This was be--

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15:00:21 1 ARBITRATOR CARON: So, it only talks--it's an
2 inference one has to derive?
3 MR. SHARPE: Right.
4 ARBITRATOR CARON: It does not follow the
5 Plan of Operations with that sentence.

MR. SHARPE: Correct.

ARBITRATOR CARON: And whether it contradicts or not is an expert question related to the angle?

MR. SHARPE: Correct. I apologize for misspeaking.

ARBITRATOR CARON: And finally if I could just ask on Behre Dolbear's situational valuations, and I just want to understand a little more the excerpt you have says are derived from the average of and the average of. What does that mean? Does that mean there are two derivations? Does that mean that they are weighed equally? Or is there some formulation by which they are mixed? I agree that it's--I can see that it's not simply the first average, but I'm just wondering, do you know what that means to say derived from?

MR. SHARPE: Right.

15:01:17 Yes. In light of the fact that the gold prices had started to increase at that time or are increasing rapidly, Behre Dolbear itself recognized that one cannot use an historic 10-year average because the historic 10-year average was so low. Therefore, it had to recognize this rapid increase in gold prices and therefore had to take the average of the first six months of that year and to add that with the 10-year average to reach a calculation that was more reflective of--

ARBITRATOR CARON: That's this movement.

It's how they take those two averages. Do you have a sense of--is that--again, is it--did they average the two averages?

MR. SHARPE: I'm not sure about that. I believe they did.

ARBITRATOR CARON: That's the end of my questions, Mr. President.

Thank you.

ARBITRATOR HUBBARD: Mr. Sharpe, I have just a few questions, and I'm sort of going backwards here. Bear with me. I will do it by tab number.

15:02:24 MR. SHARPE: Okay.

ARBITRATOR HUBBARD: But in Tab 48, which is the June 16, 1999, Glamis valuation memo--

MR. SHARPE: Yes.

ARBITRATOR HUBBARD: --in paragraph five, you read that second sentence about recent experience has shown that an average of $40 to $50 over spot market gold price is readily achievable over a long-term mine life such as Imperial.

I'm wondering about the significance, if any, of the following sentence, which says, "A firm contract for such a vehicle was recently proposed by Goldman Sachs, but was rejected by Glamis because permits were not in hand."

How would you explain what they're saying there? Is that--the fact that they don't have their permits makes them feel that that's inappropriate to

use the spot market price?
MR. SHARPE: Well, I think this actually confirms that they could--I haven't attached it, but the Navigant Exhibit 184, I believe, contains this correspondence with Goldman Sachs recognizing this

15:03:40 very fact.
Now, Glamis has decided or a firm contract for such a vehicle was recently proposed by Goldman Sachs but was rejected by Glamis. So, Goldman Sachs is recognizing this average of $40 to $50 over spot market price.
So, I think the documentation is there to suggest that this is precisely possible for Glamis, although Glamis has decided because it didn't have its permits in hand, it would not go forward with that.
ARBITRATOR HUBBARD: Why would they do that? If they thought this was an appropriate measure, that Goldman Sachs was proposing, why wouldn't they say that was a great idea?
MR. SHARPE: Without having permits in hand?
ARBITRATOR HUBBARD: Right.
MR. SHARPE: Glamis made the determination they would refer to obtain the permits.
ARBITRATOR HUBBARD: That they thought it was not appropriate to adopt that proposal if they didn't have their permits.
MR. SHARPE: It would appear that was

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15:04:37 Glamis's interpretation.
ARBITRATOR HUBBARD: I just wanted to see how you read that.
Going back to Tab 44, the first page where you--the language about the write-off of the Cerro Blanco project.
Was that--what happened subsequently to that? The fact that they decided to go ahead and continue to pursue the Cerro Blanco project, was that basically--let me rephrase that.
Was that entirely because of the increase in gold prices, or was there another factor there?
MR. SHARPE: We would have no idea. This is one example of the Real Option Value of the Cerro Blanco project. Whatever Glamis encountered at the Cerro Blanco project, it provided additional incentive for it to proceed with the Cerro Blanco project.
The only point of this is, in February of 2001, Glamis wrote down the Cerro Blanco project explicitly stating that gold prices were too low. It bought it in 1988, when gold prices were high. Gold prices slumped. It wrote it off. They said we will

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15:06:02 hold and we will seek to improve project economics. Those project economics did improve, and Glamis is going forward.

Now, whether there were additional circumstances at Cerro Blanco itself is irrelevant. Mr. Guarnera has denied the Real Option Value of mineral properties, despite the evidence that Navigant put into the record, stating that Real Option Value is itself a recognized valuation principle in mineral properties.

This is an illustration of it, with the Cerro Blanco project.

ARBITRATOR HUBBARD: Would you equate the--from what you know, would you equate the Cerro Blanco project with the Imperial Project in terms of the type of mining that's involved and what was known about the amount of gold in the two deposits?

MR. SHARPE: I listened to the testimony earlier on this week, and I failed to see any relevance whatsoever. The point is not to compare the Imperial Project and the Cerro Blanco project in terms of the kinds of mines they are. They're both mineral

15:07:07 properties, and they both have an inherent value. If the price of that mineral improves, then it may make it economic to exploit that mineral. If the price of it decreases, you may have to write it off. You can hold it for a time. That's the optionality that is inherent in mineral properties, and that, I think, is precisely reflected in these documents, regardless of the differences between the two projects.

ARBITRATOR HUBBARD: But what I'm getting at

is there could be different reasons for different projects and why one decided to reopen and go ahead and the other they don't.

MR. SHARPE: Absolutely, Mr. Hubbard. If this case turned on whether the Imperial Project was the same as the Cerro Blanco project, well, then that might be relevant, but this is one illustration of the application of the Real Option Value, which Mr. Guarnera has denied exists, and Navigant has shown, look, even Glamis's own Cerro Blanco project shows the inherent optionality of this kind of property, regardless of whether a different vein, if it's underground or surface mining, it's simply

15:08:12 irrelevant. We are not comparing them as apples and apples in the sense of the kinds of projects they are except to say that they're mineral properties with inherent value arising from the optionality to exploit it at a later time.

ARBITRATOR HUBBARD: And the fact that one would be easily permitted versus the other which is at least seriously in doubt--

MR. SHARPE: Again, I think the permitting issue, with respect, is completely irrelevant. This is not to show that the Imperial project--it's not to compare them as to permitting. It's to compare the value of the mineralization and the ability to exploit that at a later time.

And, of course, the second point about the

real option--or the write-down is that it shows that a write-down is not only not an objective indicator of value, but it's no indicator at all.

ARBITRATOR HUBBARD: And yet we heard testimony that suggested that it was required by the Securities and Exchange Commission and other Government agencies in terms of what do you estimate

15:09:15 for the purposes of public dissemination to be the value of this asset.

MR. SHARPE: That's correct. There is no doubt that there are accounting rules about writing down property, but one cannot equate accounting rules for the treatment of the property with the market value.

ARBITRATOR HUBBARD: I'm saying this is a Government regulation.

MR. SHARPE: Correct. But again, even if it's a Government regulation, the Government is not telling Glamis the value of its property. If certain things occur, you may have to write down.

For instance, if you decided the resources cannot be exploited, you may have to downgrade them to--reserves can't be exploited, you may have to downgrade them to a resource, but it's not going to necessarily affect the value in the future if the price of gold improves to make the exploitation of those resources possible, in which case they can become reserves again. They're exploitable.

22 ARBITRATOR HUBBARD: Well, I would grant you

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15:10:11 1 that, but I'm just suggesting that at the time of the
2 write-down, they were pursuing a Government regulation
3 which required that they establish a value figure,
4 which is intended for the protection of the public
5 investor.
6 MR. SHARPE: Right, but this is precisely the
7 problem with Glamis's entire argument is it assumes
8 that it could not go forward with this project even
9 with complete backfilling.
10 We are talking about permitting. No one is
11 suggesting that Glamis couldn't go forward with their
12 project. They have not sought a permit. So to say to
13 Cerro Blanco it's easier to get permitting down in
14 Guatemala, that may well be the case. The issue is
15 Glamis has not shown that they couldn't permit the
16 Imperial Project if they had an approved Reclamation
17 Plan with complete backfilling. So I'm not sure how
18 far this takes us.
19 ARBITRATOR HUBBARD: Well, I won't pursue the
20 point.
21 I just have one more, I believe. Even though
22 this is going back to the discussion of--I have lost

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15:11:26 1 my place here. Excuse me for just a minute.

(Pause.)

ARBITRATOR HUBBARD: It was back when we were talking about swell factors. I realize you said that the swell factor is not that significant an issue, whether 23 percent or 35 percent, but I wanted to find out where the 35 percent swell factor that Behre Dolbear used originated. And as I recall, it did not originate just with them, but that it was a figure that appeared in the final feasibility report and that WESTEC was the source of the 35 percent figure.

MR. SHARPE: I think you could be forgiven for thinking that it was stated there, but it's not. It was tangentially derived from loader productivity figures. There was a statement about the in-place density and apparently a statement about the loose density of the material, and Behre Dolbear has made a calculation of the swell factor. Nowhere in the final Feasibility Study does it say 35 percent swell factor. That is simply a product of Behre Dolbear's own calculations.

And as Norwest has pointed out, this

15:13:14 has--this is enormously problematic because at the time of loader productivity, the material is at its maximum swell before it's been moved around and compressed. And so it may not be surprising that this material would swell at a greater amount in the early phases of the excavation, but the swell factor itself is stated only in the contemporaneous Glamis--in the

contemporaneous Glamis documents, the swell factor is stated only as 23 percent and not as 35 percent.

ARBITRATOR HUBBARD: And so, the 35 percent figure does not appear in the WESTEC Report that went into the final feasibility?

MR. SHARPE: I have not seen any--as far as I know, Glamis has not produced any evidence that WESTEC stated a 35 percent swell factor.

ARBITRATOR HUBBARD: Okay. That's all.

MR. SHARPE: Prior to this arbitration, prior to this dispute.

ARBITRATOR CARON: Can I just follow on that for a second.

Mr. Sharpe, you said--it was unclear. You said the two densities, the infill and the mine

15:14:19 density were taken from. Could you say where were they taken from?

MR. SHARPE: Well, we know Navigant introduced the loader productivity figure that we saw. This is from the final Feasibility Study. Those two figures were--the 3,050 figure that we flashed on the screen was from the loader productivity. Now, Behre Dolbear apparently has gone to a different part of that document to obtain the in-place density and then has made a calculation about the swell factor that is tangentially derived from this loader productivity figure.

ARBITRATOR CARON: So, there is not a swell

factor in the final Feasibility Study, but there are in different places two densities?

MR. SHARPE: There are in different places two densities. Apparently this document is not--I believe that the page stating the in-place density has not been put into evidence in this arbitration, only the loose density, and that was put in by Navigant.

ARBITRATOR CARON: Thank you.

PRESIDENT YOUNG: Mr. Sharpe, thank you for

15:15:14 your patience with--your presentation and your patience with our questions here.

I have a number of questions which I think with a couple of exceptions are largely technical. I want to make sure I understand everything that I'm supposed to.

Does the record reflect in the Behre Dolbear Reports relating to other evaluations it had done, this weighted average of 10 years plus the last six months with the spot prices, does the record reflect that it's a 50/50 weighting?

MR. SHARPE: I don't recall offhand, but I believe that's the case.

PRESIDENT YOUNG: Thank you. So, that's actually in their report there.

Secondly, you may not know the answer to this, and that would be fine, but it does seem relevant in the calculations. Is there--Navigant used or Norwest, I think Norwest actually, used an increase

in capital costs of around 18 percent and operating costs of 26 percent. Did they also calculate what the weighted ratio is between capital and operating costs

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in a mine? Do you, A, know if that's in the record, and if so, off the top of your head, do you recall what that is? Is my question clear?

MR. SHARPE: It is.

I don't believe this was a Norwest figure. I believe Navigant did look to the western mine.

PRESIDENT YOUNG: So, if Navigant did it, but whoever did the calculation of the increase in costs, they attributed different factors to capital and operating costs, but did they--what is the ratio between capital and operating costs?

MR. SHARPE: I don't know the answer to that offhand. I will look into that and refer back to you.

PRESIDENT YOUNG: If it's in the record, you can point me to that.

The 40-ton difference between 287 and 186, I think you answered in response to Professor Caron's question, which is the difference between an assumption that you have to backfill everything and the assumption that you can leave 25 feet on the ground--on the surface; am I correct?

MR. SHARPE: I may not have understood.

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15:17:18 There are two, two factors that account for the 40-ton difference. About 25 million tons is the fact that you wouldn't have to spread this additional material and backfill it. The other approximately 15 million tons would be the swell factor.

PRESIDENT YOUNG: Is the difference in swell factor?

MR. SHARPE: It's a difference in swell fact, correct.

PRESIDENT YOUNG: Thanks. That's very helpful. There is a five or $6 million difference in those calculations. I'm just trying to be clear.

I'm going to see if I have your argument clear, and you may make it again, and whether I will be more convinced this time or not, we will see.

It does seem to me from reading the documents that there may be a difference in the notion of mineral optionality as a value that would differ between whether you take a piece of property and which you basically say this is not a productive piece of property, but, whoa, we discovered a new vein, as opposed to a piece of property you say this was not

15:18:17 economic under certain gold prices, and it's now more economic. As I read the rest of this report, it seemed to me that Mr. Jeannes, as he was talking about, was talking about that second kind of optionality. The first does not strike as any

different from my backyard, the optionality of finding gold in my backyard, although the University of Utah owns my backyard, so I presume I wouldn't get the benefit. That doesn't seem to me the same kind of optionality. But I heard you to argue that you thought it was. Am I right in that?

MR. SHARPE: I think what is inherent in a mineral property is the mineralization at different values, at different prices. So if the Imperial Project has 1.7 million ounces of contained mineralization, contained gold mineralization, it has value. It has a known value. Now, it may not be economic to exploit it at any one given time, but it necessarily has value.

PRESIDENT YOUNG: That's the one kind of optionality I get. The question I'm asking is really the probative value of the Cerro Blanco argument that

15:19:24 you're making--argument you're making light of Cerro Blanco because it does strike me that if gold prices remain constant and they find a new very valuable, economically productive vein to mine at that same gold, that strikes me as a very different kind of optionality than the first kind that merely turns on the fluctuation of gold prices. Am I right in thinking that, or am I wrong?

MR. SHARPE: I'm not sure these are separate because why was Glamis--why did Glamis find this vein in the Cerro Blanco project? No evidence has been

introduced in this case; this is a new fact stated by Mr. McCrum, but because the value of the price of gold increased so as to justify development of this project, it's not surprising that they found additional mineralization. That happens often.

PRESIDENT YOUNG: But that's your assumption is that they looked. Your notion is that the gold prices affect their exploratory activities.

MR. SHARPE: I'm sorry, could you repeat that?

PRESIDENT YOUNG: So, your assumption there

15:20:25 is that it turns on the rise in gold prices is likely to increase their vigor with the exploratory activity.

MR. SHARPE: Absolutely.

PRESIDENT YOUNG: I wasn't sure you'd be--okay, thank you.

A couple of other questions.

Does the record reflect anywhere what BLM uses for in its VER, evaluations for gold prices? Does it use historic, 10-year averages? Does it spot prices?

MR. SHARPE: It uses averages, but as I understand it, it uses a very--it uses three-year averages. If you look in the Navigant supplemental statement from August 7, 2007, you will see a letter from Mr. Jeannes to a Mr. Ferguson at the BLM criticizing the BLM for this constrained notion of gold prices. He says you have to look at the futures.

Mr. Jeannes makes the argument precisely that Navigant has made in this arbitration. Markets are inherently forward-looking. If you're looking back in an exuberant gold price, in an exuberant gold market, that doesn't make any sense, so Mr. Jeannes was

15:21:34 imploring BLM to look to increase the price of gold that they were using for their determination of whether the Project could go forward.

So, Mr. Jeannes, I would submit, in his letter to Mr. Ferguson, precisely echoes the arguments that Navigant has made in this case.

PRESIDENT YOUNG: That's fine, but I'm actually trying to figure out what the BLM actually does.

MR. SHARPE: I think it's a three year. They do use historic averages, but it's a much smaller period than a 10-year averages, if I understand well.

PRESIDENT YOUNG: Thank you.

We will have the debate on whether the past is prologue some other time, I suspect.

One other question about Behre Dolbear's evaluation using these weighted averages. Is that--does the record reflect any examples of other evaluation companies or Behre Dolbear doing that, or is that really the only instance that the record reflects?

MR. SHARPE: Certainly Glamis has introduced

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15:22:32 1 no evidence of any kind suggesting an 85 percent cost
2 increase.
3 In fact, Navigant had to back into the cost
4 increases that Behre Dolbear used.
5 PRESIDENT YOUNG: I'm sorry, I might have
6 misspoke. I meant the 10-year average combined with
7 the spot average. Are there other examples in the
8 record that Behre Dolbear--
9 MR. SHARPE: Yes. There is the Hellas
10 valuation, and there is the Anglo-Asian valuation.
11 Both of those are in the Navigant binders, and I can
12 provide the exhibit numbers.
13 PRESIDENT YOUNG: That's very helpful, thank
14 you.
15 One of the questions that has arisen as a
16 factual matter, and I wonder if the record reflects
17 any of this, is that not all conglomerate may be
18 created equal.
19 Is there anything in the record reflecting
20 actual assays of the conglomerate?
21 MR. SHARPE: There is. We looked at some of
22 this material with Mr. Houser and with Mr. Purvance,

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15:23:30 1 but what we didn't see were the conclusions that
2 Mr. Purvance drew from those assays. The information
3 is all there in Mr. Purvance's memoranda, in his

letters, so I don't think there is any dispute necessarily about the underlying data.

In fact, I understood Behre Dolbear to be confirming that there's nothing wrong with Mr. Purvance's data which is somehow inexplicably they are drawing radically different conclusions about what that data indicates.

PRESIDENT YOUNG: Did Norwest run its own calculations based on that assay?

MR. SHARPE: No, absolutely not. Norwest adopted Glamis's figure. Norwest looked as these figures--Norwest determined that these figures, the Glamis contemporaneous figures seemed completely reasonable, and Norwest determined these figures could be used.

PRESIDENT YOUNG: What did Norwest do to independently confirm the 23 percent swell factor?

MR. SHARPE: Simply by examining the documents that were attached to Mr. Purvance's

15:24:29 memorandum to looking at the kind of material that was listed and the density of that material, and just made a determination is this reasonable based on our understanding of what different densities or different rocks should be or different materials should be, and then looked at the conclusions that Navigant or that, rather, that Glamis determined itself at the time about those materials.

PRESIDENT YOUNG: So, when it says it

independently confirmed, that's what it means. It didn't do independent assays, it just simply read the reports and added the numbers up?

MR. SHARPE: Exactly.

PRESIDENT YOUNG: Thank you.

Another question. And this, I think, may go to valuation, and may also be legal implications to it, as well.

A great deal of the conversation has been around costs related to compliance with the SMGB Board regulation and what that requires, which is the 25-foot limit and the contouring.

Am I correct in assuming that if that is

15:25:45 satisfied, S.B. 22 is also satisfied in terms of requirements?

MR. SHARPE: Yes.

PRESIDENT YOUNG: That's all I have.

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

PRESIDENT YOUNG: We're close to a break. I propose we'll take our break and be back here at five to 4:00, when you can start your next section. Thank you.

(Brief recess.)

PRESIDENT YOUNG: Counsel, are we ready to proceed?

Okay, thank you.

Ms. van Slooten, the floor is yours.

MS. VAN SLOOTEN: Good afternoon, Mr. President and Members of the Tribunal.

I will be addressing the second factor of the indirect expropriation analysis and explain that neither of the California measures could have frustrated an investor's reasonable investment-backed expectations.

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15:57:45 Now, because they are distinct measures, I will first discuss why Glamis could have had no reasonable expectation that the California Mining and Geology Board would not amend its regulations to require complete backfilling of open-pit mines to protect the environment and public health and safety.

I will then address why Glamis could not reasonably have expected the California legislature would not enact legislation such as S.B. 22 in order to protect important Native American cultural resources.

Whether an investor's expectations with respect to government action are reasonable is an objective inquiry. The relevant standard is whether an investor acquired the property in reliance on the nonexistence of the challenged regulation. An investor's subjective exceptions are not relevant to this inquiry.

As the U.S. Supreme Court has noted, where an industry is already highly regulated, reasonable extensions of those regulations are foreseeable. The

U.S. Supreme Court has thus recognized that those who

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do business in a regulated field cannot object if--

PRESIDENT YOUNG: Ms. van Slooten, if I could just interrupt you for a moment.

When you refer to Supreme Court case or any case, would you give us the reference, the information. You may be coming to that. I apologize.

MS. VAN SLOOTEN: Certainly.

The case that I'm referring to right now is Concrete Pipe and Products of California versus Construction Laborers Pension Trust for Southern California, and that's available at 508 U.S. 602. And this is a case from 1993.

And there the Court stated that those who do business in a regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.

International tribunals have ruled similarly. The Feldman versus Mexico Tribunal found, for instance, quote--and this appears on the slide, if you would like to read--"Not all Government regulatory activity that makes it difficult or impossible for an investor to carry out a particular line of business is

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an expropriation under Article 1110. Governments, in

their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic, or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue."

Dealing with regulatory change is simply part of doing business in a State such as the United States that already places significant restrictions on ways in which companies may operate. The question an investor must consider is whether the regulatory climate is such a State might act to protect certain public values such as public safety or the environment, if they were discovered to be threatened.

Now, this standard is illustrated in several cases that the United States discussed in its Rejoinder at pages 93 to 96. I will just mention one of them was District Intown Properties versus the District of Columbia.

And, in that case, the plaintiff's property was declared to be a historic landmark just days

16:00:51 before his building permits were approved, and the Court found--or expected to be approved. The Court found that the plaintiff had operated in an industry that had historically been subject to regulation and that the property in question "was the subject of increasing public activity devoted to restricting development through landmark designation." And,

therefore, the plaintiff had no reasonable investment-backed expectations, but the historic landmark laws would not be applied to his property, even though the plaintiff had no way of knowing the particular facts that its property would be deemed historic at the time that he sought his permit.

Because the Government has this broad authority to regulate, and because reasonable extensions of laws are foreseeable, investors who operate in highly regulated industries cannot reasonably expect that they will not be subject to extensions of those regulations, unless they have received specific assurances from the Government to the contrary.

As the Methanex Tribunal noted--and this also

16:01:52 appears on the slide--as a matter of general international law, a nondiscriminatory regulation for a public purpose which is enacted in accordance with due process and which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then-putative foreign investor contemplating investment that the government would refrain from such action"--pardon me, "from such regulation." And that's from the Final Award on Jurisdiction and Merits, Part IV, Chapter D, at paragraph seven.

Throughout this arbitration, Glamis has

persisted in misstating the legal standard. The issue is not whether Glamis could have foreseen that its property would be expropriated, as it has argued in its written submissions--that, of course, is circular--nor is the issue whether Glamis could have foreseen the particular facts that gave rise to the California measures.

Rather, the question is whether an investor could have had a reasonable expectation that the

Government would not act in a particular manner, and this is informed by the overall regulatory regime surrounding the industry and any specific assurances given to the investor by the State.

Turning now to the two specific California measures at issue here, I will first discuss the SMGB regulation.

Glamis could not have acquired its unpatented mining claims in reliance on the nonexistence of the SMGB's regulation; and, thus, it could have no reasonable expectation that this regulation would not be adopted.

First, it is indisputable that the Hardrock Mining industry is heavily regulated. The United States is, and has been, a country that is highly protective of its natural resources, of the environment, and of public health and safety. And California, among all the U.S. States, has one of the longest standing reputations for implementing

progressive regulation in order to protect the environment and, in fact, has imposed restrictions on gold mining for over 100 years, even before the

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16:03:53 Federal Government imposed restrictions.

Glamis entered the California market fully aware of the regulatory framework that was in place.

The California Mining and Reclamation Act, which is available in the binders that we handed out at Exhibit 3 and which you have heard a great deal about--and I will say that I will walk through these measures again, even though we have heard them in the discussion of the background principles argument. Regardless of whether they are found to be background principles, they are still relevant to the question of whether they affected investor's reasonable investment-backed expectations, so I will discuss them again.

Now, SMARA provided, since 1975, that all mined lands must be reclaimed to a usable condition which is readily adaptable for alternate land uses, and that they must create no danger to public health or safety. And the same provision states that this process may require backfilling, grading, resoiling, revegetation, soil compaction, stabilization, or other measures.

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16:05:02 1 SMARA further directs the SMGB to "adopt
2 regulations specifying minimum verifiable statewide
3 reclamation standards, subjects for which such
4 standards shall be set include, but shall not be
5 limited to, the following: backfilling, regrading,
6 slope stability, and recontouring."
7 So, California had years before imposing the
8 specific backfilling regulation at issue in this case,
9 it had passed a law requiring that lands be reclaimed
10 to a usable condition, and it directed the SMGB to
11 enact the very type of regulations that are at issue
12 in the present case.
13 As you have heard, in California, the local
14 lead agencies are responsible for ensuring that mines
15 located within their jurisdiction are in compliance
16 with SMARA. But, in fact, as Dr. Parrish explained in
17 his statements, those local lead agencies were not
18 enforcing SMARA standards consistently and were
19 approving reclamation plans that did not, in fact,
20 return the land to a usable condition.
21 That is what was happening with each of the
22 mines cited by Mr. Leshendok in his rebuttal report

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16:06:10 1 and testimony at this hearing. The result was that
2 open-pit mining operators across the State were
3 leaving gaping pits in the land after the conclusion
4 of mining operations. And as we have heard, these
5 pits were often hundreds of feet deep, and the

surrounding waste piles were often hundreds of feet high and presented serious hazards to the public health, safety, and to the environment.

Glamis and its lobbyists, the California Mining Association, were active participants in the months of public comment and debate leading up to the SMGB's permanent regulation. Glamis representative James Voorhees testified before the SMGB at its meeting on November 14, 2002; and Charles Jeannes testified before the SMGB on December 12, 2002.

It was in late 2002 that the SMGB passed the emergency regulation--pardon me, it was on December 12, 2002--and then, in April 2003, the Board passed the final regulation. That regulation provided "an open-pit excavation created by surface mining activities for the production of metallic minerals shall be backfilled to achieve not less than the

16:07:19 original surface elevation."

In other words, the mining operator must simply fill in the pit that it created and return the land to the condition--to the approximate original contours that existed before it began mining. By reclaiming the land in this manner, the SMGB concluded, the lands would be returned to a usable continue as required by SMARA since 1975. And the regulation achieves this by implementing reclamation standards, including backfilling, that it had been specifically directed to do by SMARA.

Additionally, SMARA is explicit that state policy--and when it says state policy in SMARA, that's defined as the SMGB's regulations--it's explicit that, a quote which appears on the slide, "State policy shall be continuously reviewed and may be revised," thus defeating any expectation that the SMGB's regulations, once in place, were to remain unchanged.

Glamis has argued that it could not have foreseen that the SMGB would require backfilling, that it was surprised by the Board's action because, "before December 2002, California had not imposed

16:08:31 complete backfilling requirements." That was a statement from Glamis's Reply at paragraph 264.

But faced with the State law that explicitly provides, one, that mined lands must be reclaimed to usable condition; two, that the end use must present no danger to public health and safety; and, three, that reclamation may include backfilling.

Glamis could have no reasonable expectation that the California--that California would not later impose a regulation that required all open pits to be backfilled. The SMGB's regulation was an incremental change in California law. As Glamis's expert Mr. Leshendok testified, in the CDCA, "as it related to backfilling, there was a general pattern, and the pattern was either for partial backfilling, sequential backfilling, but no complete backfilling of open pits."

So, backfilling had long been employed as a reclamation technique by other hardrock mines in California, and Glamis itself, in fact, intended to backfill two of its three pits. And as Mr. Purvance correctly admits in his rebuttal statement at

paragraph eight, he says: "Of course, the Imperial Project proposal always involved a very substantial degree of partial backfilling and regrading of waste piles." But Mr. Purvance attempts to distinguish this from complete backfilling which, he says at paragraph 10 of his rebuttal statement, had never been imposed on any substantial open-pit mine in California under SMARA.

But this is mincing words. The very substantial degree of partial backfilling to which Mr. Purvance referred is, in fact, complete backfilling of two of the three pits in the proposed Imperial Project. And, as Mr. Purvance admits, the amount of backfilling that Glamis contemplated was already a very substantial degree of backfilling. The SMGB regulation merely requires that all open pits be backfilled.

Moreover, Glamis received no specific assurances from the State of California that it would not make the particular changes to its regulatory structure that are at issue here. Under international law, an investor operating in a highly regulated

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16:10:47 industry can have no expectation that there will not be reasonable extensions of those regulations, absent specific assurances to the contrary. Glamis received no assurances, specific or otherwise, from California. Glamis was not guaranteed to receive approval for its Reclamation Plan for the Imperial Project.

SMARA states: "No person shall conduct surface mining operations unless a permit is obtained from, a Reclamation Plan has been submitted to and approved by, and financial assurances for reclamation have been approved by, the lead agency for the operation pursuant to this Article."

Glamis did not have an approved Reclamation Plan or financial assurances, and so it had not received any guarantees that it would be able to mine the Imperial Project in the manner in which it proposed.

Nor had Glamis received specific assurances that the SMGB would not impose the complete backfilling requirement. As mentioned, SMARA already provided that reclamation measures may include backfilling and had instructed the SMGB to revise its

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16:11:49 regulations to ensure that the standard was met.

Now, throughout this hearing, we have heard Glamis repeatedly cite the 1999 National Academy of

Sciences and National Research Council report that states that backfilling is generally not technically feasible; but, as the United States has explained in its written submissions, such qualified statements cannot be the basis for a Claimant's expectation that backfilling would never be imposed in any circumstances. Even the National Mining Association did not go so far as to say that backfilling is never technically or economically feasible. Rather, it states in its nondisputing parties submission in this case that "complete backfilling poses an economic burden that renders many open-pit mining operations cost-prohibitive." This is in its submission at page 14--oh, pardon me--13.

Indeed, the NRC Report itself states: "The appropriateness of backfilling open-pit mines continues to be a matter of public debate. Although the Committee believes partial or complete backfilling can be environmentally and economically desirable in

16:13:00 some circumstances, it was unable to find a basis for establish a general presumption either for or against backfilling in all cases."

Now, the NRC Report does state that the NEPA process is appropriate for considering the costs and benefits of backfilling in a site-specific context; but, as you heard Dr. Parrish explain, although the SMGB regulation requires backfilling of all new nonmetallic--pardon me, all new metallic open pits, it

accounts for particular site-specific environmental problems from backfilling by requiring that mine operators comply with the Regional Water Quality Control Board's Water Quality Regulations. This requirement is a California Code of Regulations Section 3704.1(b).

Glamis also points to statements in the California Desert Conservation Area plan, in the FLPMA, and the BLM's 3809 regulations that provide--and I'm paraphrasing here--something to the effect that mitigation measures imposed must be subject to technical and economic feasibility, and they provide this--they cite this as evidence that

16:14:07 California's complete backfilling requirement was unreasonable and unforeseeable.

There are two problems with this argument. First, what Glamis ignores is that FLPMA, the 3809 regulations, and the CDCA Plan referred to Federal oversight over mining activity. Statements in the Federal laws could not have informed Glamis's expectations regarding the regulations that California might place on mine reclamation within its state borders. Such statements regarding the Federal mine permit approval process simply could have no influence on an reasonable investor's expectations with respect to California's environmental regulations.

It is beyond question that States have the authority to impose environmental regulations on

mining operations, even if those regulations are more stringent than the ones imposed by Federal law.

The BLM's 3809 regulations provide at 43 USC Section 3809.3 that there is no conflict with State law--pardon me--there is no conflict if the State law or regulation requires a higher standard of protection for public lands than the subpart.

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16:15:16 In responding to the public comments during the rulemaking process for this rule, the BLM noted, quote--and this appears on the slide as well--"There are also certain situations where the State law or regulations may provide a higher standard of protection than Subpart 3809, such as the restriction on cyanide leaching-based operations approved by voters in Montana. In this situation, the State law or regulation will operate on public lands. BLM believes that this is consistent with FLPMA, the Mining Laws, and the decision in the Granite Rock Case."

Yet, Glamis has persisted in this hearing in citing the same documents and laws as assurances, even though those documents have no bearing on California's ability to take regulatory action.

Second, Glamis is confusing mitigation measures which are those site-specific measures imposed on a particular project during the mine permitting process by the BLM and local lead agencies in California, with regulations which are statewide

standards that apply to all mines. Mines on Federal

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lands are always subject to more stringent state regulations, and those regulations may be extremely costly for mine operators. But they are not mitigation measures in the strict sense of the term, as it is used in the BLM permanent approval context. They're environmental regulations.

The requirement in the CDCA Plan, the mitigation measures to be subject to technical and economic feasibility, is not a requirement that is imposed by the California legislature or the SMGB. It is a requirement that is placed on BLM in imposing site-specific mitigation measures for a particular plan.

Glamis has also tried to emphasize over the past week it had valid existing rights. The point bears a brief descript--discussion.

In September 2002, the BLM made the finding that Glamis had discovered a valuable mineral deposit. Now, such a finding is necessary, as you know, but is not sufficient for a mining company to proceed with operations. That validity determination has not been rescinded. Glamis still has a valuable mineral

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deposit in the Imperial Project claims. But, from

September 2002 through today, Glamis has not had a Plan of Operations approved by the BLM; and, thus, it has no legal right to begin mining without a Plan of Operations. And this is explicitly stated in the BLM's regulations at 43 CFR 3809.11 and 3809.412.

Glamis has no Reclamation Plan or financial assurances approved by Imperial County; so, although it has located a valuable mineral deposit, it does not yet have the right to proceed with mining.

And as the U.S. Supreme Court in U.S. versus Locke stated, "The power to qualify existing property rights is particularly broad with respect to the character of the property rights at issue here. Although owners of unpatented mining claims hold fully recognized possessory interests in their claims, we have recognized that these interests are a unique form of property. The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired.

The fact that Glamis has valid existing

16:18:53 rights has located a valuable mineral deposit does not freeze in time the preexisting laws and regulations. Glamis remains subject to State and Federal environmental regulations and any changes to those regulations.

The SMGB regulation which implemented SMARA's reclamation standard in order to ensure that mined

lands were reclaimed to usable continue, presenting no danger to public health and safety from the dangers of unclaimed pits was a reasonably foreseeable and incremental change to California's regulatory scheme which could not have frustrated a reasonable investor's--an investor's reasonable investment-backed expectations.

So, this brings us to the discussion of the second California measure S.B. 22.

S.B. 22, unlike the SMGB regulation, was enacted specifically to protect Native American sacred sites. It applies only to open pit hardrock mines that are on or within one mile of any Native American sacred site located in an area of special concern. Open pits that are left behind from Hardrock Mining

16:20:01 operations within one mile of sacred sites must be backfilled and graded to achieve the approximate original contours of the mined lands prior to mining.

You have heard testimony this week regarding the archeological history surrounding the Imperial Project area, and you have seen the extensive evidence regarding the sacred nature of the area to the Quechan Tribe, but none of that is relevant to the question of whether Glamis or any investor could have had a reasonable expectation that the California legislature would not have enacted in the form of S.B. 22 to protect those cultural resources if such sites were identified.

In other words, the inquiry is not whether Glamis should have known about the existence of the Trail of Dreams or of any other specific cultural resources near its proposed mine site; but, rather, whether once the Government identified important Native American resources, a reasonable investor could have expected that the Government would act to protect those resources. The answer, certainly, is that a reasonable investor should have expected such

16:21:10 government action.

And Glamis could have expected this type of government action because what the California legislature did was merely to impose specific reclamation requirements to enforce its already stated broader principles regarding the protection of Native American sacred sites. Those policies, as you have heard, were contained in the Native American Sacred Sites Act which predated Glamis's investments ion the Imperial Project mining claims. Glamis, like any investor, must be tasked with knowledge of the underlying laws and regulations that governed its property.

So, S.B. 22 was a reasonable extension of preexisting law. After more than 20 years of experience in the California mining industry, as a sophisticated and active participant in the legislative and administrative processes in California, Glamis undoubtedly was aware that the

regulatory climate in California was increasingly protective of Native American cultural resources and religious freedoms.

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16:22:08 The United States has detailed in its written submissions the host of Federal and California legislation designed to ensure the protection of Native American cultural. Indeed, California has been at the forefront of such efforts passing the Sacred Sites Act in 1976, years before such Federal efforts as the 1978 American Indian Religious Freedom Act, for example, or the Native American Graves Repatriation Act of 1990.

As you had heard earlier today, the Sacred Sites Act provides that no public agency and no private party using or occupying public property, or operating on public property, under a public license, permit, grant, lease, or contract shall, in any manner whatsoever, cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property except in a clear and convincing showing that the public interest and necessity so require.

This was the legal framework that was in place at the time the Glamis made its investments in

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16:23:15 the Imperial Project. As we have explained earlier and in our written submissions, S.B. 22 merely implemented in the context of surface mining operations these pre-existing principles under the Sacred Sites Act. But, even if this Tribunal were to conclude that S.B. 22 did not implement those background principles, given the purpose and language of the Sacred Sites Act and the overall legislative climate in the United States and in California, in particular, regarding the protection of Native American culture, a reasonable investor could not have had any reasonable expectation that California would not enact measures such as S.B. 22 to further protect such resources in the event that they were discovered.

Glamis received no specific assurances that the legislature would not enact S.B. 22. Certainly, it did not make its investment in reliance on the nonexistence of S.B. 22. Glamis knew that its proposed Imperial Project was located in the California Desert Conservation Area. The CDCA is a 25-million-acre area in Southern California. When Congress created CDCA and the FLPMA, it found that

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16:24:22 "the desert contains historical, scenic, educational, recreational, and economic resources that are uniquely located adjacent to an area of large population."

In 1980, before Glamis located its Imperial Project mining claims, the Department of the Interior

completed the CDCA Plan. The purpose of the plan was to balance the need for multiple use, sustained yield, and the overall maintenance of environmental quality.

There are four classes of lands in the CDCA. Glamis's unpatented mining claims are located on what are referred to have as Class L lands, or limited-use lands. These receive the second-highest level of protection.

Because the CDCA is so vast, the cultural resources in the CDCA had not been fully cataloged. As Mr. Kaldenberg, one of the drafters of the CDCA Plan, testified, the 1980 plan was statistically very insignificant in the sense that we were able to survey one percent of the desert in a few years for the Desert Plan, so it's a statistically low level. And the CDCA Plan confirms that, by 1999, only about 5 percent of the CDCA had been inventoried for cultural

16:25:34 resources. That is why the CDCA Plan expresses a continuing goal to broaden the archeological and historical knowledge of the CDCA through continuing inventory efforts and the use of existing data and to continue the effort to identify the full array of the CDCA's cultural resources.

In other words, the full extent of the cultural resources within the CDCA is not known, and Glamis was, or should have been, aware of this.

Glamis was also aware that it located its unpatented mining claims approximately one mile south

of the Indian Pass area of critical environmental concern, an area with particularly important historical, cultural, and scenic values.

So, then, given this, what were Glamis's expectations when it located its mining claims? First, it entered onto the Federal public lands located within the State of California. It located its claims in the CDCA in close proximity to known culturally sensitive resources in the nearby ACECs, to say nothing about the known cultural recourses in the Project area itself. It knew that California was

protective of cultural resources, and that California had in 1976 enacted the Sacred Sites Act.

It was aware that the cultural resources in the CDCA were not fully cataloged; and, thus, additional resources could be identified at any time, and California might act to protect those resources. And it had not received any specific assurances from California that the State would not act to protect such resources, if identified.

Now, Glamis implies that it did receive assurances that California would not require complete backfilling because of a single sentence contained in the California Desert Protection Act which the U.S. Congress passed in 1994, and the CDPA is available at Exhibit 53 of your binders. But it states: "Congress does not intend for the designation of wilderness areas in Section 102 of this Title to lead to the

creation of protective perimeters or buffer zones around any such wilderness areas."

Before proceeding any further on this point, I think it would be helpful for the Tribunal to look at the definition of "wilderness areas" in the

16:27:51 California Desert Protection Act of 1994. And I apologize, but I do not have it reproduced for you in those binders, but it's available at 16 USC Section 1131, and I'm happy to obtain that for you.

But the CDPA of 1994 refers the reader to the 1964 Wilderness Act, which is the citation that I just gave you.

And it defines "wilderness"--and I will forewarn you that this is very a long definition, so please bear with me--it defines wilderness as "a wilderness in contrast with those areas where man and his own works dominate the landscape is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An 'area of wilderness' is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions, and which, one, generally appears to have been affected primarily by the forces of nature with the

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16:28:59 1 imprint of man's work substantially unnoticeable; two,
2 has outstanding opportunities for solitude or
3 primitive and unconfined type of recreation; three,
4 has at least 5,000 acres of land or is of sufficient
5 size to make practicable its preservation and use as
6 an unimpaired condition; and, four, may also contain
7 ecological or geological or other features of
8 scientific, educational, scenic or historic value."
9 In other words, a wilderness area is not
10 designed to protect the cultural resources left behind
11 by man, but to protect the untouched nature of the
12 area. Mr. McCrum, in his cross-examination of
13 Mr. Kaldenberg, suggested through his questions that
14 "Picacho Peak Wilderness Area and the Indian Pass
15 Wilderness Area were, in part, designated based on
16 Native American cultural and religious values."
17 As you can see from the definition that I
18 have just read, that is simply wrong. The CDPA does
19 not--pardon me. The CDCA does provide Native
20 Americans a right of access to carry out religious
21 practices in a wilderness area, but that is not part
22 of what makes up the designation of a wilderness area.

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16:30:11 1 But yet, Glamis clings to the buffer-zone
2 statement in the CDPA as supposed proof that Glamis's
3 impositions--pardon me--California's imposition of its

reclamation standards is contrary to the stated intent of Congress in the CDPA, because as Glamis--to paraphrase Glamis, the reclamation requirements are merely an attempt to expand the protected area surrounding the wilderness areas.

But there is no evidence in this record that any of the measures at issue were intended by their proponents to protect wilderness areas.

In order to reach its conclusion regarding the buffer-zone language, Glamis must ignore the very next sentence in the CDPA, which states: "The fact that wilderness activities or uses can be seen or heard from areas within a wilderness area shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area. Such nonwilderness sites and sounds would be subject to regulation, if any, flowing only from the application of other law."

For example, the fact that a mining operation can be seen or heard from a point within a wilderness

16:31:48 area is not sufficient to impose restrictions on that mining operation that are not the result of provisions in other applicable law.

In short, the CDPA is irrelevant to this case. The buffer-zone language in the Act does not prevent regulation of uses such as mining on nonwilderness lands for reasons flowing from the application of other law. S.B. 22 is one such other law. The buffer-zone language could not have provided

Glamis with specific assurances that California would not pass a measure such as S.B. 22.

Finally, I will just briefly comment on the California Assembly Resolution regarding Glamis's reclamation at Picacho--its Picacho Mine which Glamis has referred to several times this week, and I will put this up on the screen.

This was Exhibit 14 to Glamis's Memorial, and you saw this in Glamis's opening statement, and also Glamis showed it to a few of its witnesses, including its valuation expert, during their testimony this week.

Just to put this resolution in context, it

was not a resolution by the entire California legislature, as Mr. Gourley suggested in his opening statement, when he said that it states that it takes great pleasure in commending Glamis Gold. In fact, it was a resolution of a single member commending Glamis for its work at Picacho. The award that Glamis received was from its lobbyist, an industry association, the California Mining Association, as you can see.

That Glamis would suggest that it had a reasonable investment-backed expectation that it would be able to proceed with its Imperial Project mining plan without regard to California's reclamations requirements, just because it received an award from the mining industry and an acknowledgement from a

legislative member for its work on another mining project, just underscores the weakness of its claim that it could have had any such reasonable expectations.

In conclusion, Glamis could not have had any reasonable expectation that that SMGB would not strengthen it's reclamation standards in compliance

16:33:59 with SMARA to ensure that mined lands were returned to a usable condition to protect the public health and safety from the dangers left from hardrock open-pit mines; nor could it have reasonably expected that the California legislature would not further act to protect important Native American resources by requiring that open-pit mines near sacred sites be backfilled to return the area to its approximate original contours.

The possibility of either of those Government actions was reasonably foreseeable, given the preexisting regulatory and statutory regimes, and Glamis received no assurances from the SMGB or the California legislature that they would not take these measures to protect public resources.

Glamis's assertion that either California measure frustrated its reasonable investment-back expectations should thus be rejected.

And I will be happy to entertain any questions you may have, and then we will turn the floor over to my colleague, Andrea Menaker, who will

22 then address the third and final prong of the indirect

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16:34:58 1 expropriation analysis, the character of the
2 California measures.
3 QUESTIONS FROM THE TRIBUNAL
4 ARBITRATOR HUBBARD: Thank you, Ms. van
5 Slooten. I only have one question, and I guess it
6 relates to the question of the timing of the
7 California measures.
8 It appears as though that Glamis, when it
9 made its initial investment in this property, was
10 following what was then applicable law. It had gone
11 through at least two other projects where it thought
12 it knew what the applicable law was, and it appeared
13 for a long period of time that this project, the
14 Imperial Project, was also being pursued pursuant to
15 applicable law; and then suddenly it was faced with
16 the Solicitor's Opinion which reversed the
17 interpretation of applicable law to Federal law, which
18 brought the Project to a halt for the period of time
19 until it was reversed. And then it suddenly,
20 thereafter, found itself faced with two new California
21 measures that it viewed as changes in the applicable
22 law.

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16:36:23 1 Is there any significance--should the

Tribunal attribute any significance to the timing factors in this situation?

MS. VAN SLOOTEN: If I understand your question correctly, there is no legal significance to the timing of the two measures, of the Federal actions and the State actions. And, as I explained, as you know, Glamis was always subject to changes in California regulations. I won't speculate as to what the California legislature or the SMGB might have thought about the Federal processing, but there is no legal significance between--in terms of the timing.

Glamis was always subject to changes in the regulations. These were incremental changes based on past law that contemplated such actions. And so, regardless of the timing of the measures, Glamis was always subject to them, and a reasonable investor should have always foreseen that potential.

ARBITRATOR HUBBARD: So, in other words, the reasonable-expectation principle is not affected by the timing of the measures in question, as far as you're concerned?

16:37:41 MS. VAN SLOOTEN: It depends on the circumstances. If the timing of the measure with respect to a particular--the processing of a--let me strike that and start over.

The State's ability to regulate an unpatented mining claim is quite broad; and, in the event that the State finds that there are public health and

safety reasons to restrict particular activities on its lands, those should be foreseeable to a mining operator, regardless of the timing.

As a practical matter, the regulatory and legislative authorities might determine that, as a matter of fairness or equity, they decide not to impose those restrictions on operators that have received--that reached a certain point in the processing. But, still, they always have the authority to regulate in that manner.

I just wanted to add, after conferring with my colleague, that, in fact, it's important to note that, in this case, they did grandfather--California did grandfather those mining operations that already had an approved Reclamation Plan and financial

assurances, neither of which were present in this case.

ARBITRATOR CARON: I just have a few questions, and they're rather straight-forward.

You mentioned during the consideration of the SMGB regulations there was testimony from Glamis. You mentioned Mr. Voorhees and Mr. Jeannes. Are they in the record?

MS. VAN SLOOTEN: The testimony of James Voorhees is in the record, and I could get you the citation for that.

Actually, we need to confirm those are both in the record.

ARBITRATOR CARON: That's fine.

And the second question is: Is there a definition of "buffer zone" in the Wilderness Act or elsewhere?

MS. VAN SLOOTEN: I have not been able to locate one. It appears that--and that's why we looked at the references in the legislative history to buffer zones because that was the closest we could find for an explanation. I have not been able to find one, and

16:40:18 I have searched, and so I don't think there is.

ARBITRATOR CARON: And has there ever been a buffer zone created where that is the term used in some location?

MS. VAN SLOOTEN: I don't know. I would be happy to look into that, if it would be helpful for the Tribunal.

ARBITRATOR CARON: I'm not making that request.

The last is crossing back into questions we had asked before. It's somewhat speculative; so, if you would rather decline answering, that's fine, but I think this is a question we all have in some sense. It's about the relationship of the various statutes, State and Federal, which some clarification which I think helps us understand a little bit. And I may get even the basics incorrect.

The 3809 regulations, I think we understand the one statement where it's indicated that there may

be another Federal statute such as the Endangered Species Act that would actually stop the process. There might be another statute, historic places that

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would slow the process but not stop the process. Then I believe you said that, as far as the States, it indicates reasonable regulation--recognizes there may be reasonable regulation. The question I have is how far that can go.

So, is it your understanding that if, instead of S.B. 22 as it is, if they had concluded that mining within one mile of a sacred site is simply interference--the backfilling is not enough; it's just interference--could they actually stop the Project, or is that no longer regulation, that is now crossing into something else? And again, if you want to--if there is not a straight-forward answer, that's understood.

MS. VAN SLOOTEN: It turns on an important distinction in the Federal Mining Laws between what a State can or cannot do on Federal lands within its borders. States permitted reasonable environmental regulations on those lands. It is not permitted to engage in land-use planning.

But banning mining altogether--it is possible that that could run afoul of that standard, if that

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would be too much to ban all mining on Federal lands. They don't have the authority to ban. They have the authority to regulate.

ARBITRATOR CARON: So, it's similar to other distinctions where you might address the manner in which something is done but not whether it is possible at all, for example?

MS. VAN SLOOTEN: Yes.

Actually, it's very similar to the situation that's taken place in recent years in the State of Montana, where they imposed a ban on the use of cyanide in mining; and, as the quote that we showed from the rulemaking in that case, the BLM found that that was consistent with what a State was permitted to do on Federal lands within its borders.

An additional point to that is that it is the case that, in order to mine gold from this low-grade ore--cyanide is the only current technologically possible way to do that. So, it would affect--very, very significant restriction to mine gold in Montana on Federal lands, or Montana generally.

ARBITRATOR CARON: I'm sorry--you're saying

the Montana ban not only makes it more expensive but, in fact--

MS. VAN SLOOTEN: It prohibits the use of cyanide altogether.

ARBITRATOR CARON: And may make some mining

not possible?

MS. VAN SLOOTEN: Correct.

PRESIDENT YOUNG: Ms. van Slooten, thank you very much.

Let me ask just a few questions, if I can.

You say on what is page 240 of the transcript here, as we are talking, or maybe 239, referring to mitigation, saying that technical and economic feasibility is not a requirement imposed by the California legislature. "Requirement" is an odd word there, but let me skip that for a minute.

And what you go on to say is that the BLM is imposing mitigation--that's a requirement placed by BLM on imposing mitigation measures for a particular plan.

This goes a little bit, I think, to Professor Caron's point. On the one hand, I think what I have

16:45:35 understood you to say is that States may define their measures within the context of a Federal regulatory regime, and so some measures would be too extreme. Is that fair?

MS. VAN SLOOTEN: I don't think "extreme" is exactly the right word, but some measures may fall into the rubric of land-use planning, which would not be permissible. But I don't believe there is any limit on--you know, any outer limit on the type of environmental regulation.

PRESIDENT YOUNG: There is no outer limit.

Is that the Government's position, that there is no outer limit on the State regulation on mining on Federal lands?

MS. VAN SLOOTEN: That there is no--I don't know what the stated limit would be because the standard is that the State may impose reasonable environmental regulations, so that is what--

PRESIDENT YOUNG: "Unreasonable" is the limit?

MS. VAN SLOOTEN: No. What I'm saying is that the limit is reasonable environmental

16:46:38 regulations.

PRESIDENT YOUNG: So, "unreasonable" is the limit? I'm just--

MS. VAN SLOOTEN: It is not the Government's position that the State may act unreasonably.

PRESIDENT YOUNG: So, unreasonable environmental regulations would not be permitted?

MS. VAN SLOOTEN: That's correct, yes.

PRESIDENT YOUNG: Okay. So, in part, what we are being asked to do here in terms of evaluating, I think, is to figure out did anything the State do exceed the limits of reasonableness and, therefore, exceed the permissible scope that the Federal Government seems to have ceded to the States for dealing with mining on Federal land. Is that a fair definition of our task on this particular narrow issue?

MS. VAN SLOOTEN: It is--that is not your task.

PRESIDENT YOUNG: That's not our task.

MS. VAN SLOOTEN: Your task is not to determine whether or not the California measures are

16:47:35 land-use regulations or environmental regulations, whether they are preempted by Federal law or not.

PRESIDENT YOUNG: That's not really what I'm saying.

MS. MENAKER: Could we take one moment.

PRESIDENT YOUNG: Please.

(Pause.)

MS. MENAKER: Mr. President, as we were noting, the law permits a state to impose reasonable environmental regulations. It is our submission that that doesn't mean that your task is to determine whether these are "reasonable." There is no definition out there of what is reasonable, but what is meant by that language is that it is actually like a bona fide environmental regulation; that it is not, in essence, a disguised land-use plan that--and that's what the States are prohibited from doing.

If there is to be--if there is Federal land that is open to mining, the States may regulate. They may impose reasonable environmental regulations. What they can't do is then say no, you can't mine here.

So, if they are trying to do that by imposing

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16:50:22 a regulation that is, in essence, a disguised land-use regulation--and that is not a reasonable environmental regulation, but insofar as environmental regulations are concerned, as long as they are bona fide environmental regulations, they may have a very stringent economic impact and may, in some cases, even make mining infeasible, but that is still legitimate, and that is still within a state's purview.

PRESIDENT YOUNG: So, I take it, what you're doing, Ms. Menaker, is you're not fundamentally disputing the point that there is a limit on what the State can do in terms of its definition or redefinition of the range of legitimate activities on the federally granted rights for mining, but you're giving me some definition of what the content of that would be?

MS. MENAKER: I think that's a fair characterization. We have never--it's never been our submission that the State could essentially withdraw that land from mining.

ARBITRATOR CARON: If I could just ask one question. You posited a test of a disguised land-use

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16:51:37 effort. Let me just ask: Under S.B. 22, S.B. 22 applies to private land, State land, Federal land, or is there a distinction made?

MS. VAN SLOOTEN: It applies to all lands in California.

ARBITRATOR CARON: Thank you.

PRESIDENT YOUNG: All lands, or public lands?

MS. VAN SLOOTEN: It applies to--it applies to public lands within areas of Critical Environmental Concern within the CDCA. That's correct. That's a correct formulation, yes.

PRESIDENT YOUNG: And the law exempts municipality land, if I recall; is that correct?

MS. VAN SLOOTEN: Yes.

MS. MENAKER: That's the Sacred Sites Act. Excuse me, the limitation of the nonapplicability to certain municipal properties, yes, that's the definition of--

PRESIDENT YOUNG: That's not actually S.B. 22.

MS. MENAKER: That's correct.

PRESIDENT YOUNG: Ms. van Slooten, let me ask

16:52:55 you, in light of what I just talked about, what do you make of the grandfathering of all of these prior projects? I mean, the Board attacks rather vigorously, as does the legislature, the open-pit mines that are not complying with SMARA, but then basically says, "Okay, as to those that are ongoing, we are just going to do the new ones," what inference am I to draw from that? Any?

MS. VAN SLOOTEN: With respect to

expectations? I'm not sure--I apologize, but I wonder if you could phrase that another way. I'm not sure how to answer what inference to draw from that.

The question of--I guess--I'm sorry, I don't understand the question.

PRESIDENT YOUNG: Well, I'm wondering in terms of trying to judge both what would be reasonable in terms of a state environmental regulation, and I realize the government describes that as quite far-reaching, fair enough, but also in terms of what one might have anticipated as reasonable investment-backed expectations, what am I to make of the fact that they grandfather everything that is

preexisting?

MS. VAN SLOOTEN: I think it's interesting, when you look at where the State of California chose to place its grandfathering requirements. They grandfathered at the point at which the mine operator had a reclamation plan approved and approved financial assurances. They had received sort of an agreement from the Government that they could go forward under these terms, and at that point the Government stated that it was not going to impose these new requirements on these operators out of a sense of fairness, really, that--

So, I think that the grandfathering reflects, in a way, an assurance that the distinction between those mine operators who had received some form of

assurance from the Government that they could proceed and those who had not.

PRESIDENT YOUNG: Okay. I think that most of your sentence restated my question, but let me ask whether the last part in which you do respond to it, I take it, then, you're saying goes to the issue of fairness?

16:55:24 MS. VAN SLOOTEN: And expectations, yes.

PRESIDENT YOUNG: And expectation, thank you.

MS. MENAKER: Mr. President and Members of the Tribunal, we have now shown that Glamis's proposed Imperial Project retained significant value, even taking into account the complete backfilling requirements, and Ms. van Slooten has just explained that none of the measures could have interfered with Glamis's reasonable investment-backed expectations, and I will now be discussing the third and final factor that is commonly considered by international tribunals and domestic courts when considering an indirect expropriation claim, which is the character of the challenged measures.

And, as an initial matter, because as I mentioned, the character of the government action is one factor in the three-part inquiry into whether an indirect expropriation has occurred. Glamis is incorrect when it argues in its written submissions that it is a defense that the United States has asserted. Rather, the burden always remains on Glamis

to prove that its property interest has been

expropriated, and this is just--the character of the action is just one of the factors that the Tribunal should weigh in making that determination.

So, I will begin by addressing what tribunals and courts mean when they refer to the character of the action. Then I will discuss the SMGB regulation and later move on to Senate Bill 22 and show that both measures are nondiscriminatory, regulatory measures of general application.

Looking at the character of the measure involves consideration of whether the government action constituted something akin to a physical invasion of property or whether, as the United States Supreme Court has explained in the Penn Central Case, whether the measure merely affected property interests through a public program adjusting the benefits and burdens of public life; in other words, whether it was regulatory in nature or--and whether it was enacted for a public purpose.

Where a State proclaims that it is enacting a nondiscriminatory statute for a legitimate public purpose, tribunals rarely question that

characterization. And as one respected commentator

has noted--and this is Mr. Westin in his seminal article "Constructive Takings Under International Law: A Modest Foray into the Problem of Creeping Expropriation," quote--or there is "a necessary presumption that States are regulating when they say they are regulating, and they are especially to be honored when they are explicit in this regard."

Numerous international arbitral tribunals have concluded that nondiscriminatory regulations enacted to benefit the general public welfare under ordinary circumstances will not be deemed expropriatory, and I will mention just a few of these here.

For example--and I have listed these on the slides--in the recent case of Saluka versus the Czech Republic, the Tribunal stated: "It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a nondiscriminatory manner bona fide regulations that are aimed at the general welfare."

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16:58:43 The Tribunal in Lauder versus the Czech Republic similarly observed that "Parties to the Treaty are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State."

And the S.D. Myers Tribunal likewise found that, "The general body of precedent usually does not

treat regulatory action as amounting to expropriation.

The united States has also detailed in its submissions the many sources in addition to arbitral awards that support this conclusion, and I will mention just a few of these here, which I will also put on the screen for your convenience.

The Harvard Convention on the International Responsibility of States for Injuries to Aliens provides: "An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of a property of an alien which results from the action of the competent authorities of the State in the maintenance of public order, health, or morality, or otherwise incidental to the normal operation of the law of the State, shall not be considered wrongful,

16:59:46 provided that it is not a clear and discriminatory violation of the law of the State concerned and it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world."

The same concept is also reflected in the 2004 United States Model Bilateral Investment Treaty, which provides: "Except in rare circumstances, nondiscriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objections"--excuse me--"objectives, such as public health, safety, and the environment do not constitute indirect expropriation."

And finally, as far as the authorities that I will review today, the 1967 OECD Draft Convention on the protection of foreign property also likewise provides that bona fide regulations that are nondiscriminatory are noncompensable, and that document provides that measures taken in pursuit of the State's political, social, or economic ends do not constitute compensable expropriation.

As Ms. van Slooten just noted, quoting from

17:00:56 the Locke case, the State has particularly broad regulatory power over the type of property interest that is at issue here, which are the unpatented mining claims, because the United States retains title to the underlying land on which those mining claims are located. And the Court has long recognized--the Supreme Court has long recognized the substantial regulatory authority that the Government has over those claims on its public lands.

And neither of the California measures requires Glamis to relinquish its unpatented mining claims, and neither prohibits mining the Imperial Project claims. Rather, as I will explain in greater detail, both measures merely obligate a mining company at the conclusion of mining to restore the public lands to roughly the condition they were in at the outset.

So, I will first turn to address the SMGB regulation and show that the character of that

regulation is, indeed, regulatory; that is, that the regulation is a bona fide regulation that is nondiscriminatory and is designed to protect

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17:01:56 legitimate public welfare objectives.

So, I will begin by demonstrating the public purpose underlying the regulation, which is the third restatement of Foreign Relations Notes that the public-purpose prong of this test "has not figured prominently in international claims practice perhaps because the concept of public purpose is broad and not subject to effective re-examination by other States," and that is in Section 712 of the Third Restatement, Comment E.

So, after discussing the public purpose of the measure, I will then demonstrate the nondiscriminatory nature of the measure.

So, first, there really can be no doubt, in our submission, that the SMGB regulation was enacted for a public purpose. As Dr. Parrish's testimony and the rulemaking history make clear, California was concerned about the harm to the environment as well as to public health and safety hazards that were caused by open-pit hardrock mining, including the massive open pits that remained unclaimed after completion of the mining process.

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17:03:04 The purpose of the SMGB regulation was to ensure that open pits from metallic mines are reclaimed to a usable condition which is readily adaptable for alternate land uses. So, clearly, then, it was enacted with a public purpose.

The amendments to the SMGB regulations are also nondiscriminatory. It applies--the regulation applies to every open-pit metallic mine in the State that did not have a reclamation plan and financial assurance in place by December 18th, 2002. So, on its face, the regulation is of general applicability.

And Glamis doesn't contest that the SMGB's regulation applies statewide. In its opening statement, Mr. Gourley stated, and I quote: "The State Mining and Geology Board will require backfilling of all metallic mines in the future. The regulation will apply statewide to new metallic metal mines."

So, Glamis admits, as it must, that the regulation will apply to other mines. Under international law which provides significant deference to a State in its determination that the measure is

17:04:09 regulatory, the measure's facial neutrality shall lead to a presumption that the character of SMGB regulation is, in fact, regulatory. But the Tribunal doesn't have to rely just on the facially neutral language of the SMGB regulation to conclude that the regulation is

not discriminatory. And this is because, although the regulation has never been applied to Glamis, it has been applied to another project, as you have heard, which is the Golden Queen Mining Company Soledad Mountain Mine in Kern County, California. And I have placed on the screen some quotations from Golden Queen's Web site, which have been attached to Mr. Leshendok's report.

There, as you can see, the company stated that the State of California introduced backfilling requirements for certain types of open-pit metal mines in December 2002, and the company contended that these regulations did not apply to its project. It then went on to state that the company, therefore, pursued both a favorable interpretation under the regulation and subsequently an amendment of the regulation with the SMGB in 2006.

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17:05:19 But the SMGB rejected both of those proposals. As it states, both approaches were rejected by the Board and the decision was duly recorded by the Board in January 2007.

In rejecting Golden Queen's petitions to either, first, exempt them from the regulations or, two, to amend the regulations so that it did not apply to its mining project, the SMGB reiterated its goal that, in enacting the backfilling regulations, its goal was to enforce a statewide standard under SMARA. And the Board stated--and here I'm quoting from the

California Office of Administrative Law Regulatory Notice Register--that: "The goal of the SMGB's regulations was to require mining companies to address the problems of unreclaimed open-pit metallic mines and to take responsibility for cleaning up their mine sites after the completion of surface mining operations and return them to a condition that allows alternative uses and avoids environmental harms, thereby meeting the purpose and intent of SMARA." Golden Queen has since stated that it intends to proceed with its mining operations in accordance with

17:06:26 the reclamation requirements contained in the SMGB's regulation.

Clearly, then, the regulation is nondiscriminatory. Glamis argues that the regulation is discriminatory because it does not apply to nonmetallic mines. But, just because an environmental regulation doesn't address every environmental problem does not make the regulation discriminatory. The SMGB regulation is not discriminatory because it does not treat similarly situated persons differently. Nonmetallic mines may raise environmental issues, but those mines are different from metallic mines and, thus, raise different issues. That those mines are not covered by the regulation doesn't make the regulation discriminatory, and I will return to this point in more detail when I'm addressing Glamis's Article 1105 claim; but, just briefly to summarize, as

Dr. Parrish explained in his written and oral testimony as well, in the case of nonmetallic mines, because the mined materials are mostly hauled away, there was typically insufficient waste material to fill the remaining pit.

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17:07:36 So, the fact that the SMGB regulation doesn't apply in such circumstances doesn't render the regulation discriminatory or otherwise cast doubt on the regulation as a bona fide regulation.

Nor does the SMGB regulation impose a disproportionate burden on Glamis or on any other mining operators to which it applies. Glamis asserts this it has been unfairly singled out to "bear public burdens which in all fairness and justice must be borne by the public as a whole," and this is in their Reply in paragraph 176.

So, Glamis complains that it should not have to shoulder the expense of the regulation when it is the people of California who wished to reap the environmental benefits of reclamation. But, in fact, open-pit mining operators such as Glamis are the very ones who should bear the costs of the damages that their activities on the public lands cause. After all, if it was not for the metallic mining company's creation of these vast open pits and tarrying waste piles in the first place, the SMGB's regulation would never have been necessary.

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17:08:41 By the autumn of 2002, the California Resources Agency had become acutely aware of the environmental impacts of open-pit metallic mines. As you can see in Secretary Mary Nichol's letter to the SMGB chairman, in that letter there was expressed an urgent concern regarding the vast unfilled excavations in the California landscape and the equally vast piles of waste materials that were left across the State from open-pit metallic mining.

And we have seen the evidence in the record and heard Dr. Parrish's testimony that the SMGB concluded that the potential creation of yet another such unreclaimed open pit, as was proposed by Glamis's Imperial Project, constituted an emergency condition and that emergency regulations were necessary to protect the California landscape from another--yet another such scar.

The fact that Glamis was mentioned as the emergency condition is irrelevant because Glamis was not singled out by the regulation which applies statewide.

So, it's not disproportionate or

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17:09:48 discriminatory for a State to require mining operators to internalize the costs of the environmental and cultural harms that they cause, essentially to clean

up the area that's damaged by their activities. Requiring reclamation of open-pit metallic mines through backfilling and recontouring of the land after mining is not akin to a physical invasion of Glamis's property. It is an appropriate regulatory response to a very real environmental problem.

As such, the character of the SMGB regulation weighs heavily in favor of a finding that there has been no expropriation.

So, I will now turn to discuss the character of the second California measure: Senate Bill 22.

Senate Bill 22, like the SMGB regulation, is a generally applicable regulatory measure that was enacted for a public purpose. So, as I did for the SMGB's regulation, I will first demonstrate the public purpose of Senate Bill 22 and then demonstrate that that bill also is not discriminatory.

So, in late 2001, Senator Byron Sher introduced Senate Bill 483 into the California

17:11:00 legislature to amend SMARA to address reclamation of abandoned mined lands. Language was added to S.B. 483 in mid 2001 to include protection for Native American sacred sites by requiring backfilling and regrading to the approximate original contours of the mined lands prior to mining where the mine was within one mile of a Native American sacred site in an area of special concern.

In February 2002, Senator John Burton

introduced Senate Bill 1828 in the California legislature. That bill also required backfilling and regrading but was considerably broader than Senate Bill 483.

Most notably, Senate Bill 1828 would have altered the CEQA process to effectively give Native American Tribes the power to veto any project within 20 miles of a Native American reservation on the grounds that it would substantially impact a sacred site. The bill would have done this by providing that a federally recognized Indian Tribe would be considered a public agency having jurisdiction over natural resources; and, thus, it would have given the

17:12:10 Tribes all the powers that such an agency would have had in determining during the EIS/EIR process whether impacts existed or needed to be mitigated.

Now, S.B. 483, as you have heard, was a single joined to Senate Bill 1828, which means that neither one could become law unless they were both signed. Now, because Governor Gray Davis vetoed Senate Bill 1828, Senate Bill 483 couldn't take effect until another bill which was Senate Bill 22, until that bill was enacted in April 2003. And what Senate Bill 22 did was it removed the provision joining 483 to Senate Bill 1828. So, it was the more conservative of the two bills, the one that did not grant sweeping powers to Native American Tribes, that became law.

Now, the purpose of Senate Bill 22 is clear

from the text of the bill, and I have put this on the slide. The bill provides that "This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are to prevent the imminent destruction of

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17:13:31 important Native American sacred sites threatened by proposed strip mining and to ensure that these mining activities are adequately mitigated through implementation of new state reclamation requirements at the earliest opportunity. It is necessary that this act take effect immediately."

Thus, Senate Bill 22 was intended to mitigate damage to Native American sacred sites by requiring that all excavation be backfilled and graded to the approximate original contours of the mined lands prior to mining, and that the financial assurances for the Project be sufficient to cover the costs of doing so. So, we contend that the public purpose of Senate Bill 22 is, thus, clear.

And, in fact, Glamis's own lobbyist, the so-called "spokesmen" for the metallic mining industry in California at the time, recognized Senate Bill 22--that Senate Bill 22's purpose was to protect Native American sites. And this comment was made by Adam Harper, who at the time was the manager of the California Mining Association in testimony that he

made before the SMGB Board.

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17:14:40 And the tribunal will recall that Mr. Gourley, in his cross-examination of Dr. Parrish, made a point of the fact that the California Mining Association was a "spokesman for the metallic mining industry as it existed at the time, that S.B. 22 was enacted and the SMGB legislation was promulgated." And Mr. Gourley also emphasized the fact that Glamis was a member of the California Mining Association.

During his testimony, and--excuse me, I believe that was Mr. McCrum rather than Mr. Gourley.

During Mr. Harper's testimony opposing the adoption of the SMGB regulation, Mr. Harper urged the SMGB to limit the scope of its regulation to the scope of Senate Bill 22, and he recommended--and I have put this on the slide--that the SMGB "take the guidance from the legislature and adopt a backfilling regulation that respects the Native American sacred sites. It would allow potential gold mines that would not impact Native American sites. It would certainly still be protective of the interests that were brought before the legislature, and that is our request to this Board."

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17:15:54 So, even Glamis's own spokesperson recognized

the public purpose of Senate Bill 22.

But now, Glamis instead points to other sources in an attempt to show that Senate Bill 22 was not enacted for a public purpose, but because the intended purpose of the bill is clear from the bill itself, there is no justification for searching the legislative history in an attempt to undermine that stated purpose. Indeed, as one respected commentator, who was Christie in his seminal article about what constitutes a taking of property under international law, as he has noted, which I have put on the screen, "If the facts are such that the reasons actually given for a measure are plausible, no search"--excuse me--"search for the unexpressed real reasons is chimerical. No such search is permitted in municipal law, and the extreme deference paid to the honor of States by international tribunals excludes the possibility of supposing that the rule is different in international law."

Here, the public purpose of the bill to prevent irreparable harm to Native American sacred

17:17:10 sites by mitigating the effects of open-pit mining is clear. The facts before this Tribunal make it plain that the reason for the Bill is a plausible one; thus, there is no need for deeper inquiry into the legislative history and into the minds of legislatures or their staffers to determine if there was some other intended purpose.

Thus, Glamis's argument that the legislative history shows that the true purpose of Senate Bill 22 was to prevent the Imperial Project from ever going forward should be disregarded. Even if Glamis's contention were correct, this Tribunal could not make a factual finding that that is what the legislature intended. The evidence in this case shows that the legislation that was actually enacted does not prevent the Imperial Project from going forward. It only requires certain reclamation measures where mining is to take place on certain lands near Native American sacred sites.

There is no evidence to suggest and, thus, no basis to find that if Glamis were to move forward with its mining application and submit a Reclamation Plan

17:18:09 that complies with Senate Bill 22's reclamation requirements that its Imperial Project would be prevented from going forward. This is yet just another example of the evidentiary problems that have arisen in this case because Glamis chose to submit its claim prematurely before it was ripe.

United States courts, for example, rarely examine facial challenges to legislation for this very reason. Here, there is absolutely no basis to assume that the legislation would be applied to Glamis in a manner that is inconsistent with its plain language to prevent the Imperial Project from ever going forward, as Glamis contends.

So, now finally on this point, I will just want to address why Glamis's reliance on some of the other documents which they have repeatedly referred to throughout this week, such as the Governor's statement or certain documents that were produced by legislative Committees, their reliance on these documents to support a contrary conclusion is misplaced.

So, Glamis, as you know, has relied on Governor Davis's signing statement for Senate Bill

17:19:19 483, and we have placed that on the slide, as well. But, in that statement, you can see that Governor Davis said that the Bill would "prevent mines such as the Glamis Gold Mine in Imperial Country from being developed unless sacred sites are protected and restored." In other words, the purpose was not to prevent Glamis from mining at all, but rather to prevent projects like the Imperial Project from going forward in the manner that they were proposed; that is, in a manner that did not accord sufficient protection to Native American sacred sites.

Glamis has also pointed to statements made by certain legislative Committees to the effect that Senate Bill 22 would make the Imperial Project economically infeasible. But these documents don't prove that this was the purpose of Senate Bill 22.

So, for example, one of the documents that Glamis has repeatedly referenced this week, which was prepared by the Senate Natural Resources and Wildlife

Committee, provides that the proposed project would "destroy sacred areas of critical religious and cultural importance to the Quechan Tribe" and that the

17:20:31 site would "irreparably harm both ends of the Quechan's spiritual trial, the Trail of Dreams."

That document also provides that the author believes that the backfilling requirements established by Senate Bill 483 make the Glamis Imperial Project infeasible.

But that last statement does not establish that the purpose of the proposed legislation was to render the Project infeasible. It's just a declarative statement.

And, moreover, the Tribunal will recall that Glamis was actively lobbying against this proposed legislation. It was telling legislators that the bill would make the project infeasible and would kill all metallic mining in California. Of course, we now know that Glamis at the same time was also preparing internal documents that showed otherwise, that showed that its project could still be economically infeasible, even with this complete backfilling requirement.

But it was in Glamis's interest to try to kill the legislation because it would render the

17:21:37 Project more costly, that it was then subsequently reported in various documents that the proposed legislation would purportedly have the effect of rendering the Project economically infeasible is not that surprising, then.

Finally, as a legal matter, even if one or some of these legal documents can be construed as evidence of an intent on the part of an author or on the author of the document to kill the mine, which Glamis argues, which we say it cannot, even if that were the case, that intent could not be imputed to the entire California Government. And, in this regard, I would point the Tribunal to the Methanex Tribunal's First Partial Award, and I have put this quote also on a slide.

The Tribunal state--noted: "Decrees and regulations may be the product of compromises and the balancing of competing interests by a variety of legal actors. As a result, it may be difficult to identify a single or predominant purpose underlying a particular measure. Where a single governmental actor is motivated by an improper purpose, it does not

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17:22:46 necessarily follow that the motive can be attributed to the entire government."

Here, the public purpose of the bill is clear from the bill itself. The documents that Glamis would like the Tribunal to focus on do not provide or prove

otherwise.

I will now move on to the second part of the inquiry and show that Senate Bill 22 is not discriminatory.

Senate Bill 22 applies to all open-pit metallic mines throughout the State of California that are located on or within one mile of any Native American sacred site that is located in an area of special concern. So, it applies to millions of acres of land in California that are open to exploration under the Mining Law, and which could be located within one mile of a Native American sacred site.

As we have noted, less than 10 percent of the CDCA has been inventoried for cultural resources, and Mr. Kaldenberg confirmed this in both his written and oral testimony, and that inventory for the CDCA is an ongoing process. Therefore, it's possible and even

17:23:55 likely that future mining projects would be subject to Senate Bill 22.

In fact, as we noted in our Rejoinder, Canyon Resources Corporation, which operates the Briggs Mine also located in the CDCA, has indicated in its filings with the United States Securities and Exchange Commission that Senate Bill 22 may be applicable to its proposed expansion of its mine. And I have put this on the slide, as well.

In that filing, Canyon Resources explained: "Our Briggs project is located in the Panamint Range

within the designated limited-use land of the CDCA and the nearby Timbisha Shoshone Native American Tribe has stated that they consider the entire project area to be sacred. Any new open-pit developments on our properties outside the existing Plan of Operations area might be required to comply with these regulations."

Glamis has pointed to Enrolled Bill Reports which were created by the staff of executive agencies and to the Governor's signing statement for Senate Bill 483, all of which mentioned Glamis's Imperial

17:25:03 Project by name as the impetus for the legislation. The focus on Glamis's Imperial Project is proof of the urgent need to pass a bill such as Senate Bill 22 is unsurprising, given that at the time the legislature took action to protect Native American sacred sites, the Imperial Project was the only proposed open-pit hardrock mine that was then known to impact such sites.

The Imperial Project was the most prominent and immediate example of the type of harm that open-pit hardrock mining could cause to Native American cultural resources. It is unremarkable that the California legislature responded directly to the threat that was posed by the Imperial Project.

That is what legislatures do. They react to problems brought to their attention by their constituents by passing legislation that addresses

those problems. The fact that the harm to be addressed in this case was being caused by a single company does not make the legislation discriminatory so long as that legislation is applied generally to all similarly situated actors, and that is precisely

17:26:10 what Senate Bill 22 does.

So, in conclusion, neither the SMGB regulation nor Senate Bill 22 have a character or are akin to a physical invasion of Glamis's property. Both measures are nondiscriminatory regulatory measures of general applicability that were enacted for a public purpose; and, thus, again an assessment of the character of those measures weighs heavily in favor of a finding of no expropriation.

Thank you.

PRESIDENT YOUNG: Ms. Menaker, thank you.

Professor Caron?

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR CARON: Ms. Menaker, I have to put two questions. And starting in the order you did it, if we go first with the SMGB and your discussion of the nondiscriminatory or discriminatory nature of that measure, I'm a little confused, and I want to check and at the same time maybe confusion may be introduced.

On the other hand, there is language like "general" versus "narrow," "metallic" versus

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17:27:34 "nonmetallic," and all of those are distinctions, discrimination of one versus the other. But, when we refer to in the Saluka Award a "nondiscriminatory manner," am I correct that the question of discrimination is are you discriminating against the foreign investor? Is it that you're discriminating on the basis of foreignness or that you're discriminating between groups in the country? If you could just clarify that.

MS. MENAKER: Well, first, let me just note here that Glamis, of course, does not have a national-treatment claim under Article 1102, which would be a claim, if it were claiming that it was discriminated against on the basis of its nationality, but the reason for that is because--the reason why it can't bring such a claim, rather, is because there was an exception to Article 1102 for mining because, in order to--in the United States, in order to have a mining claim, you need to be a U.S. national. You need to be a U.S. corporation or national, so there can be no discrimination on the basis of nationality there.

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17:29:22 I think in an expropriation analysis, when you're assessing the character of the measure, when you're looking at whether the measure is one of

general applicability or whether it's discriminatory, I don't think that analysis is limited to a question of whether it's discriminatory on the basis of nationality as opposed to whether it is a discriminatory measure, which, in my understanding, is more along the lines it is targeted.

And when I say "targeted," I don't mean that you form the impetus for the legislation, which I hope is a point that I have made clear. It means that it's not applied generally to all persons who are similarly situated. That, I think, is the notion of discrimination as it's used here--I mean, in an expropriation analysis.

I would just note on the other points, the distinctions between metallic and nonmetallic and things like that, those are, in our view, distinctions, but distinctions with a--you know, legitimate distinctions, which in no way render a regulation discriminatory because, again, as long as

17:30:36 there are legitimate distinctions between actors, they are no longer similarly situated, so the application of the measure can't be discriminatory in that case.

ARBITRATOR CARON: So, the question is whether maybe "discriminatory" in some ways is not the right--maybe a carryover from an earlier phrasing, but the question of whether targeted, singling out and looking to these other distinctions either in the general applicability or in the actual set tells us

whether it is a singling out occurring. Is that what you're trying to do?

MS. MENAKER: Yes, but I would be very careful to note that when saying a targeting or singling out, that does not mean, in this language that is used, is discriminatory, that a measure would be discriminatory just because it was passed in response to a particular problem or, say, a company was named. But that is not the singling out they're talking about, but rather if they--the Government wants to seize your piece of personal property, and rather than just doing that and paying you compensation, they pass a regulation that is so

17:31:53 narrowly crafted that it says, "I am going to take the property at this certain address." In that case, that is targeted because it is targeted at one particular property owner.

And, in that respect, I think the Whitney Benefits case is a good illustration of that and is clearly distinguishable from the instance--you know, the case we have here as we have illustrated in our submissions.

ARBITRATOR CARON: Thank you.

The second question relates to public purpose of the sacred sites--of S.B. 22, excuse me.

Am I correct that you said that the Tribunal's task is to ask whether the reason--the purpose stated is a plausible one?

MS. MENAKER: Yes.

ARBITRATOR CARON: The question I would have is, when you were describing the purpose, you kept referring to protection of Native American sacred sites, but S.B. 22 is, as we discussed on the last presentation, confined to Native American sites within the CDCA on certain property types, not the whole

17:33:17 State.

So, should there be a plausible statement as to why it is only in the CDCA and not in the whole State?

MS. MENAKER: No, because Senate Bill 22, its purpose is clear, as you've--I was going to say, as you know, but that's not what I meant.

The--we contend that its purpose is clearly to protect Native American sacred sites. The fact that its scope is limited does not cast doubt on that purpose because it is well recognized that a legislature does not have to address every problem of a similar nature in order for its regulation to be basically to have a rational relationship to its goal. It doesn't cast doubt on the nature of the regulation just because its scope is somewhat limited and because the legislature chose to address, you know, a piece of the problem rather than the entirety of the problem.

And this is another point that we will be returning to in more detail when addressing Glamis's Article 1105 claim.

22 ARBITRATOR CARON: But aren't we into the

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17:34:40 1 same problem that you described a moment ago about
2 singling out by crafting the legislation very
3 narrowly? So--I'm just saying if one were to defer
4 to--they crafted it narrowly in order to address one
5 part of the problem, then it's not discriminatory.
6 It's not singling out in that case.
7 I think--I'm sorry, go ahead.
8 MS. MENAKER: I think that--I mean, on the
9 one hand, clearly legislatures have the ability to
10 address a problem without addressing it
11 comprehensively, and I think that that's well
12 recognized. Otherwise, you know, Government would
13 really grind to a halt because legislation is often
14 the product of compromise, and although many
15 people--you know, there are always supporters who
16 would like more comprehensive legislation on any
17 particular topic, that's not always possible.
18 And, you know, it simply couldn't be the rule
19 that by taking legislating in a more narrow manner to
20 address the problems that you are able to address
21 somehow renders that legislation unlawful.
22 But I would also note that here it is not a

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17:35:52 1 case akin to, say, the Whitney Benefits case where the

legislation is so narrowly crafted so as to really ensure that it is only going to be applicable to, you know, as one actor.

First of all, limiting the Senate Bill 22 to the CDCA was rational because that is where there are known to be located an abundance of these sacred sites, these cultural resources of the California Desert area. I mean, that is one of the reasons or the reason why they created this area for protection because it was known to be an area that had such a wealth of these resources.

And as we also noted, that inventorying, I mean, has been very slow. It's a massive area, and it's not a very small area that we--that Senate Bill is restricted to. It still covers a very large area, but it covers the area that was widely known to contain these resources, and an area which Congress has already designated as a place that was deserving of special protection because of the wealth of cultural resources that existed in that area.

ARBITRATOR CARON: Thank you.

17:37:16 ARBITRATOR HUBBARD: Ms. Menaker, I just have one, I guess it's not so much a question as an observation.

When you mentioned the Locke case back at the beginning of your presentation, isn't it the case that the Locke case referred only to Federal regulations and not the State and that State regulation we have to

look to Granite Rock and its progeny?
MS. MENAKER: Well, I think you certainly do look to Granite Rock and its progeny for the intersection of State environmental regulations and the Federal Mining Law. But the purpose for which I was citing Locke was simply the observation of the nature of an unpatented mining claim right or the property interest that an owner of an unpatented mining claim has and that that property interest is a unique one and is somewhat limited because the Federal Government retains title to the underlying land.
ARBITRATOR HUBBARD: But I believe that was referring to that as being the reason for allowing Federal regulation of unpatented mining claims, the fact that the ownership of legal title is retained by

17:38:34 the United States.
MS. MENAKER: Give me one minute to confer.
(Pause.)
MS. MENAKER: I apologize. I'm afraid that I'm not sure that I'm understanding the question. Can you just--
ARBITRATOR HUBBARD: Well, I took it to mean your statement about the Locke case to mean that we look to it for the question of the right to regulate generally, and perhaps specifically by the States, whereas I read it to be only a statement about the right of the United States to regulate because of its legal title ownership of unpatented mining claims.

MS. MENAKER: Oh, I'm sorry. I do understand now.

And when the Locke case says that the State has broad regulatory power over the top of property interest, when they're talking about the State, I read that to mean both the Federal Government and then, since the Federal regulations provide for State regulation or State regulatory oversight of mining as well, I would see that as one and the same, that, you

17:40:09 know, the State as a whole retains this broad regulatory power over the top of property right, but, you know, as we mentioned before, the property right is created by Federal law, but Federal law recognizes the State's right--it's getting confusing with the capital State and the lower case, but recognized as California's right to impose also environmental regulations, so I look at it as one and the same.

ARBITRATOR HUBBARD: Well, I will confess that it's been a long time since I read it in its entirety, which I will do again.

MS. MENAKER: Okay.

PRESIDENT YOUNG: Ms. Menaker, thank you very much. You can proceed to your next section.

We have been asked for a five-minute break. We will take a five-minute break.

(Brief recess.)

PRESIDENT YOUNG: Ms. Menaker, the floor is yours.

MS. MENAKER: Let me just let the Tribunal know that this next section will take longer than 10 minutes. I mean, We would like to proceed. Is that

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17:49:33 all right?

PRESIDENT YOUNG: Yes. We may stop at 6:00, but I take it there would be no problem with resuming tomorrow morning? How long will this section take?

MS. MENAKER: I'm not quite sure. Maybe 20, 25 minutes.

PRESIDENT YOUNG: Is it all right if we stay until 6:10? Professor Caron has a little bit of a situation at 6:15, so we will need to--pardon me.

MS. MENAKER: Mr. President and Members of the Tribunal, that concludes our defense of the California measures with respect to Glamis's expropriation claim, and now I just want to turn to address Glamis's contention that the Federal Government actions have expropriated its investment.

So, for the reasons I will discuss, Glamis's expropriation claim based on the Federal action like its claim based on the California actions should also be dismissed.

And I'll try not to spend too long addressing the claim. I note that Glamis itself has not done that or has not spent very long addressing the claim.

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17:51:09 1 In more than 500 pages of briefing, it really spent I
2 think it was less than 10 pages arguing its Federal
3 expropriation claim, and so we submit that the
4 Tribunal should similarly devote a minimal amount of
5 time to what we contend is this meritless claim.
6 So, initially Glamis's own allegations
7 undermine its Federal expropriation claim. The date
8 of expropriation offered by Glamis, December 12, 2002,
9 is the date on which the California Mining Board
10 adopted its emergency regulation. So, if as Glamis
11 alleges California's reclamation requirements
12 expropriated its mining claims, then the Federal
13 Government's actions taken in relation to Glamis's
14 Plan of Operations cannot have expropriated that same
15 property. So, for purposes of Glamis's expropriation
16 claim, the actions of the Federal Government are at
17 best tangential in nature, and the heart of Glamis's
18 expropriation claim we submit instead concerns the
19 challenged California measures.
20 And furthermore, even assuming as Glamis
21 alleges that the California measures were adopted in
22 response to the Department of Interior's rescission of

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17:52:20 1 the Imperial Project Record of Decision, Glamis can't
2 demonstrate a causal relationship between the Federal
3 actions and the challenged California measures, and
4 they can't demonstrate a legally relevant causal
5 relationship because specifically it's not the case

and Glamis cannot show that California would not have adopted the challenged measures but for the Federal Government's actions.

So, for example, if the Federal Government had never issued the original denial of Glamis's Plan of Operations, California could have acted earlier to adopt these challenged measures, and Glamis can't demonstrate otherwise.

So, even assuming arguendo that Glamis's complaints about the Federal processing of its Plan of Operations had merit, such action or inaction cannot have been the cause of any alleged expropriation.

Further illustrating this point and that is Glamis's inability to meet causation requirements is the Tabb Lakes case that the United States discussed in its Counter-Memorial and which Glamis hasn't offered a response to. In that case, the Federal

17:53:24 circuit rejected a takings claim where the plaintiff argued that a subsequent delay in the issuance of a permit converted an earlier in time unlawfully issued cease and desist order into a taking. In rejecting the argument, the Court held that the original cease and desist order did not affect a taking when issued and that subsequent acts did not change the nontaking character of the order. And so the same is true here.

The Federal actions themselves are not expropriatory, and therefore subsequent acts taken by California cannot change the nonexpropriatory nature

of those Federal actions.

Furthermore, although much of its complaint with the Federal processing of its Plan of Operations is targeted at the Government's decision to deny its Plan of Operations, that act cannot form the basis for Glamis's expropriation claim. Even assuming that that act was--that decision to deny the plan was erroneous, such error would have been administrative in nature and quickly corrected by the rescission of that decision within the very same year, thus resulting in a merely ephemeral action which is not expropriatory.

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17:54:37 Conversely, assuming that the Record of Decision had been rightly decided, Glamis would have no grounds for challenging the decision and, instead, could rely only on a theory of delay for its expropriation claim, and this is really what is at the heart in our view of Glamis's expropriation claim.

But it's our contention that Glamis's Federal expropriation claim can't be based on, first, any alleged delay occurring after July 2003, which is the date when Glamis filed its Notice of Intent to submit this claim to arbitration. At the time of that filing, in a separate letter to the Department of Interior, which I posted on the slide, Glamis clearly abandoned any outstanding request to continue processing its Plan of Operations. In that letter, Glamis expressed it appreciation for DOI's efforts to resolve the Imperial Project matter. It expressed its

belief that the underlying issues that had become "so intractable that new avenues must be pursued," and it concluded that its property rights had been expropriated.

Since July 2003, Glamis has not contacted the

17:55:46 Department of the Interior in connection with the processing of its Imperial Project application. Glamis's silence since July 2003 is particularly conspicuous given its aggressive efforts to advance the Imperial Project in 2002.

In February 2002, BLM announced that it was initiating a validity examination for the Imperial Project Site. Over a span of five months, between April and September 2002, Glamis secured eight meetings with senior Department of Interior officials concerning the validity exam. One senior Department of Interior official, Patricia Morrison, stated that Glamis employed a quote-unquote persistent approach during that time and placed some 10 telephone calls to her alone.

In late September 2002, following those meetings and telephone calls, BLM issued its validity report, which was favorable to Glamis.

By contrast and as confirmed of Mr. Jeannes in his testimony this week, while Glamis had "ongoing discussions throughout the 10-year period with BLM and DOI," he could not recall, "any further discussions

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17:56:54 after Glamis filed its claim for arbitration." Given its persistent advancement of the Imperial Project Plan of Operations in 2002 and its subsequent silence since filing its Notice of Intent in July 2003, Glamis cannot now feign disappointment over the fact that as stated in its reply in paragraph 293, "Final administrative action has not been forthcoming."

In fact, in that very same filing, Glamis claims that once the California measures were adopted, which was before it filed its Notice of Intent, it would have been, "futile for Glamis to participate in further administrative processing of its Imperial Plan of Operations."

And indeed, in testimony this week, Mr. McArthur, President and CEO of Glamis, stated that it would have been reckless and not rational for Glamis to continue with the Project after the adoption of the California measures.

So, for purposes of its expropriation claim, Glamis has abandoned any reliance on events occurring after July 2003, and the Tribunal should not consider any claim of alleged delay after that period.

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17:58:06 But the advancement of the Imperial project in 2002 in connection with completion of the validity report is consistent with the Department of Interior's

active processing of the Imperial Project application both before the planned denial and after the rescission of that denial.

During those times, the Government either was preparing drafts of the EIS/EIR, responding to comments, conducting the validity examination, or resolving legal questions arising from the mine's impact on cultural resources and Native American sacred sites. And I prepared a time line of the various events that occurred during the time when DOI was processing Glamis's Plan of Operations.

And as you will see, an overview of the actions taken by BLM in the Department of Interior from the time that Glamis first submitted its Plan of Operations until Glamis filed its notice of intent to seek arbitration in this matter, illustrates the Federal Government's ongoing and active review of the Imperial Project application throughout that period.

The first thing is in December 1994, Glamis

17:59:12 submitted its initial Plan of Operations. After 16 months of study, BLM issued the first Draft EIS/EIR in November 1996, and I note that Mr. Jeannes testified earlier this week that this was a, quote, unquote, normal time frame. During the 90-day comment period on the Draft EIS, BLM received more than 425 comment letters, which is far in excess of the number typically received for a project.

During that comment period in February 1997,

BLM held two public hearings on the Draft EIS at which 49 people presented comments.

In response to the concerns raised in the public comments to the DEIS, Glamis made substantial revisions to its proposed Plan of Operations and it submitted a revised plan in September 1997. BLM, for its part, prepared a new Draft EIS, which it issued in November of 1997, which provided more detail about the proposed project.

Due to the intense public interest in the Imperial Project, the mandatory 90-day comment period for the 1997 DEIS was extended to 135 days, during which time the BLM received an additional 541

comments. It was during this process in response to the strong concerns over the Imperial Project that had been expressed by the Quechan Tribe to the BLM at a December 1997 meeting that BLM, in January 1998, requested a legal opinion from the DOI Solicitor's Office.

A few months later, in August, BLM requested consultations with the Advisory Council on Historic Preservation concerning the Imperial Project's significant impact on the area's cultural resources.

The following month BLM began conducting a validity expectation of the Imperial Project mining claims. Three months later, in December 1998, BLM held two public hearings on the 1997 DEIS at which 73 speakers presented comments.

In March 1999, the ACHP working group assigned to the Imperial Project held a public hearing as part of its consultation process with various interested parties and conducted a site visit. At the public hearing, Glamis representatives as well as 46 additional speakers addressed the ACHP Working Group.

Between April and June of 1999, Glamis

18:01:49 discussed with BLM its proposal for using a higher gold recovery rate for the validity examination. In October 1999, the ACHP issued its comments on the Imperial Project which were followed two months later by the issuance of the 1999 M-Opinion.

Glamis then challenged that opinion in its Devada [ph.] lawsuit, which was filed in April 2000. That suit was dismissed on ripeness grounds that October.

A month after the suit was dismissed, BLM issued the Final EIS/EIR. Two months later, the Department of Interior issued its Record of Decision denying the Imperial Project Plan of Operations.

In response, Glamis filed another lawsuit, this time in D.C. District Court in March 2001. After meeting with Glamis representatives in September 2001, the Department of Interior issued the 2001 M-Opinion in October, and rescinded the Imperial Project Record of Decision the following month in November.

The month after that, Glamis withdrew its D.C. lawsuit which, in turn, was followed by BLM's

reinitiation of the validity examination in

February 2002. Between April and September 2002, there were a series of meetings and telephone calls between Glamis and senior Department of Interior officials culminating with the issuance of the validity report.

Three months later, in December 2002, Glamis requested that BLM suspend processing of the Imperial Project Plan of Operations.

In early January 2003, BLM sought reconfirmation from Glamis of its suspension request. Glamis waited nearly three months and then, on March 31st, 2003, Glamis sent a letter declining to reconfirm its request.

A few days after that, Glamis sent a legal memorandum to the Solicitor's Office of the Department of Interior, arguing that the SMGB regulation was preempted by Federal law. A little more than three months later, Glamis notified the Department of Interior of the filing of its Notice of Intent. It thanked DOI for its efforts to resolve the Imperial Project matter, and it communicated its decision to pursue quote-unquote new avenues of relief.

While a failure to act may under certain

circumstances give rise to an expropriation, the Federal Government's active processing of the Imperial Project Plan of Operations from the time an initial draft was filed in December 1994 until Glamis notified DOI in July 2003 that it was pursuing new avenues of relief clearly demonstrates that there was no failure to act in this case.

In the face of all of this evidence of activity, Glamis continues to cite to an October 1998 memorandum from John Leshy, the Solicitor, to Ed Hastey, the BLM State of California Director. In its opening statement, Glamis argued that this memo, "directed Glamis to stop working on the Final EIS/EIR." Mr. Jeannes similarly testified this week that the memo quote-unquote certainly confirmed that the Solicitor's Office, "had put the stops on the Project."

But the memo evidences no such thing. Glamis consistently mischaracterizes the memo as a directive to stop the processing of Glamis's Plan of Operations. But a simple look at the memo reveals that this isn't

18:05:35 the case, and I place the memo on the screen. You also have copies of it.

First, the memorandum clearly illustrates the challenges facing an agency grappling with competing interests and difficult legal issues.

To begin, in the memo Solicitor Leshy observes that he has, "had several meetings and

intensive discussions with the several attorneys in his office working on these issues," and that the matter has, "his substantial personal attention."

He then continues by noting that, "These legal issues are complicated and precedent setting."

Furthermore, he observes, "We will almost certainly be sued by one side or another."

Next, he says, "It is imperative that we take a careful approach to these issues."

And finally, he notes, "It would be a grave mistake to rush through the validity examination or the Final EIS without having a good, legally defensible record, based on sound legal advice that allows us to navigate successfully through the issues."

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18:06:43 Solicitor Leshy informs Mr. Hastey, and I quote that, "I expect to review a draft memo on these issues when I get back in the country in a couple of weeks."

In light of the schedule, Solicitor Leshy then instructs that, "In the meantime, your folks should delay completion of the validity examination and the Final EIS."

That is an entirely unremarkable directive. Solicitor Leshy notes that the completion of the Final EIS should be delayed until he returns because the answers to the legal questions that his office is tackling, "directly concerns how the Final EIS treats

potential mitigation measures."

He then assures Mr. Hastey that the legal memo that he is preparing is a, "high priority with him, and that his folks are working hard on it."

To repeatedly construe this memorandum as a directive to stop processing the Glamis Plan of Operations is a blatant mischaracterization. Not only is that characterization belied by the content of the memo itself, but the Tribunal can see that the memo

18:07:56 did not do what Glamis claims it did by just looking at the time line that I just reviewed. That time line shows that action on Glamis's Plan of Operations did continue and did not cease between October 1998, when the memo was written, and December 1999, when the M-Opinion was issued. Federal processing of the plan continued unabated.

So, for example, during the November and December 1998, BLM continued gathering validity--excuse me--data for the validity exam as illustrated by its requests for additional testing of core samples from the Imperial Project Site, and we cite the letters where--that show this in our Rejoinder at page 129 in footnote 514.

Also, the following month, in December 1998, BLM held two public hearings on the Draft EIS. During that same period, the EIS/EIR contractor, Environmental Management Associates, continued to respond to the hundreds of comments that it had

received on the 1997 DEIS. In March 1999, as I referenced earlier, the ACHP held its public hearing and conducted a site visit of the Imperial Project

site.

Between April and June 1999, Glamis held discussions with BLM concerning the recovery rate to be used for the validity examination.

Also, in June 1999, BLM worked on responding to comments on the 1997 DEIS. In July 1999, Glamis met directly with Solicitor Leshy. Three months later the ACHP issued its comments on the Imperial Project, and it was two months after that when Solicitor Leshy issued the 1999 M-Opinion. The actions taken by BLM and DOI during this time period illustrate conclusively that the October 1998 memo from Solicitor Leshy to Mr. Hastey in no way constituted a request to stop processing the Imperial Project application.

The United States is a complex regulatory state. In the area of mining in particular, there are a multitude of highly complex regulations in place, and as we have discussed throughout this hearing, in California, for instance, a mining operator must comply with FLPMA, NEPA, CEQA, SMARA, to name just a few.

As recognized by the Federal Circuit in the

Wyatt decision, "Governmental agencies that implement complex permitting schemes should be afforded significant deference in determining what additional information is required to satisfy statutorily imposed obligations." That the United States took care in administering this highly complex regulatory scheme to ensure compliance with all relevant laws is neither surprising nor blameworthy.

Indeed, Behre Dolbear, Glamis's expert, as well as the National Mining Association, have both testified that a 10-year time frame for receiving permitting approval in the United States is not all that unusual. And I have placed this on the screen. And this is testimony from a member of the National Mining Association. This person stated, "The U.S. has many advantages, including a stable Government, lack of corruption, a strong economy, and a strong market, a talented workforce, a technologically advanced and environmentally aware mining industry, and importantly a strong reserve base for most major metals and minerals. But the U.S. also has disadvantages, including an uncertain policy environment, a complex

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regulatory structure, and very long permitting delays that are excessive and expensive."

That permitting and regulatory regime may be a drawback for companies that are eager to started operations, but the public, through its democratically

elected Government has chosen to make the protection of the environment and public health and safety a priority. As the Fireman's Fund NAFTA Chapter Eleven Tribunal stated, while a, "failure to act in omission by host State may also constitute a State measure tantamount to expropriation under particular circumstances, those cases will be rare and seldom concern the omission alone." Here, there was no failure to act by the Federal Government, and thus, there has been no expropriation.

I have just one final point to make on this matter, but if you would prefer that I wait.

PRESIDENT YOUNG: Professor Caron has specifically said don't go beyond that.

MS. MENAKER: So, my final point is that Glamis's Federal expropriation claim as we noted in our written submissions is further weakened by its

18:12:53 failure to pursue any domestic relief in response to DOI's alleged delay since the ROD was rescinded in November 2001. As we noted in those submissions, Tribunal in several investor-State cases, namely in Generation Ukraine, the Feldman case, and in the EnCana versus Ecuador case, have found that the absence of any reasonable effort to obtain domestic relief casts doubt on the existence of conduct tantamount to expropriation.

Although Glamis has asserted that it has not sought declaratory or injunctive--excuse me. Although

Glamis has asserted that the challenged California measures are preempted under Federal law, it hasn't sought declaratory or injunctive relief in U.S. Courts on those grounds. Nor has Glamis pursued a claim against BLM or DOI under the Administrative Procedure Act for any alleged unlawful delay in the processing of its Plan of Operations.

As the tribunals in Generation Ukraine, Feldman, and EnCana have concluded, this Tribunal shall likewise find that such a lack of action by Glamis further weakens any claim that the Federal

Government's actions in this manner amounted to an expropriation of its property rights. So, for the reasons that I've just discussed, we respectfully request that the Tribunal also dismiss this claim.

Thank you.

PRESIDENT YOUNG: Professor Caron?

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR CARON: I just have one question that's slightly related because I'm not familiar with the BLM or Interior process. There was a reference in the record at one point to Department of Interior internal appeal process. Is that somehow relevant to these decisions?

MS. MENAKER: I think that there is a process within an administrative process, and I think it's relevant insofar, again, as it shows that Glamis did have avenues of relief available to it had it thought

that DOI had done something wrong and that for which it could seek relief either that it was not acting on its plan when it should have been or that it had made an erroneous decision in some respect, it could certainly have sought relief either administratively

or in the courts, depending on exactly what its complaint was. And that's why it's our contention that its failure to do so does weaken any claim that it can bring before this international tribunal that the United States has somehow affected an expropriation of its property rights by failing to act or by any alleged delay or administrative error.

PRESIDENT YOUNG: I think I have just one question, Ms. Menaker.

Mr. Leshy, when he initially issued his opinion that some at least viewed as a reinterpretation of the law, but however one characterize it, when that opinion was withdrawn by the subsequent Solicitor, what precisely did they say about the withdrawal and what are we to make of that? Did they just simply withdraw it, or did they--was there an actual statement about its validity and so forth when they withdrew it?

MS. MENAKER: There is the end, and I also noted in response to Mr. Hubbard your question also, that I do want to make clear, and we will be arguing tomorrow that Solicitor Leshy's opinion was not, in

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18:16:53 1 our view, this reinterpretation, but we will deal with
2 that tomorrow.
3 Now, when the Solicitor Norton rescinded the
4 Record of Decision prior to that, the new
5 Solicitor--well, the new Solicitor issued--Solicitor
6 Myers issued another M-Opinion in 2001, and that
7 explains the reasons why he disagreed with the earlier
8 M-Opinion, and I'm just checking now on whether the
9 Record of Decision added anything, you know, that
10 rescinded the earlier Record of Decision added
11 anything substantively to that. I didn't recall
12 offhand, but I will address that in detail tomorrow,
13 if that's okay.
14 PRESIDENT YOUNG: That's fine.
15 Thank you very much. We appreciate your
16 patience.
17 I understand Mr. Schaefer is no longer with
18 us. His wife is having a baby, I understand. Please
19 offer him our best wishes and congratulations and
20 telling him that that's adequate reason to miss the
21 afternoon session.
22 We will reconvene again at 9:00 tomorrow

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18:18:09 1 morning. Thank you.
2 (Whereupon, at 6:18 p.m., the hearing was
3 adjourned until 9:00 a.m. the following day.)

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CERTIFICATE OF REPORTER

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.

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DAVID A. KASDAN