

NAFTA/UNCITRAL ARBITRATION RULES PROCEEDING

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 In the Matter of Arbitration :  
 Between: :  
 GLAMIS GOLD, LTD. , :  
                   Clai mant, :  
                   and :  
 UNITED STATES OF AMERICA, :  
                   Respondent. :  
 ----- x Volume 7

HEARING ON THE MERITS

Monday, September 17, 2007

The World Bank  
 600 19th Street, N. W.  
 H Building  
 Eugene Black Auditorium  
 Washington, D. C.

The hearing in the above-entitled matter came  
 on, pursuant to notice, at 9:02 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

0917 Day 7  
Assistant to the Tribunal

Court Reporter:

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1605

APPEARANCES:

On behalf of the Claimant:

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MR. R. TIMOTHY McCURUM  
MR. ALEX SCHAEFER  
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APPEARANCES: (Continued)

On behalf of the Respondent:

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1 PROCEEDINGS

2 PRESIDENT YOUNG: Good morning. We're ready  
3 to commence.

4 The schedule, as you will recall, is we will  
5 run from 9:00 to 10:30, and then from 11:00 to 1:00  
6 today, and the time available will be Claimant's time.  
7 Then we will tomorrow on the same schedule for  
8 Respondent, and then each party will have an  
9 additional hour on Wednesday morning, plus at that  
10 time we may have additional questions, as well, that  
11 we'll pose to the parties.

12 So, with that, does either party wish to  
13 raise anything as we commence?

14 MR. RONALD BETTAUER: Thank you,  
15 Mr. President.

16 Looking at the schedule for Wednesday  
17 morning, since we have at least one hour each and want  
18 to finish in the morning, we thought it might be  
19 useful to plan on--and Claimant has overnight to  
20 prepare for that one hour--perhaps we could have the  
21 nine to 10:00 for the Claimant and then take a  
22 two-hour break or two-and-a-half-hour break and start

2 gives us two-and-a-half hours to prepare for our  
3 response, and there is still enough time in between  
4 for you to ask questions.

5 PRESIDENT YOUNG: Mr. Bettauer, thank you. I  
6 will talk with my co-arbitrators, and we will tell you  
7 after the break what the precise schedule will be  
8 then, on Wednesday.

9 Thank you.

10 Mr. Gourley.

11 MR. GOURLEY: Good morning, Mr. President and  
12 Members of the Tribunal. I'm going to make a few  
13 brief remarks before turning this over to my  
14 colleagues for our closing.

15 I want to express first that this is a very  
16 important case, not just to Claimant who has lost--

17 (Interruption.)

18 PRESIDENT YOUNG: Continue.

19 CLOSING ARGUMENT BY COUNSEL FOR CLAIMANT

20 MR. GOURLEY: This is a very important case  
21 not just for Claimant, who has lost a very significant  
22 investment of \$49.1 million in value and \$15.2 million

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09:07:33 1 plus in restitution costs, but also for the  
2 international investment community.

3 Numerous other countries, Argentina, Egypt,  
4 Ecuador, Spain, Mexico, Canada, Turkey, have all been  
5 required by tribunals to pay compensation for their  
6 arbitrary and targeted acts similar to those at issue  
7 here, where these acts' measures have caused

8 significant economic loss to a foreign investor.

9           In fact, Argentina has been repeatedly held  
10 liable for acts which were focused on addressing of  
11 very serious economic crisis in their country, but  
12 nonetheless violated the protections offered under the  
13 various bilateral investment treaties.

14           If the United States, without compensation,  
15 without paying compensation to Glamis here can  
16 arbitrarily change the rules, as it has done on the  
17 Glamis Mine, it will undermine confidence that all the  
18 countries are subject to the same rules with respect  
19 to protection of foreign investors. There can be no  
20 economically powerful country exception to the  
21 investment protections offered under Chapter Eleven of  
22 NAFTA, which are similar, if not identical, to most of

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09:09:01 1 the bilateral investment treaties.

2           Now, you have a very large record to go  
3 through, and you've heard a lot of testimony and  
4 argument. Respondent has sought to put a gloss on the  
5 facts; and, contrary to the law of indirect  
6 expropriations, measures tantamount to an  
7 expropriation, they seek to carve up the various  
8 Federal acts and State acts as discrete events and  
9 want you to analyze them separately. I would like to  
10 refocus the Tribunal on precisely what happened here  
11 as--before we get into the details.

12           First of all, Glamis had a perfectly  
13 acceptable Plan of Operation for the Imperial Project.

14 There really is no dispute about that. Mr. Leshendok,  
15 with 30 years of experience with BLM in approving such  
16 plans, is unrebutted in his testimony that this plan  
17 was an acceptable mining plan that should have been  
18 approved, even with the discovery of significant  
19 Native American cultural values at that site.

20 Now, the actions of Respondent in denying the  
21 plan were not mistakes or administrative errors, as  
22 you're often--is often suggested by the cases on which

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09:10:21 1 Respondent relies. These were deliberate, intentional  
2 acts to elevate, contrary to the existing law,  
3 cultural resource values above the rights of the  
4 mineral right holder, Glami s Gold.

5 Now, Respondent has elected not to present to  
6 the Tribunal any of the DOI officials involved, but  
7 the documents themselves are clear, that the Imperial  
8 Project was ready for approval as early as early 1999.  
9 Yet Solicitor Leshy held it up in order to kill the  
10 Project, and that occurred on January 17, 2001, when  
11 Secretary Babbitt issued his Record of Decision, the  
12 ROD, just three days before leaving office.

13 Now, the Leshy Opinion clearly and unlawfully  
14 imposed a new legal standard for mines on Federal  
15 land, one that Interior had never thought previously  
16 existed, and one that Interior itself didn't itself  
17 seek to impose retroactively to pending plans of  
18 operation when it inserted a similar discretionary  
19 authority in the 2000 amendments to the 3809

20 regulations.

21           Accordingly, it was only the Imperial Project  
22 that was ever subjected to this discretionary veto

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09: 11: 41 1 authority.

2           Now, the Record of Decision not only wilfully  
3 disregarded applicable law by relying on Leshy's  
4 manufactured grounds for denial, but it also violated  
5 expressly the very promise in the California Desert  
6 Protection Act on which Glamis had relied in making  
7 its significant investment. That Record of  
8 Decision--and you will remember back in August we were  
9 shown the diagram from that Record of Decision on the  
10 impact of the Project would have to the site of Indian  
11 Pass and Picacho Peak, which were the withdrawn areas  
12 in that Act, but that the no-buffer-zone language, the  
13 specific and express purpose of that language is to  
14 prohibit agencies from regulating mines or affecting  
15 the operation of mines and other authorized activities  
16 for sight and sound related to the withdrawn areas.

17           So, the very connection of connecting the  
18 Imperial Site to those was exactly what the  
19 no-buffer-zone language was intended to prohibit, and  
20 yet that's what the Interior Department did.

21           Now, this expropriation of Claimant's mineral  
22 rights was never cured. You will hear frequently from

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09:13:13 1 Respondent that it was ephemeral, that the denial was  
2 rescinded, and that is true, but rescinding the denial  
3 does not approve the Plan of Operations, and that's  
4 what Glamis was entitled to. And because that was  
5 never corrected, the Federal measures have resulted in  
6 violations of both Articles 1110 and 1105.

7           Similarly, no matter how hard Respondent  
8 struggles to justify the State of California's  
9 measure, the Tribunal should not be misled there.  
10 Yes, S. B. 22, the statute, and the SMGB regs are  
11 separate measures, but they are inextricably  
12 intertwined, and they spring from the same single  
13 political motivation financed by Quechan, to kill the  
14 Imperial Project and not compensate Glamis for its  
15 significant loss.

16           And this is not a case where the Tribunal has  
17 to search for some hidden meaning or motive. Governor  
18 Davis, the Legislature, and numerous executive  
19 agencies have made it abundantly clear what their  
20 intent was, and it was to draw a statute and a  
21 regulation as narrowly as possible to affect only the  
22 Imperial Project. And they succeeded. They may have

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09:14:37 1 expressed other rationales, but the record clearly  
2 demonstrates that it was the Imperial Project they  
3 were after.

4           Now, just a few words about our presentation  
5 today. We are going to present it in a little

6 different structure. We will start with Article 1110,  
7 but only an aspect of it, and that is the aspect of  
8 categorical takings. Mr. Schaefer will first address  
9 the ripeness argument defense that Respondent has  
10 raised, and then he will address the law of  
11 categorical takings, showing that where the measures  
12 result in a full deprivation of the value of the  
13 property interest, then that ends the inquiry for the  
14 Tribunal.

15           Mr. McCrum will then walk you through the  
16 evidence that demonstrates that, in fact, this was a  
17 full deprivation of value, just as California thought  
18 it was, just as BLM thought it was, just as Glamis  
19 thought it was, and the only person who you will hear  
20 from who didn't think it was is Respondent's expert in  
21 this case.

22           After that, and only if the Tribunal doesn't

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09:15:56 1 find a full categorical taking, then it has to engage  
2 in the balancing that is required under less than  
3 categorical takings in expropriation under 1110, under  
4 the elements of fair and equitable treatment under  
5 1105, due process, arbitrariness, and legitimate  
6 expectations.

7           So, Mr. Schaefer will return to discuss the  
8 elements that you need to consider for a less than  
9 categorical taking under 1110, and Ms. Haque will  
10 address the standards of fair and equitable treatment  
11 under 1105.

12           After which we will then apply the facts to  
13 those standards, and Mr. McCrum will return to address  
14 the character of the Federal measures, both in terms  
15 of 1110 and 1105, as well as the reasonable  
16 expectations.

17           Ms. Hall will then address the cultural  
18 resources and demonstrate that the Imperial Project  
19 was, indeed, subjected to entirely different standards  
20 than any other projects before or after.

21           And, finally, Mr. Ross will address the  
22 character of the California measures. And if we can,

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09:17:19 1 in fact, do that all in three-and-a-half hours, I will  
2 return briefly to discuss the compensation we seek.

3           So, with that, and with the Tribunal's  
4 permission, I'd like to turn it over to Mr. Schaefer.

5           MR. SCHAEFER: Mr. President and Members of  
6 the Tribunal, good morning. My name is Alex Schaefer.  
7 It's my privilege to present to you today a brief  
8 overview of NAFTA's Article 1110, its meaning and  
9 structure in the broader context of U.S. international  
10 law. My goal here really is to identify and discuss  
11 with the Tribunal the legal standards applicable to  
12 our 1110 claim so that you can evaluate the factual  
13 record, which my colleagues will walk through later on  
14 this morning.

15           I would like to begin by explaining why the  
16 1110 claim is actionable now. This is what Respondent  
17 has referred to as ripeness, which, of course, is a

18 domestic U. S. law principle. I will then go on to  
19 address the legal standard for confiscatory or total  
20 takings, which under both international and U. S.  
21 domestic law, provides for compensation without the  
22 need for any further balancing.

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09: 18: 23 1 Before I get into the scope of 1110' s  
2 coverage and what a Claimant is required to show in  
3 terms of merits, I would like to talk a little bit  
4 about the jurisdictional issue that Respondent has  
5 raised; namely, its argument that Glamis' s claim is  
6 not yet ripe because the measures allegedly had not  
7 been applied.

8 Now, Respondent has cited several domestic  
9 and international cases that they contend support that  
10 position, and they repeated that point during their  
11 lengthy oral argument. But if you look at the cases  
12 that Respondent has cited, and if you look at Whitney  
13 Benefits, which the Tribunal has asked us explicitly  
14 to address, it' s clear that these decisions don' t  
15 actually support Respondent' s position at all. The  
16 reason that they don' t is that in each of these cited  
17 cases, what the measures at issue did was create the  
18 possibility of a future deprivation, and that' s not  
19 our case.

20 This is particularly true with respect to the  
21 Iran- U. S. Claims Tribunal cases that Respondent cites.  
22 For example, in the Mohtadi case that Respondent

09: 19: 21 1 cites, the measure at issue was a law that provided  
2 that the Iranian Government would expropriate the  
3 Claimant's property if that property was not developed  
4 or improved within three years. Because there were  
5 contingent findings and events that had to take place  
6 before the Government would take the property, the  
7 Tribunal determined the mere passage of the Act had  
8 not effected a taking of that property. We'd note,  
9 too, that that case, like most of the cases cited by  
10 the Respondent in this regard, was brought as an  
11 actual expropriation case which, of course, typically  
12 requires the transfer of title as a precondition for  
13 bringing a claim.

14           Respondent's own excerpt from the Pobrica  
15 Decision really highlights this point, so I would like  
16 to put it up on the screen, if we could.

17           This is from footnote 526 to Respondent's  
18 Counter-Memorial. The mere enactment of a law under  
19 which property may later be nationalized does not  
20 create a claim. A claim for nationalization or other  
21 taking of property does not arise until the possession  
22 of the owner is interfered with. The Malek Decision

09: 20: 29 1 that the Respondent cites involves yet another  
2 situation in which the deprivation had not yet  
3 occurred and indeed, was uncertain. In that case,

4 which involved what the Claimant alleged to be a  
5 forced sale of real property to an Iranian bank, the  
6 Tribunal pointed out that, and we have this on the  
7 screen as well, according to Article 34, the debtor  
8 had eight months within which to pay the debt and  
9 thereby retain title to the building. Alternatively,  
10 within six months after the same date, i. e., 9  
11 November, 1981 or until 9 May, 1982, the owner of the  
12 property had the right to request that the building be  
13 sold at auction with the surplus being returned to the  
14 debtor. Thus, the alleged loss of property did not  
15 become irreversible until May 1982.

16 So, the upshot of all of these cases, as well  
17 as Williamson County, which I will discuss in a  
18 moment, is that passage of a measure which creates  
19 only the possibility of a future deprivation, whether  
20 by the later exercise of discretion or contingent on  
21 intervening events, or by the later implementation of  
22 a statutory procedure, isn't sufficient to support an

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09: 21: 32 1 expropriation claim. As I said, that's not our case.

2 Glamis's situation, as we will review later  
3 on this morning, is entirely different because Glamis  
4 already has experienced an actual deprivation rather  
5 than the threat of a possible one, with no possibility  
6 of relief. This is more than adequately demonstrated  
7 by the fact that neither BLM nor Imperial County have  
8 seen fit in over six years to take any further action  
9 on Glamis's still pending Plan of Operations. The

10 deprivation began when the Federal Government  
11 unlawfully refused to approve Glamis's Plan of  
12 Operations in January 2001. As Mr. Gourley mentioned,  
13 it has never been cured.

14           While the actual denial was rescinded, that  
15 didn't end the confiscatory taking because the  
16 perfectly acceptable Plan of Operation was never  
17 approved. The rescission of the denial just put  
18 Glamis right back into processing limbo which, when  
19 combined with California's measures, sealed the  
20 Project's fate and Claimant's injury.

21           Now, Respondent would like to lay the  
22 responsibility for its own continued inaction at the

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09:22:36 1 Federal level at Glamis's feet. They argue that  
2 Glamis should have more forcefully insisted that  
3 Respondent fulfill its own obligation. Of course,  
4 Respondent hasn't identified a single action that  
5 Glamis could have taken that would have any legal  
6 significance or that could in any way compel  
7 Respondent to continue the processing. And Glamis  
8 isn't aware of any means by which it can do so. The  
9 fact is that Respondent has always been free to  
10 process Glamis's plan and it's just refused to do so.

11           The reason that it's refused to do so is that  
12 everybody involved, again other than perhaps the State  
13 Department lawyers, accepts that the California  
14 measures killed the Project and ensured that the  
15 Federal expropriation couldn't be cured. That's why

16 Respondent couldn't introduce any testimony from any  
17 California or Interior officials which could even  
18 suggest that there was anything that Glamis could do  
19 that would make any difference.

20           And also, with respect to Respondent's  
21 surprising notion that Glamis's pursuit of this  
22 proceeding somehow stopped the processing, I guess

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09:23:37 1 we'd just note that Glamis's actions to enforce its  
2 rights should motivate Respondent to correct the  
3 problem, not to quarantine it. In fact, encouraging  
4 that sort of correction is precisely why NAFTA's  
5 Article 1118 urges negotiated settlement of claims,  
6 and why it further provides in Article 1119 a  
7 mandatory consultation period. Respondent in this  
8 case didn't take advantage of that period, again  
9 because it knows futility when it sees it. Indeed,  
10 there are numerous cases, Metalclad is a good example,  
11 in which the host country continued to act after the  
12 initiation of the arbitration. Respondent hasn't  
13 identified anything that precluded it from doing so in  
14 this case.

15           Now, on the subject of futility, the Tribunal  
16 has requested that we discuss the Whitney Benefits  
17 decision and its implications for the ripeness issue.  
18 As we've said in our papers, Whitney Benefits is  
19 squarely on point. In that case, the Court of Federal  
20 Claims and the Federal Circuit rejected the very same  
21 argument that the Respondent now offers; namely, that

22 plaintiff's property, and I'm quoting here, "could not

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09:24:42 1 have been taken until their application for a mine  
2 permit actually was denied." The Court held that  
3 further processing of plaintiff's permit would have  
4 been futile because--and if we could have that quote  
5 on the screen--"when a statute prohibiting surface  
6 coal mining is enacted, at least in part, specifically  
7 to prevent the only economically viable use of a  
8 property, an official determination that the statute  
9 applies to the property in question is not necessary  
10 to find that a taking has resulted."

11 In this case, we submit that the initial  
12 Federal denial and the subsequent California measures  
13 were enacted wholly to prevent the only economically  
14 viable use of Glamis's property. Even Respondent  
15 concedes that they were enacted at least partly to do  
16 so. They've repeatedly made the argument, for  
17 example, that measures frequently arise in response to  
18 specific situations and that that doesn't make those  
19 measures discriminatory.

20 Now, we think their argument about  
21 discrimination is unsustainable on the facts here; but  
22 in any event, it's clear the measures were enacted, at

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09:25:44 1 least in part, to stop the Project. Here there is no

2 economically viable plan, as Mr. McCrum will  
3 demonstrate in a few moments, that could extract gold  
4 from the Imperial Project while satisfying the  
5 mandatory complete backfill and site recontouring  
6 requirements.

7           Now this aside, during its oral argument The  
8 Respondent implied that there was some possibility  
9 that California wouldn't enforce its own requirements  
10 or that the mechanics of that enforcement are somehow  
11 unclear or unpredictable. There is just no basis for  
12 that at all. Neither the emergency regulations nor  
13 S. B. 22 provides for any variance procedure, and  
14 neither allows for any discretion as to  
15 implementation.

16           And that, by the way, is why the Williamson  
17 County decision Respondent has relied upon is  
18 inapposite. The law at issue in that case explicitly  
19 included a variance procedure that Claimant didn't  
20 invoke, so the Supreme Court said that the impact of  
21 the law on the property couldn't be determined. Here,  
22 unlike in Williamson County, there is, "a definitive

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09:26:45 1 position regarding how it will apply the regulations  
2 at issue to the particular land in question, and  
3 that's the formulation from the Whitney Benefits,  
4 because only one way that the law can be applied.

5           We'd also note that in response to the  
6 Tribunal's question on the subject of variances,  
7 Respondent pointed out the only exception, which

8 involves situations in which there is not enough  
9 material to backfill the pit. If we've learned  
10 anything else from the various expert reports in this  
11 proceeding, we've learned that Glamis was going to  
12 have more waste rock than hole to put it in. In other  
13 words, the exception can't possibly apply. There is  
14 no reason or legal basis to require Glamis to do  
15 anything more than it has already done, which was to  
16 submit the only economically viable plan for  
17 extracting gold at the Imperial Site, a plan that  
18 calls for partial backfill.

19           The Tribunal in Ethyl Corp. v, Canada noted  
20 as much when it found that under international law,  
21 Claimant need not perform a futile act as a  
22 prerequisite to bringing what in that case was an 1118

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09:27:42 1 claim. The certainty of the result in this case is  
2 why Glamis's property interests already have already  
3 been entirely devalued, and that devaluation is why  
4 the case is ripe.

5           Finally, just a quick word about preemption.  
6 In desperation, to suggest something that Glamis might  
7 do, Respondent has argued that Glamis should have  
8 pursued a preemption claim in Federal court prior to  
9 bringing this action simply because Glamis previously  
10 sought to encourage Respondent to rein in the State of  
11 California. Putting aside that NAFTA doesn't include  
12 an exhaustion requirement, we'd note that Claimant has  
13 never argued in this arbitration that the California

14 measures were preempted. In any event, literally,  
15 just pages after arguing that Glamis should have  
16 pursued that avenue, Respondent rejects its own  
17 suggestion and notes that, "In any event, neither the  
18 Sacred Sites Act or SMARA is preempted by Federal  
19 law." That appears on page 16 of Respondent's  
20 Rejoinder Memorial.

21 Thus, just as Respondent would apparently  
22 require Glamis to prepare a futile new proposal

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09:28:48 1 without ever explaining why the current pending one  
2 can't be acted upon. It would also have Glamis pursue  
3 what it contends would be futile litigation. There is  
4 no reason why Glamis should pursue that course prior  
5 to bringing its NAFTA claim.

6 To sum up, Glamis already has been deprived  
7 of the value of its investment. Glamis cannot mine  
8 absent approval by Interior, and the agency has  
9 steadfastly refused to grant such approval,  
10 notwithstanding the total absence of any legal basis  
11 for withholding it. Even if it were to approve it,  
12 there are no variance procedures in the California  
13 requirements that Glamis can invoke, and there is no  
14 exception to them for which Glamis could qualify.  
15 Under Whitney Benefits, the fact that Glamis has not  
16 undertaken a review process with a predetermined  
17 outcome does not compromise the ripeness of the claim;  
18 and, accordingly, the Tribunal should reject  
19 Respondent's ripeness argument.

20 I would like to turn at this point to Article  
21 1110 and briefly summarize the legal standards that it  
22 incorporates with respect to complete takings.

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09:29:55 1 In our opening statement, we pointed out that  
2 Article 1110 incorporates the international law  
3 standard as to what constitutes measures tantamount to  
4 expropriation; and that that standard, in turn, is  
5 heavily influenced by U.S. Fifth Amendment takings  
6 jurisprudence. Under U.S. law, measures that do not  
7 merely implement preexisting background principles  
8 are, per se, compensable where their effect is to  
9 entirely destroy the value of the property interest at  
10 issue. In such instances, which the Lucas court  
11 referred to as categorical takings, no further inquiry  
12 or balancing of other factors is required or  
13 appropriate. It is only where a measure affects a  
14 substantial but incomplete reduction in the value of  
15 property right that U.S. courts will undertake the  
16 balancing exercise laid out in the Penn Central line  
17 of cases. The Supreme Court's recent decision in  
18 Lingle v. Chevron lays this framework out quite  
19 clearly. Here is what the Lingle court said, if we  
20 could have that quote: "Our precedents stake out two  
21 categories of regulatory action that generally will be  
22 deemed a per se takings for Fifth Amendment purposes.

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09: 31: 03 1 A second categorical rule applies to regulations that  
2 completely deprive an owner of all economically  
3 beneficial use of her property. We held in Lucas that  
4 the Government must pay just compensation for such  
5 total regulatory takings except to the extent that  
6 background principles of nuisance and property law  
7 independently restrict the owner's intended use of the  
8 property. Outside these relatively narrow categories  
9 and the special context of land use exactions,  
10 regulatory takings challenges are governed by the  
11 standards set forth in Penn Central. "

12           And just to be clear, I should note that the  
13 reference in that quote to land use exactions refers  
14 to situations in which the government demands an  
15 easement or similar right in exchange for the granting  
16 of a permit. Supreme Court has a separate line of  
17 cases addressing those limited issues, but that  
18 framework's not relevant to the facts here.

19           As Professor Wälde has pointed out,  
20 international law incorporates the same standard with  
21 respect to expropriation that Lucas and Penn Central  
22 lay out for takings. You see this, for example, in

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09: 32: 02 1 the Tecmed decision in which the Tribunal used the  
2 severity of economic impact as the basis for  
3 distinguishing between regulatory measures on the one  
4 hand and de facto expropriations on the other.

5           And that brings me to the Tribunal's question

6 about the methodology that it should employ to  
7 evaluate Glamis's 1110 claim. Because the  
8 international law standard for expropriation is in  
9 harmony with U.S. jurisprudence as to categorical  
10 takings, we submit that if the Tribunal finds that the  
11 Federal and California measures deprived Glamis of the  
12 full value of its property right, then no assessment  
13 of reasonable investment-backed expectations or  
14 character is required. If, on the other hand, the  
15 Tribunal should find a significant but not total  
16 deprivation, then assessment of those factors is  
17 appropriate. And I will discuss the mechanics of that  
18 assessment later on this morning.

19 Now, when it comes to categorical takings,  
20 the Lucas case lays out an exception to the default  
21 rule of per se compensation. Lucas states that laws  
22 and regulations that merely specify preexisting

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09:33:05 1 limitations on property rights are not compensable  
2 takings. Respondent and its expert Professor Sax have  
3 argued that in this case, the Sacred Sites Act and the  
4 Surface Mining and Reclamation Act give rise to  
5 background principles that S.B. 22 and the SMGB  
6 regulations merely specify. You will note that this  
7 entirely ignores the Federal measures, which  
8 Respondent doesn't allege specified any such  
9 principle.

10 Even as to just to California measure,  
11 though, Respondent is simply wrong both on the law and

12 on the facts. There's been a great deal of ink  
13 spilled on this question already, but I would like to  
14 highlight just a few of the key points that  
15 demonstrate why neither of the California measures was  
16 or could have been the specification of a background  
17 principle that limited Glamis's property rights under  
18 the Lucas framework.

19           Former Solicitor General Olson has opined in  
20 this case that neither the Sacred Sites Act nor SMARA  
21 is a preexisting background principle that  
22 circumscribed Glamis's rights within the meaning of

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09:34:04 1 Lucas. Relying on Lucas's plain language, Mr. Olson's  
2 rebuttal statement notes that since the prohibition  
3 must already exist, any grandfather clause is  
4 inconsistent with a finding that the measure is the  
5 mere expression of a background principle. In other  
6 words, if the use is already unlawful--

7           ARBITRATOR CARON: Counsel, I think our  
8 recorder is asking that you slow down the pace of the  
9 words, not just the pause between sentences.

10           MR. SCHAEFER: Oh. Thank you very much,  
11 Professor Caron.

12           If the use is already unlawful, the time for  
13 grandfathering is over. Your grandfather, as  
14 Professor Sax submits, preexisting projects from new  
15 requirements, not from existing ones. Mr. Olson  
16 points to the language in Lucas indicating that  
17 differential treatment of similarly situated parties

18 ordinarily indicates the absence of a background  
19 principle. Since both of the California measures  
20 include grandfather clauses that treat similarly  
21 situated mines differently, based entirely on whether  
22 or not they had approved reclamation plans, he

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09:35:23 1 concludes that they cannot be the expression of a  
2 background principle.

3           Mr. Olson also points out that this  
4 differential treatment distinguishes the California  
5 measures from the one at issue in the American Pelagic  
6 case on which Respondent relies. In that case, there  
7 was no suggestion that the law at issue, which was a  
8 Federal statute that abrogated the right to fish in a  
9 particular zone, applied to some fishermen but not to  
10 others. And we would simply add that in American  
11 Pelagic the Federal Circuit found that fishing in that  
12 zone was entirely subject to the preexisting  
13 discretion of the U.S. Government. There was simply  
14 no unqualified right to fish in that area.

15           The background principle was the preexisting  
16 absolute discretion to give or withhold a fishing  
17 permit. There was no such absolute discretion in this  
18 case either at the Federal or at the State level.  
19 Respondent attempts to refute Mr. Olson's report in  
20 several different ways. None of them survive  
21 scrutiny.

22           First, in oral argument, Respondent noted

09: 36: 27 1 that, and if we could have the next slide. Respondent  
2 noted that future and existing mines are not  
3 necessarily similarly situated, and thus, they need  
4 not be subject to the same controls. This is at page  
5 1064 of the transcript. I apologize. I think that we  
6 may have a cross-up with the slides.

7           So, respondent noted that future and existing  
8 mines are not necessarily similarly situated, and thus  
9 they need not be subject to the same controls. This  
10 consideration applies with particular force where, as  
11 here, the challenged measures concern reclamation  
12 requirements. While existing mines may already have  
13 had such plans approved, and, in fact, existing mines  
14 may have already finished mining altogether, they may  
15 be fully reclaimed and abandoned.

16           But that's circular. It's the mandatory  
17 reclamation requirements that are at issue. The fact  
18 that existing mines are exempted while future mines  
19 are not is the very inconsistency that Mr. Olson  
20 identifies. It proves that the requirement is new and  
21 not preexisting. That disparate treatment can't be a  
22 basis for a finding that the mines are not similarly

09: 37: 42 1 situated.

2           Separately Respondent contends that with this  
3 similarly situated notion, Glamis is impermissibly

4 requiring the government to apply preexisting  
5 prohibitions in all possible cases. Well, that's  
6 bootstrapping because it presupposes that which is to  
7 be proved; namely, that there is a preexisting  
8 prohibition in the first place. The question is not  
9 whether given such a existing prohibition the  
10 Government must implement it at every possible  
11 opportunity or whether failure to do so confers a  
12 property right. The question is what differential  
13 treatment of similarly situated actors tells us about  
14 whether there is such a preexisting prohibition at  
15 all. As Mr. Olson points out, Lucas is clear on this,  
16 holding that such differentiation indicates an absence  
17 of a preexisting prohibition.

18           Respondent's only answer to this is an  
19 attempted end run around the issue. It argues that  
20 the pertinent language in Lucas doesn't apply where  
21 the preexisting prohibition is based on a statute  
22 rather than on a common law nuisance principle--or,

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09: 38: 49 1 excuse me, a common law principle such as nuisance.

2           As a result, Respondent seeks to foreclose  
3 any inquiry into whether there is, indeed, a  
4 background principle, since it has helpfully pointed  
5 the Tribunal to the pertinent statutes. This is  
6 wrong-headed. Respondent doesn't provide any  
7 authority for this proposition; and, indeed, it cannot  
8 because there is no basis in Lucas to distinguish  
9 between common law and statutory background

10 principles. If anything, the converse of Respondent's  
11 argument is true. Common law principles must be  
12 discerned through their application in specific cases,  
13 but for a statutory prohibition to be a background  
14 principle, it must as written prohibit the use  
15 contemplated for the property. Neither statute on  
16 which Respondent relies does that.

17 As Mr. Olson points out, the background  
18 principles exception in Lucas is an affirmative  
19 defense. It falls to Respondent to demonstrate that  
20 there was such a principle and that it effected a  
21 prohibition of the activity in question. Respondent  
22 has failed to make that showing as to either the

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09:39:51 1 Sacred Sites Act or SMARA, and I would like to review  
2 those quickly, in turn.

3 During oral argument, Respondent conceded  
4 that Lucas requires that the expression of a  
5 background principle mere duplicate the result that  
6 could have been obtained in court. Yet with respect  
7 to the Sacred Sites Act, there is simply no indication  
8 anywhere on the record that the Act's prohibition on  
9 causing severe or irreparable damage to Native  
10 American sacred sites ever was intended to or could  
11 prohibit activities on Federal lands, much less that  
12 it could have served as the basis for an injunction of  
13 the Imperial Project. Indeed, prohibition of such  
14 activities would be unconstitutional, as Mr. Olson's  
15 expert report points out. Article IV(3) clause two of

16 the U. S. Constitution states that, "Congress shall  
17 have the power to dispose of and make all needful  
18 rules and regulations respecting the territory or  
19 other property belonging to the United States.  
20 Glamis's mining claims on Federal lands are property  
21 rights defined by the Federal Government. Although  
22 the State with Federal permission may regulate how

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09:41:02 1 these activities are conducted, it may not affect a  
2 de facto prohibition of them. So the Sacred Sites Act  
3 cannot, as Respondent suggests, be the basis for any  
4 prohibition of mining on Federal lands.

5           Putting aside whether the Act's application  
6 on Federal lands would be constitutional, in our reply  
7 Memorial at pages 34 to 37, we've analyzed the  
8 language of the Sacred Sites Act, as well as its  
9 legislative history and the legal regime in which it  
10 falls. We've demonstrated that it was not intended to  
11 and did not restrict the Federal Government's  
12 activities on its lands.

13           In addition, we've pointed out that neither  
14 the Federal nor California State Government ever  
15 raised it during the nearly decade-long review of the  
16 Imperial Project or, indeed, with respect to any other  
17 project in California, including, as I will discuss a  
18 moment, the road at issue in Lyng Case. We pointed  
19 out that each of the two EIS/EIRs includes a laundry  
20 list of applicable statutes. Neither of those  
21 mentions the Sacred Sites Act.

We pointed out that the Sacred Sites Act was

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09: 42: 05 1 not raised in the context of the Lyng Case in which  
2 California was desperately trying to prevent a road  
3 from being built on Federal lands to facilitate  
4 private logging in a national forest. In short, the  
5 first time anybody ever heard of the Sacred Sites Act  
6 as being specifically applicable to the Imperial  
7 Project or, indeed, any other mining project on  
8 Federal lands was in this arbitration.

9 Now, Respondent would have the Tribunal  
10 believe that this was simply a strategic decision by  
11 California. At oral argument, Respondent speculated  
12 that the State could have gone to court and used the  
13 Sacred Sites Act to ensure the same requirements as  
14 those set forth in S.B. 22, but may simply have chosen  
15 not to do so for tactical reasons. Of course,  
16 Respondent hasn't provided any authoritative opinion  
17 from California's Attorney General or indeed from any  
18 California officials to support that position, or even  
19 to support the position that the Act could restrict  
20 activity on Federal lands. It's not surprising that  
21 they haven't provided that because the State clearly  
22 disagrees. As we've pointed out, the Enrolled Bill

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09: 43: 11 1 Report of S.B. 22 report itself warned that without

2 the legislation, the project would otherwise go  
3 forward under current law. That's in paragraph 374 of  
4 our Memorial.

5 So, Respondent would have the Tribunal  
6 believe that the Sacred Sites Act applied and could be  
7 the basis to stop the Project, but that nobody in the  
8 State of California knew that to be the case. It's  
9 not credible.

10 Respondent also doesn't dispute that the  
11 Sacred Sites Act has never been invoked as to any  
12 projects in the California Desert, even though as  
13 Dr. Sebastian has testified, a number of them have had  
14 a substantial impact on Native American sacred sites.

15 During oral argument Respondent sought to  
16 turn this around with a double negative contending  
17 that there's no evidence that the Sacred Sites Act  
18 wasn't enforced with respect to those other projects.  
19 In other words, Respondent argues that there isn't any  
20 evidence that the Act didn't apply. Respondent  
21 elaborated on this during oral argument noting that  
22 the fact that the State chooses to clarify a

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09:44:10 1 background principle with a particular piece of  
2 legislation rather than going to court doesn't  
3 demonstrate the nonexistence of the background  
4 principle.

5 But that turns the burden of proof on its  
6 head. Again, as former Solicitor General Olson points  
7 out, the background principles argument is an

8 affirmative defense. As such, it is not Glamis's duty  
9 to using Respondent's formulation demonstrate the  
10 nonexistence of the background principle. Rather, it  
11 falls to Respondent to prove the elements of its  
12 defense, including that the Sacred Sites Act did apply  
13 to the Imperial Project. They failed to do that.

14 Respondent also has argued that SMARA  
15 operated as a background principle that prohibited  
16 hardrock/metallic mining, although not other types of  
17 mining, without mandatory complete backfilling and  
18 site recontouring. This too fails because neither  
19 SMARA nor its implementing regulations included any  
20 such prohibition before the measure in question.

21 What SMARA does is empower the SMGB to issue  
22 reclamation regulations that implement SMARA's

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09: 45: 15 1 explicit balancing of mineral development on the one  
2 hand and site reclamation on the other. In that  
3 sense, SMARA is a mixed use statute, as its language  
4 clearly shows.

5 The statute provides that reclamation of  
6 mined lands which are elsewhere defined as lands where  
7 mining was, is, or will be conducted, will permit the  
8 continued mining of minerals. In that context, it  
9 provides that reclamation must provide for the  
10 protection and subsequent beneficial use of the mine  
11 and reclaimed lands. When you read these provisions  
12 together, it's clear that the subsequent beneficial  
13 use could include further mining. It's an important

14 fact because, as Mr. Ross is going to discuss this  
15 morning, it was that consideration, among others, that  
16 lead the lead agencies in California to reject  
17 complete backfilling in numerous mining operations.  
18 It was not, as Respondent contends, a simple case of  
19 the agency's failing to implement SMARA standards.  
20 Regulations based on this principle of mixed  
21 use were in place when Glamis filed its Plan of  
22 Operations, and they did not mandate complete

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09:46:26 1 backfilling and site recontouring from metallic mines.  
2 In fact, generally speaking, they didn't mandate any  
3 particular reclamation requirements for metallic mines  
4 or for any other type of mine because reclamation  
5 under SMARA is explicitly a site-specific process.

6 Indeed, SMARA Section 2773(a) states, and  
7 let's put this on the screen as well, the Reclamation  
8 Plan shall be applicable to a specific piece of  
9 property or properties, shall be based upon the  
10 character of surrounding area and such characteristics  
11 of the property as the type of overburden, soil  
12 stability, topography, geology, climate, stream  
13 characteristics and principal mineral commodity, and  
14 shall establish site-specific criteria for evaluating  
15 compliance with the approved reclamation plan  
16 including, including topography, revegetation, and  
17 sediment and erosion control.

18 Now, let's put Section B of that same  
19 provision up on the screen. This provision requires

20 that by January '92, the Board shall adopt regulations  
21 specifying minimum verifiable statewide reclamation  
22 standards, and it provides a laundry list of the

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09:47:39 1 standards to be set.

2           If we go to our next slide, let's look at the  
3 language that follows that laundry list. These  
4 standards shall apply to each mining operation, but  
5 only to the extent that they are consistent with the  
6 planned or actual subsequent use or uses of the mining  
7 site.

8           And this concluding sentence, which  
9 Respondent ignores, again the statute requires that  
10 reclamation measures be developed on a site-specific  
11 basis. SMARA thus doesn't mandate complete  
12 backfilling and site recontouring. In fact, it  
13 doesn't mandate backfilling at all. It simply  
14 indicates that some backfilling may be required in  
15 certain instances, again to be determined on a  
16 site-specific basis. The California measures, by  
17 contrast, ignore SMARA's directive to evaluate  
18 reclamation plans on a site-specific basis and, for  
19 the first time, created a nondiscretionary,  
20 prophylactic, complete backfilling and recontouring  
21 requirement limited exclusively to the very small  
22 class of new metallic mines.

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09: 48: 43 1           Turning back to the Lucas framework, then,  
2 SMARA could not be a background principle that the  
3 measures merely expressed. Since SMARA is explicitly  
4 site-specific and does not mandate any backfilling,  
5 let alone complete backfilling and site recontouring,  
6 a measure that create such a mandate while  
7 simultaneously eliminating the site-specific  
8 consideration required by the statute cannot possibly  
9 be the mere expression of a principle in that statute.

10           To conclude, Respondent has failed to meet  
11 its burden of proof with respect to its affirmative  
12 defense. The California measures couldn't have been  
13 the expression of the background principle in the  
14 Sacred Sites Act because that Act didn't apply to the  
15 Imperial Project, and Respondent has failed to show  
16 otherwise.

17           Likewise, those measures could not have been  
18 the expression of a background principle in SMARA  
19 because they ignored SMARA's directive that  
20 reclamation be site-specific, and they created a  
21 mandatory full backfilling requirement that the  
22 statute doesn't contain and that is inconsistent with

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09: 49: 43 1 the statute's very design. Accordingly, and  
2 consistent with both U. S. Fifth Amendment  
3 jurisprudence and international law, to the extent  
4 that the Tribunal finds that the measures at issue in  
5 this proceeding deprived Glamis of the full value of

6 its investment, the Tribunal must also find that  
7 compensation is owing.

8           At this point I will turn it over to my  
9 colleague, Mr. McCrum, who's going to review the  
10 evidence demonstrating conclusively that the original  
11 failure to approve the Imperial Project and the  
12 subsequent California and position of mandatory  
13 backfilling and site recontouring utterly destroyed  
14 the value of Glamis's mineral claims.

15           Thank you.

16           PRESIDENT YOUNG: Thank you.

17           Mr. McCrum?

18           MR. McCRUM: Good morning, Mr. President and  
19 Members of the Tribunal.

20           We will now turn to the issue of the  
21 valuation of the Glamis Imperial Project before and  
22 after adoption of the California measures, and we will

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09: 50: 40 1 summarize the evidence that has been put forth into  
2 the record on this issue as a result of the hearing  
3 and the memorial submissions.

4           Now, Claimant relies on the findings of  
5 Mr. Bernard Guarnera, President of Behre Dolbear, who  
6 you heard testify, and he has concluded that the fair  
7 market value of the Glamis Imperial Project as of  
8 December 11, 2002, was \$49.1 million, and after  
9 enactment of California complete backfilling and site  
10 regrading regulations, the value was minus  
11 8.9 million.

12           And as Mr. Guarnera has testified, the effect  
13 of the measures obviously was to completely destroy  
14 any economic value that was present, and the  
15 destruction of the economic value has been very  
16 clearly demonstrated by the fact that nobody wants it.

17           Mr. Guarnera's testimony has been  
18 corroborated by the testimony of Mr. Kevin McArthur,  
19 CEO of Goldcorp, Inc., Glamis Gold, Limited, who  
20 testified that California's complete backfilling  
21 regulations had a stunning, devastating effect on our  
22 company and the Imperial Project's value. I mean, it

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09: 51: 57 1 rendered the Imperial Project worthless.

2           These findings are consistent with the U. S.  
3 Bureau of Land Management September 2002 Mineral  
4 Report at page three in the record finding that  
5 complete backfilling was not economically feasible.

6           Now, first I will go over some introductory  
7 comments on the valuation topic. As of late on Friday  
8 at the August hearing session, there appeared to be a  
9 consensus emerging among the parties that the primary  
10 relevant date of valuation for the alleged  
11 expropriation is December 12, 2002. That is the date  
12 of the adoption of the California emergency  
13 backfilling regulations, and that is the date that  
14 Behre Dolbear has always stated is its view of the  
15 proper date for valuation of the alleged  
16 expropriation.

17           The parties also agree on the valuation

18 approach. What would a reasonable buyer offer and a  
19 reasonable seller accept for the mineral property with  
20 both having reasonable knowledge of the facts. Yet,  
21 as we will see, the Respondent's expert, Navigant,  
22 repeatedly errs by treating this as if it were a

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09:53:09 1 company being valued, not a mineral property.

2 In general, we see Navigant and Norwest  
3 selectively pick and choose from Glamis documents and  
4 ignoring inconsistent information, and we will review  
5 examples of this in detail. For example, while  
6 repeatedly claiming its swell factor is the same as  
7 Glamis's, it fails to show that Glamis ever used an  
8 assumed swell factor that they seize upon in various  
9 Glamis documents.

10 The Navigant and Norwest analysis are  
11 infected by their lack of qualifications to appraise  
12 metallic mineral property and the failure to comply  
13 with standards, all of which emphasize the need to  
14 have the valuation done by qualified persons. In  
15 fact, a guidance issued by the United States Justice  
16 Department requires such expertise, as we will show.

17 Now, as we'll recall from the evidentiary  
18 hearing, there is a--there are several issues that are  
19 involved in this valuation of the Glamis Imperial  
20 Project gold or body that we will all recall. Is the  
21 overburden dominantly on unconsolidated gravel or  
22 cemented conglomerate? What geologic information was

09: 54: 27 1 available to determine the rock type and what did it  
2 indicate? What geotechnical reports were available to  
3 classify the rock type and what did they indicate?  
4 Would a site visit have assisted with the valuation?  
5 Were rock core samples available and what did they  
6 indicate? What swell factor would apply to the rock  
7 types at the site and what cost implications did this  
8 pose for the backfilling?

9           Are there other issues that we heard  
10 testimony on, include what swell factors were typical  
11 at metallic mine sites? What settlement would know  
12 expected in the backfilled pit? What are the  
13 differences between mineral resources and mineral  
14 reserves? And how do gold heap-leaching costs compare  
15 with gold milling operations? Was underground mining  
16 a feasible option at the Imperial Site? Were deep  
17 geologic vein features present or indicated?

18           I think it is obvious that metallic mineral  
19 valuation experience is critical to evaluate these and  
20 other related geotechnical and mining engineering  
21 issues that are involved in this valuation.

22           And so, let's turn to our review of the

09: 55: 35 1 experience that we have associated with the experts in  
2 this case.

3           Mr. Guarnera, President of Behre Dolbear, has

4 a B. S. degree in geological engineering, master's  
5 degree in economic geology. He is a longstanding  
6 Certified Mineral Appraiser, Registered Professional  
7 Engineer, and professional geologist, member of the  
8 Society of Mining Engineers and serves on their  
9 Special Committee for Resources and Reserves.

10 Behre Dolbear has provided mineral appraisal  
11 training services to the World Bank.

12 Most of Mr. Guarnera's work involves mineral  
13 valuations. Behre Dolbear's clients include mining  
14 companies and major financial institutions of which  
15 they are considered the preferred consultant for these  
16 major financial institutions.

17 Behre Dolbear's mineral valuation clients  
18 also have included governments around the world, the  
19 Government of Saudi Arabia, the Government of Jordan,  
20 Government of Nigeria, and the United States Justice  
21 Department, as Mr. Guarnera testified.

22 Mr. Guarnera personally has valued mineral

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09: 56: 45 1 deposits on every continent of the world, except  
2 Antarctica he testified.

3 Mr. Guarnera was assisted by qualified  
4 professionals with metallic mineral valuation  
5 experience, and applied standards and methodologies  
6 consistent with past practices.

7 Turning to the qualifications and experience  
8 of the Norwest team - I'm sorry, the Navigant team - the  
9 primary valuation expert for the United States,

10 Mr. Kaczmarek, relied on Norwest for all geologic and  
11 mining engineering aspects of the valuation.

12 Mr. Conrad Houser was the lead member of the  
13 Norwest team. Mr. Houser does not have a degree in  
14 mining engineering or geology, and notably, Mr. Houser  
15 testified that he never visited the Imperial Project  
16 site.

17 Mr. Houser is not a Certified Mineral  
18 Appraiser. He had a variety of past involvement with  
19 fuel minerals, including coal and synfuels and a  
20 particular experience with the World Trona Company,  
21 involving a sodium mineral operation that resulted in  
22 no trona being produced, but he clearly did not have a

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09:57:54 1 demonstrated involvement with metallic mining  
2 operations. In fact, he has no demonstrated  
3 qualifications with a valuation of disseminated gold  
4 deposits, which we have at issue here. Mr. Houser  
5 acknowledged that he was assisted by Mr. Stubblefield,  
6 who was primarily experienced with coal mining and  
7 some iron ore mining. And Mr. Houser was largely  
8 unfamiliar with the questionable gold mining operation  
9 experience of his one colleague, Mr. Moore, whose  
10 resume indicated some gold mining experience.

11 Turning to the Navigant team, Mr. Kaczmarek  
12 is the lead author of the Navigant reports. He also  
13 has no degree in mining engineering or geology, worked  
14 on one mineral valuation project prior to this case  
15 involving a nonmetallic mine. He admitted that he did

16 not have the experience involving the valuation of  
17 metallic mineral properties, and he agreed that the  
18 same conclusion applied to his colleague,  
19 Mr. Sequeira.

20 Mr. Sequeira also has no degree in mining  
21 engineering or geology, and he worked on the same one  
22 mineral valuation project involving a nonmetallic

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09: 59: 00 1 mine.

2 Behre Dolbear went to the site early on in  
3 their work on this valuation. Mr. Guarnera testified  
4 about what that site visit entailed and why it was  
5 standard that he would do such a thing. He said,  
6 "Yes, we saw what the rock material looked like and  
7 certainly identified it right away as conglomerate."  
8 He walked down into the arroyos and saw the  
9 conglomerate present. While they were there, they  
10 looked over the site overall to see that it was  
11 correct and appropriate. That's part of the standard  
12 work they do.

13 Although Mr. Houser of Norwest has asserted  
14 that the vast majority of the overburden is  
15 unconsolidated gravel, Mr. Houser said that it was not  
16 necessary to visit the Imperial Project site to  
17 examine the rock types. Mr. Kaczmarek of Navigant  
18 admitted that neither he or nor Mr. Sequeira ever  
19 visited the Imperial Project site, although the  
20 opportunity was offered to them.

21 Mr. Kaczmarek testified about the conformance

22 with the Canadian valuation standards known as CIMVal,

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10:00:08 1 and he said that he believed his valuation was  
2 100 percent in accordance with those standards, and he  
3 didn't find one aspect that was not in compliance.

4 We then reviewed the definition of a  
5 qualified valuator under the CIMVal standards, as  
6 including the fact that the individual have  
7 demonstrated extensive experience in the valuation of  
8 mineral properties and experience relevant to the  
9 subject mineral property.

10 Mr. Kaczmarek then agreed that he was not a  
11 qualified valuator under the Canadian CIMVal standards  
12 and that is in part because he does not have  
13 demonstrated experience in the valuation of mineral  
14 properties. And under the CIMVal standards, as we  
15 see, the qualified valuator is to be responsible for  
16 the overall valuation of a mineral property in  
17 preparation of the valuation report.

18 The CIMVal standards also make clear that a  
19 site visit is standard for a valuation of a mining  
20 site. It is a presumptive requirement. It allows the  
21 opportunity to explain why a site visit wasn't  
22 conducted, but when we look at Navigant and Norwest

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10:01:19 1 Reports, there is no explanation why a site visit was

2 not undertaken. No explanation offered at the  
3 hearing. Certainly a site visit would have helped  
4 assess the rock type and swell factor, so we have a  
5 clear failure to comply with the CIMVal standards.

6 Mr. Kaczmarek has testified and stated in his  
7 reports that in his opinion, valuing mineral  
8 properties does not require special expertise  
9 regarding mineral properties, and he relies on a paper  
10 by a Mr. Trevor Ellis that is included as an  
11 attachment to his report. Yet the Ellis paper itself  
12 concludes by stating that certification should be  
13 developed for valuers working in the extractive  
14 industries similar to the certified mineral appraiser  
15 designation. Mr. Kaczmarek admitted that neither he  
16 nor Mr. Sequeira were certified mineral appraisers.

17 We also reviewed the Canadian standards  
18 applicable to mineral disclosure reports for public  
19 corporations in Canada, the Canadian National  
20 Instrument 43-101 that Mr. Kaczmarek said he was aware  
21 of, and he agreed that he was not a qualified person  
22 to submit a technical report concerning a mineral

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10:02:31 1 property for investors to rely on, and he was  
2 unfamiliar with Mr. Conrad Houser's experience of  
3 Norwest in that regard.

4 Next, we asked Mr. Kaczmarek if he was  
5 familiar with the U.S. Government standards regarding  
6 mineral appraisers, the Uniform Appraisal Standards  
7 for Federal Land Acquisitions. We submitted that to

8 the Tribunal per authorization on August 14, 2007,  
9 referring to the standards which are contained on the  
10 Web site of the U.S. Justice Department, and the  
11 latest edition in 2000 is sponsored by the Assistant  
12 Attorney General, and the foreword by her states that  
13 these standards have earned a prestigious position  
14 published since 1991, frequently cited by Congress.

15 The Federal U.S. standards specifically  
16 provide regarding valuation of mineral properties that  
17 the appraisal of properties containing valuable  
18 minerals is a complex, specialized subject. As a  
19 result, appraisers must have specialized training and  
20 experience to properly understand and apply the proper  
21 methodologies established for estimating market value  
22 of these properties. The Norwest and Navigant team

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10:03:44 1 members who have submitted expert reports on the  
2 valuation of the Glamis Imperial Project failed to  
3 meet this U.S. Government standard.

4 Now, let's turn to the issues involved in the  
5 valuation. We have the first category of the  
6 pre-backfill measures. This is the value of the  
7 deposit before the adoption of the California  
8 measures. Behre Dolbear has stated that the value of  
9 the Imperial Project was 49.1 million. Navigant has  
10 stated that the property value was 32.7 million, in  
11 their opinion. Some of the key issues bearing on this  
12 difference in approach of 16 million reflects the  
13 determination of the proper discount rate, which is a

14 10 million-dollar factor, and then the appraisal  
15 approach is little less than 3 million, and then we  
16 have some other adjustments of a lesser magnitude.

17           Let's turn to the appraisal approach.  
18 Navigant seeks to depress the value of the Imperial  
19 Project by suggesting that the income approach for  
20 valuation, which would yield a 35 million-dollar value  
21 in their view, should be averaged with values  
22 calculated from allegedly comparable sales of mineral

1660

10:04:56 1 properties and values calculated based solely on  
2 Glamis's purchase of mineral interests in the Imperial  
3 area in 1994, at a time when the reserves were not yet  
4 proven.

5           Behre Dolbear has responded in its reply  
6 expert report of December 2006, in pointing out that  
7 Navigant relies on four transactions that occurred  
8 prior to the date of the valuation, but those had  
9 significantly higher costs and thus lower values than  
10 the Imperial Project because they are milling  
11 operations, not gold heap-leach operations like the  
12 Imperial Project. So, we have a comparing of apples  
13 and oranges among these allegedly comparable  
14 properties reflecting the need to understand these  
15 differences between gold extraction methods.

16           Second, Behre Dolbear has pointed out that  
17 the reliance on 1994, in Glamis's purchase of a  
18 35 percent interest was of resources, which sell at a  
19 discount, whereas the December 2002 expropriation is

20 primarily of proven and probable reserves, which Behre  
21 Dolbear has explained there is a vast difference  
22 between those concepts when conducting a mineral

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10:06:10 1 appraisal.

2 Other factors at issue on the pre-backfilling  
3 valuation is that Navigant proposed to add resources  
4 to the income calculation. Behre Dolbear has pointed  
5 out that the CIMVal standards warn that resources  
6 should not be based--should not be value based on an  
7 income approach because resources would face a  
8 significantly different risk profile than reserves.

9 And then we turn to the issue of the  
10 selection of the proper discount rate. Both experts  
11 agree that the appropriate discount rate should be an  
12 after-tax rate applied to the after-tax net income  
13 stream, and both experts agree that the buildup rate  
14 method is the appropriate method. The experts  
15 disagree on whether the buildup rate reflects pre- or  
16 after-tax rates, and whether a particular Capital  
17 Asset Pricing Model, CAPM, relied on by Navigant may  
18 be used to value a mineral property.

19 Behre Dolbear has explained its rationale for  
20 valuating discount rates, which is the standard  
21 approach it uses in mineral valuations. It's  
22 described in detail in its initial report and its

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10:07:23 1 reply report. Behre Dolbear has explained how the  
2 selection of the discount rate requires a calculation  
3 determination first of what is a risk-free rate of  
4 return, in this case at this time 2 percent, and then  
5 site-specific risks, geologic, et cetera, are added to  
6 that, the risk-free rate of return, and then global  
7 risks in the form of market and country risks are  
8 added as well. Navigant has not identified any risks  
9 that it claims Behre Dolbear failed to consider.

10 Now, the standard risk buildup method yields  
11 a pretax rate. Behre Dolbear then uses the Lurch  
12 formula to convert the pre-tax rate to an after-tax  
13 rate, and Navigant has cited nothing to support its  
14 assertion that the buildup is an after-tax rate, but  
15 simply argues that the equation should not be used the  
16 way Behre Dolbear has always done it, again without  
17 any particular support.

18 Instead, Navigant relies on this Capital  
19 Asset Pricing Model, but the Capital Asset Pricing  
20 Model is a model that's used for valuing corporations  
21 and corporate values, not the value of individual  
22 mineral properties. This approach is used for valuing

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10:08:42 1 companies, and even literature which Navigant relies  
2 on acknowledges that the basis of this CAPM method is  
3 the return on an individual corporate stock that can  
4 be related to the stock market as a whole and notes  
5 that there are a number of problems with using a

6 market-based beta to evaluate an individual mineral  
7 property. And this is the conclusion that Behre  
8 Dolbear has reached, that the CAPM method is entirely  
9 inappropriate for valuing an individual mineral  
10 property.

11 The rate that Behre Dolbear selected for the  
12 discount rate is 6.5 percent, and the reasonableness  
13 of that rate is demonstrated by the fact that BLM in  
14 their 2002 Mineral Report used 5.5 percent to evaluate  
15 whether a reasonable investor would pursue the  
16 Project, and Glamis's CEO, Kevin McArthur's April 8  
17 28, 2002 valuation memo documented that Glamis  
18 internally used a standard five-percent discount  
19 factor for U.S. operations. Navigant has claimed that  
20 a higher discount rate should be used, higher than 6.5  
21 percent used by Behre Dolbear, so these reports  
22 support the 6.5 percent selected by Behre Dolbear.

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10:09:58 1 In sum, the 49.1 million dollar  
2 pre-evaluation is the correct valuation of the mine as  
3 of December 12, 2002 that should be. I apologize for  
4 that error. It should be December 12, 2002 in the  
5 slide. There is nothing inappropriate about the 6.5  
6 discount rate determined by Behre Dolbear; and the  
7 higher discount rate of 9.2 percent selected by  
8 Navigant would actually result in a lower valuation  
9 after backfilling regulations were effective, which is  
10 really where the main dispute between the parties is  
11 focused.

12 Now we will turn to the key issues on the  
13 post-backfilling measures valuation.

14 Behre Dolbear has identified three key issues  
15 that is accounting for the vast majority of the  
16 economic valuation dispute between the parties. Not  
17 all of the dispute, but for purposes of illustrating  
18 the key issues, we will identify these: The swell  
19 factor, engineering the backfill--that is, hauling the  
20 backfilled material to the bottom of the pit and  
21 filling it in lifts to minimize the long-term  
22 settlement, as the California regulations require--and

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10:11:03 1 the use of a cash-backed financial assurance for the  
2 increased reclamation costs.

3 Behre Dolbear has summarized the economic  
4 impact to these issues to the valuation using the  
5 current 35 percent swell factor that Behre Dolbear has  
6 relied on as 8.03 million to the reclamation costs  
7 determined by the Norwest/Navigant team, hauling the  
8 backfilled material to the pit bottom, and filling in  
9 lifts to minimize long-term settlement, which also  
10 relates to the swell factor, adds 7.25 million to the  
11 reclamation costs.

12 And when those costs are added to the  
13 reclamation costs determined by Navigant/Norwest, that  
14 brings the reclamation costs to \$70.7 million. With  
15 those adjustments and the use of a cash-based  
16 financial assurance, as Behre Dolbear has indicated is  
17 appropriate, the value of the project is essentially

18 destroyed.

19 Now, we will turn to these issues in some  
20 detail.

21 The U. S. experts, Navigant and Norwest, have  
22 both identified the swell factor as a major issue

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10:12:12 1 affecting the amount of material to be backfilled and  
2 thus the cost. They have done this repeatedly in  
3 their reports submitted in this case. The  
4 determination of the swell factor is based on the  
5 major issue of whether the overburden is  
6 unconsolidated gravel or cemented conglomerate.

7 Mr. Guarnera has testified that the  
8 overburden material is definitely conglomerate. His  
9 testimony is corroborated by the Glamis Project  
10 Geologist, Mr. Purvance, who says, "Gravel was simply  
11 a shorthand term that we used quite commonly, but at  
12 no time was this rock ever classified or considered as  
13 gravel. It's definitely not gravel. It is well  
14 cemented. It's representative of the overburden  
15 that's at the Imperial Project site."

16 We have some of the pictures that have been  
17 submitted as part of the rebuttal report submitted  
18 by--the rebuttal statement submitted by Mr. Purvance.  
19 He has testified that these were samples  
20 representative of the overburden maintained by him as  
21 the Project Geologist as core samples, and they're  
22 clearly solid rock conglomerate, not gravel, as

10:13:22 1 Mr. Purvance has testified and Mr. Guarnera.

2 Now, let's turn again to Mr. Houser. He  
3 admitted that he never made any request to examine the  
4 rock core samples. Never made any request through the  
5 United States counsel to examine core samples that  
6 might be available, saw no need to do so. Yet he  
7 repeatedly assumed and stated that 79 percent of the  
8 overburden was unconsolidated alluvial gravel.

9 Mr. Guarnera pointed out that the  
10 conglomerate conclusions were confirmed by a  
11 February 1996 WESTEC geotechnical report on pit slope  
12 stability which showed that, "as much as a 700-foot  
13 thickness of the conglomerate would be exposed by the  
14 proposed pit wall." That's a quote from the WESTEC  
15 report. This excerpt was included in the Behre  
16 Dolbear reply report of December 2006, after this  
17 issue emerged.

18 Mr. Guarnera testified that the pit slope  
19 stability report showed that the pits would be in the  
20 range of 45 to 50 degrees, that is quite steep, and  
21 that if it was--the overburden had a significant  
22 amount of gravel in it, the deposit would have, number

10:14:27 1 one, been uneconomic, or the whole pit walls would  
2 have collapsed and slid down.

3 Behre Dolbear also contained in their

4 December 2006 reply report a detailed geologic  
5 cross-section from the 2002 BLM Mineral Report which  
6 was available to all the experts in this case which  
7 identified the major geologic unit overlying the  
8 Imperial Project as tertiary conglomerate. This unit,  
9 there is an unconsolidated gravel alluvium on top of  
10 the land surface, but it was so thin it does not even  
11 show up on BLM's 2002 geologic cross-section that  
12 we'll now turn to.

13 This is--this excerpt from the 2002 BLM  
14 Mineral Report was included in Behre Dolbear's reply  
15 of December 2006, and let's look at the cross-section.  
16 This is the cross-section from the BLM Mineral Report.  
17 Some of the fine print at the bottom is not quite  
18 readable--states that the geology and structures  
19 interpreted by R. Waiwood from surface mapping and  
20 aerial photograph interpretation and drill logs.

21 Now we have the cross-sections that are--that  
22 come from this 2000 report, and we see that TCG unit

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10:15:42 1 at the top, several hundred feet thick, clearly  
2 identified as tertiary conglomerate, and again, the  
3 alluvial surficial gravel on the surface is so thin it  
4 doesn't even show up on the cross-section.

5 Now, the cross-section has two different  
6 sections of the pit. They both show the same thing  
7 essentially. The TCG is the major dominant unit here.  
8 Some of the darker units are--the darker units are  
9 volcanics and other metamorphic rocks that would even

10 have higher swell factors than the conglomerate.  
11 Now, this report was available as of 2002,  
12 the cross-section, and when a geologist like  
13 Mr. Guarnera goes out to the Project site and takes a  
14 rock hammer and sees an outcropping of conglomerate,  
15 this type of cross-section allows him to note that  
16 that's what goes down several hundred feet,  
17 particularly in an area that already has had 400 drill  
18 holes and has had a detailed geologic cross-section  
19 prepared based on it. And that's consistent with  
20 Mr. Guarnera's testimony, that when he went out to the  
21 site, he saw the conglomerate, and he was able to  
22 understand the nature of that rock down far below the

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10:16:53 1 surface.

2 Now, let's turn back to the Church Excavation  
3 Handbook. Mr. Guarnera has testified this was a well  
4 recognized source for swell factors for different rock  
5 types. The swell factor, according to that source,  
6 would be 33 percent for conglomerate. The swell  
7 factor for the other rock types present at the  
8 Imperial Project site, such as basalt, would be  
9 64 percent, and gneiss would be 67 percent. And thus,  
10 Mr. Guarnera has testified that the average swell  
11 factor of 35 percent used by Behre Dolbear is, if  
12 anything, conservative because all of the other rock  
13 types present have higher swell factors than the  
14 conglomerate.

15 The opinion of Behre Dolbear on the

16 35 percent swell factor is corroborated by the 1979  
17 National Academy of Sciences/National Research Council  
18 Report to the U.S. Congress which stated that rock at  
19 metallic ore mines expanded an average of about 30 to  
20 40 percent, so there was nothing on the face of this  
21 number that was in any way inflated. In fact, it was  
22 what was would be expected at this type of mine. It

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10:18:03 1 is also corroborated by other evidence in the record;  
2 that the Castle Mountain EIS BLM in 1990 calculated a  
3 swell factor of 36 percent at that mine in the  
4 California Desert.

5 Also supported by the finding in the SMGB  
6 rulemaking which noted that the swell factors of 30 to  
7 40 percent were common at metallic mines.

8 And it even is consistent with the swell  
9 factor reported in the application at the Soledad  
10 Mountain Project of the Golden Queen Mining Company,  
11 which calculates--which lists a swell factor of  
12 35 percent.

13 Now, the Norwest rejoinder report claimed  
14 that BLM had found a weighted average swell factor of  
15 23 percent. But, in fact, the BLM report made no such  
16 calculation of a weighted average swell factor and BLM  
17 made no determination of an average swell factor or  
18 even an assumed average swell factor for the rock  
19 types at the Imperial Project.

20 As noted, the BLM Mineral Report of 2002  
21 contained a geologic cross-section showing

22 conclusively the overburden material was understood to

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10:19:06 1 be tertiary conglomerate, and it contained other  
2 findings about the average bulk density that are  
3 entirely consistent with the findings contained in the  
4 Behre Dolbear Report, which is based on the 1996 Final  
5 Feasibility Study.

6 The BLM Mineral Report in 2002 also reported  
7 average bulk density figures which are essentially the  
8 same as the ones Behre Dolbear has relied on, 12.92 to  
9 12.96 versus 13 cubic feet per ton calculated by Behre  
10 Dolbear. And the Respondent has proffered no BLM  
11 employee to testify or offer any opinion to this  
12 Tribunal regarding the rock types at the Project or  
13 the swell factor to contradict Behre Dolbear.

14 And finally, to emphasize again, Behre  
15 Dolbear calculated a swell factor of 35 percent from  
16 actual data in the 1996 Final Feasibility Study.

17 Now, we've heard a lot from Norwest about  
18 various preliminary Glami's internal documents that  
19 reported assumed swell factors starting back in  
20 November 16, 1994. What's important about these  
21 documents is they expressly state in every case that  
22 the swell factor of 15 percent for gravel and

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10:20:18 1 23 percent on average are, "assumed," and those

2 particular numbers are repeated with the same  
3 qualification whenever they're presented in these  
4 documents. The first document, November 16, 1994,  
5 specifically states the swell factor is assumed.  
6 Behre Dolbear wasn't going to rely on an assumed swell  
7 factor. It did an independent evaluation of what the  
8 swell factor is concerning all available evidence.

9 The other documents that Norwest has relied  
10 on are dated November 9, 1995, and March 1996. These  
11 documents also state that the swell factors there are,  
12 "assumed." And, unlike Behre Dolbear, Norwest has  
13 specifically acknowledged that Norwest did not  
14 independently confirm the nature of the swell factor  
15 at the Imperial Project dominant waste material. In  
16 other words, Norwest chose to rely on these assumed  
17 swell factors regardless of all the other available  
18 evidence.

19 We can look through these other documents and  
20 see in each case that the swell factors, where they  
21 are presented, are stated as assumed, and these are  
22 not calculated numbers, nor can swell factors be

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10:21:34 1 calculated from the data presented here.

2 Let's turn to the March 5, 1996 Glamis  
3 document regarding the swell factor. Again, we see  
4 the statement that the swell factors are assumed.

5 There was a particular document that Norwest  
6 put forward and the Respondent has relied on which had  
7 the terms on it bankable feasibility dated March 1996.

8 Notably, this is not the final bankability Feasibility  
9 Study, which is the Final Feasibility Study of  
10 April 1996. The assumed swell factors that are  
11 reported in this internal working document of several  
12 pages are not included in the April 1996 Final  
13 Feasibility Study.

14           And then we have again documents from Glamis.  
15 These are the internal budget statements from 1998 and  
16 '99, where the same swell factor from November '94,  
17 the same information gets carried forward as assumed  
18 swell factors regardless of the fact that other  
19 information is changing about the rock density in this  
20 time.

21           Then, finally, Norwest relies on a 339 AU  
22 spreadsheet dated 2003, which also includes the early

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10:22:57 1 assumed swell factors from November 1994. Behre  
2 Dolbear specifically noted that swell factors listed  
3 in the spreadsheet are not used anywhere else in the  
4 339 AU spreadsheet, and Behre Dolbear has explained in  
5 its report from December 2006, that this was a relic  
6 or artifact from prior uses of the spreadsheet and  
7 never used in the actual spreadsheet analysis, and  
8 this was explained specifically in Behre Dolbear's  
9 December 2006 reply report, and they explained why  
10 this was an artifact in the spreadsheet, but that, in  
11 fact, there were references to the data that--from the  
12 Final Feasibility Study that do translate to the  
13 35 percent swell factor, which Behre Dolbear has

14 determined.

15           Behre Dolbear summarized its opinions  
16 regarding the swell factor in the December 2006  
17 report. We have hit on most of these points; I will  
18 go through them very briefly. Behre Dolbear explained  
19 the 35 percent swell factor is appropriate, that the  
20 79 percent of the material is clearly not  
21 unconsolidated alluvium with a swell factor of  
22 15 percent. Behre Dolbear pointed out the Church

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10:24:08 1 Handbook supported its swell factor conclusions.  
2 Behre Dolbear pointed out the BLM Mineral Report  
3 geologic cross-sections supported their conclusions.  
4 The WESTEC's pit slope stability recommendation report  
5 supported their conclusions, but clearly classified  
6 that overburden as tertiary conglomerate, and the pit  
7 slope data itself was clearly inconsistent with the  
8 idea that there would be any significant degree of  
9 alluvium or gravel units in that overburden.

10           And Behre Dolbear finally again pointed out  
11 that the 35 percent figure is, if anything,  
12 conservative.

13           Now, we have some other Glamis internal  
14 documents that bear on the swell-factor issue, and one  
15 of them is a memo by Mr. Jim Voorhees dated  
16 December 2, 2003, and it expressly specifies an  
17 average swell factor of 35 percent at the Imperial  
18 Project and notes that the application of the  
19 California backfilling regulations, because of this

20 swell factor, will cause the area of disturbance to  
21 increase by 21 percent, up to 1,571 acres.

22 The Glami s internal memo by Mr. Voorhees is

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10: 25: 21 1 entirely consistent with the same calculation set  
2 forth in January 9, 2003, which also states that the  
3 area of disturbance will increase by 20 percent up to  
4 1,571 acres, indicating that the same 35 percent swell  
5 factor was used by Glami s in January--in December of  
6 2003, and this refutes the U.S. assertion that Glami s  
7 never internally used the 35 percent swell factor and  
8 the inference that Behre Dolbear had inflated the  
9 swell factor.

10 Turning back to the rock types briefly that  
11 bear on the swell factor issue, in Norwest Report of  
12 March 2007, Norwest identified as a key major issue  
13 whether the overburden at the Imperial Project was  
14 gravel, as Norwest contended, or well cemented  
15 conglomerate. Mr. Houser was presented with one of  
16 the several photographed core samples, asked if he  
17 could determine if this was gravel or conglomerate,  
18 and he stated in response, "All I can say is it's a  
19 heavy, tubular, cylindrical object right now, and I  
20 can't say much more about it right now."

21 Mr. Houser admitted that the February 1996  
22 pit slope stability report showed the pit slopes in

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10:26:33 1 the range of 50 to 55 degrees. He did not dispute the  
2 findings by WESTEC in 1996 that as much as a 700 foot  
3 thickness of conglomerate would be exposed, and he  
4 admitted that the February 1996 WESTEC Report was  
5 relied on by the 1996 Feasibility Study.

6 He then was asked how would the 700-foot  
7 thickness on the pit wall stand up at an angle of  
8 50-55 degrees if it was made of unconsolidated gravel,  
9 and he was asked whether this would, in fact,  
10 collapse, and he agreed that, well, it would slide.  
11 It wouldn't collapse, but it would slide down to an  
12 angle of 30 percent at a natural angle of repose.

13 So, he clearly acknowledges that his views  
14 that this is gravel is inconsistent with other clear  
15 data in the record.

16 Mr. Houser also acknowledged that the Church  
17 Excavation Handbook provided reasonable estimates of  
18 what swell factors could be expected, and he admitted  
19 that the swell factor indicated by the Church Handbook  
20 for some other conglomerate was 33 percent.

21 A direct corollary to the swell factor issue  
22 is the issue of how much settlement would occur over

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10:27:41 1 time in the backfilled pit of a swelled waste rock  
2 material. Mr. Guarnera testified, we reviewed the  
3 California regulations that were part of the backfill  
4 requirement, and it calls for an engineered design to  
5 assure there would be minimal settlement of the

6 material.

7 He explained, one of the things about swell  
8 factor is the first time you dig the rock up, you have  
9 an initial swell factor, but then every time you move  
10 it again, you have an additional swell factor.

11 Mr. Houser admitted that when the mine pit as  
12 deep as 700 feet was backfilled, that the swelled  
13 material would shrink as much as 8 percent and drop by  
14 as much as 56 feet if the material was, in fact,  
15 conglomerate. Mr. Houser also admitted this  
16 settlement or shrinkage would not be uniform across  
17 the whole backfilled pit, and on the edge of the pit  
18 it might be 1 foot of shrinkage, but it could be as  
19 much as 56 feet lower in the middle.

20 Now, the California backfilling regulations  
21 provide that the backfilling shall be engineered and  
22 that all fills and slopes shall be designed to prevent

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10:28:40 1 surface water ponding, to convey runoff, and to  
2 account for long-term settlement. While Mr. Parrish  
3 of the SMGB had offered various post hoc opinions  
4 citing no official SMGB guidance documents in his  
5 declarations about what the regulation required, he  
6 has no engineering qualifications, and the United  
7 States confirmed he was merely a fact witness.

8 Norwest's 2007 report admitted that this  
9 California regulation required engineered backfilling,  
10 including engineered the backfilled pit slope to  
11 prevent surface water ponding and long-term

12 settlement. Mr. Guarnera stated his conclusion that  
13 what was needed was to be done was to haul the  
14 material down into the pit, place it into the pit, and  
15 then compact it by the movement of the trucks as the  
16 lifts were built up in gradual levels. This is  
17 significantly different than Norwest's program of just  
18 going to the edge of the pit and dumping.

19 Thus, Norwest has significantly  
20 underestimated the backfilling costs to meet the  
21 California regulations.

22 Mr. Guarnera testified about the Glamis

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10:29:44 1 internal assessment of the backfilling regulations on  
2 January 9, 2003. He testified that Glamis's  
3 assessment was consistent with their analysis that it  
4 showed a \$300 an ounce gold price, which was the price  
5 Glamis used at the time for ore reserve calculations  
6 and that the Project was considered to have negative  
7 value by the application of the California regulations  
8 as of January 9, 2003.

9 Mr. Guarnera also explained that the Glamis  
10 assessment of January 9, 2003, was incomplete because  
11 it did not include the financial assurance  
12 requirement, nor did it show any cost for rebuilding  
13 the mining equipment, nor did it account for  
14 respreading the heap-leach pad. Mr. Guarnera's  
15 testimony is consistent with the internal assessment  
16 of Mr. McArthur as he testified in August.

17 Mr. McArthur testified that in January 2003,

18 just three weeks after the emergency regulations had  
19 been adopted, we asked Jim Voorhees to provide an  
20 analysis of the impact of the consequence of  
21 backfilling. Mr. McArthur testified that this  
22 analysis did not include additional capital costs to

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10:30:51 1 the Project that were going to be involved in using  
2 the equipment more, which means getting new equipment  
3 or rebuilding the equipment, and Mr. McArthur  
4 testified we didn't look at the additional financial  
5 assurances we would have to put up for the Project.  
6 And, even so, with this very conservative view, the  
7 Project came up with a negative net present value.

8           Finally, Mr. McArthur explained that at the  
9 time the company was using \$300 gold price for its  
10 reserve calculations, for valuations for new projects,  
11 and in that case they had a negative net present  
12 value, even with the conservative approach they took  
13 and the incomplete approach, and he also pointed out  
14 that given the Governor's express intent to stop our  
15 project, it didn't make any business sense to move  
16 forward at that time. It would have been reckless and  
17 wouldn't have been rational to continue with the  
18 Project.

19           Notably, Mr. McArthur was not challenged with  
20 a single cross-examination question.

21           I would be happy to go on at this point,  
22 Mr. President, or we could take the scheduled break,

10: 31: 52 1 whatever you would prefer.

2 PRESIDENT YOUNG: Mr. McCrum, I think we will  
3 take our scheduled break at this point. We will  
4 reconvene at 11:05.

5 Thank you.

6 (Brief recess.)

7 PRESIDENT YOUNG: I note, by the way, for  
8 Claimant that we both started five minutes late, and  
9 we have taken five extra minutes on the break, so we  
10 will give you, if you need it at the end of today, 10  
11 extra minutes, in particular to see if we can get  
12 Mr. Schaefer to speak more slowly. We are about to  
13 lose our Court Reporter.

14 MR. SCHAEFER: Thank you.

15 PRESIDENT YOUNG: Mr. McCrum, you may resume.

16 MR. McCRUM: Okay. Thank you, Mr. President.

17 And I will just take another 10 minutes or so  
18 to wrap up the valuation topic.

19 Now, Behre Dolbear's opinions that complete  
20 backfilling is economically infeasible is consistent  
21 with the findings of the Bureau of Land Management's  
22 September 2002 Mineral Report, which concluded that

11: 06: 48 1 complete backfilling was not economically feasible.

2 Notably, BLM's finding did not take into  
3 account the further substantial costs of grading all

4 the waste rock piles and leach pads to a 25-foot  
5 height level and the massive financial assurance costs  
6 per the California regulations because those  
7 requirements were not yet in effect when BLM's Mineral  
8 Report was released in September 2002.

9 This BLM finding has not been rescinded, and  
10 no BLM employee has testified that this finding was in  
11 any way erroneous.

12 Behre Dolbear's findings that complete  
13 backfilling costs are infeasible are also consistent  
14 with BLM's findings in the 2000 Final EIS/EIR on the  
15 Imperial Project. Behre Dolbear estimated that the  
16 total cost of complete backfilling and site regrading  
17 to the 25-foot height level is \$95.5 million based on  
18 a per ton backfilling and regrading cost of 35 cents  
19 per ton. BLM's Final EIS/EIR on the Imperial Project  
20 found that the cost of complete backfilling the East  
21 Pit as part of the complete backfilling alternative  
22 would be approximately 80 to \$100 million.

1685

11: 08: 04 1 Quite--Behre Dolbear's estimate falls right within  
2 that range.

3 BLM used an estimated backfilling cost  
4 estimate of 40 to 50 cents per ton, which is actually  
5 higher than the Behre Dolbear cost estimate.

6 Now, these BLM findings are supported by or  
7 stated in the final EIS, and they are supported by a  
8 California Registered Engineers assessment of these  
9 costs. Mr. Smith, which is referenced in the Final

10 EIS. Navigant has criticized BLM's per ton cost  
11 estimates of 40 to 50 cents for complete backfilling,  
12 stating that this analysis that BLM relied on was just  
13 a back-of-the-envelope analysis which lacked the rigor  
14 required. Notably, the engineering firm, Norwest,  
15 provided no critique of the Sage Engineering cost  
16 estimates which BLM chose to rely on in the Final  
17 EIS/EIR.

18 And the Respondent again has proffered no BLM  
19 witness to retract the cost estimates for complete  
20 backfilling set forth in the Final EIS/EIR from 2000.

21 In fact, Sage Engineering was retained by  
22 Environmental Management Associates, the BLM's EIS

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11:09:16 1 contractor, to provide an independent review of the  
2 current industry practices and costs, and Sage  
3 Engineering determined the backfilling haulage costs  
4 would be in the range of 40 to 50 cents per ton and  
5 found it to be appropriate after reviewing costs  
6 presented by Newmont Mining Company relating to a  
7 Nevada mining project.

8 Again, these estimated costs from Sage are  
9 higher than the Behre Dolbear estimated costs, and  
10 looking at the actual document from Sage Engineering  
11 provided to the BLM, we can see that this statement  
12 regarding the cost estimates is submitted by Michael  
13 Smith, P. E., President of Sage Engineering with a  
14 sealed certified stamp as a California Registered  
15 Engineer.

16                   Turning now to the financial assurance cost  
17 requirements, Behre Dolbear has expressed the view  
18 that Glamis would have had to use a cash-backed  
19 financial assurance, and he has test--Mr. Guarnera has  
20 testified that this was based on our firm's experience  
21 in working with companies to get reclamation bonds at  
22 that point in time, and he specifically relied on

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11:10:25 1 Mr. Jeannes' s testimony and personal discussions.

2                   Behre Dolbear' s assumptions regarding the  
3 need for a cash-backed financial assurance were  
4 corroborated by the testimony and signed prior  
5 statements of Mr. Jeannes.

6                   Mr. Jeannes testified that by this time,  
7 after September 11, 2001, we were no longer able to  
8 get traditional security bonds. That market had dried  
9 up, and so Glamis was posting Letters of Credit  
10 through a U.S. Bank, but those Letters of Credit were  
11 100 percent cash collateralized, and these statements  
12 are consistent with the prior signed statements that  
13 Mr. Jeannes has submitted in this matter.

14                   Mr. Jeannes explained that Glamis Gold,  
15 Limited, absolutely had economic incentives to obtain  
16 financial assurances in the most cost-effective  
17 manner, and if we could have done it in a way that  
18 conserved our capital or was less expensive, we  
19 certainly would have done it.

20                   Mr. Jeannes testified that starting in late  
21 2001 to 2002, all our new financial assurances as

22 those surety bonds rolled over, became 100 percent

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11:11:27 1 cash-backed Letters of Credit.

2 Mr. Jeannes was asked, based on his  
3 experience, could Glami s Gold, Limited, have obtained  
4 a Letter of Credit without cash on the order of 50 to  
5 \$60 million? He answered no.

6 Mr. Jeannes was not challenged with a single  
7 cross-examination question regarding financial  
8 assurance requirements or practices. This Tribunal  
9 allowed the U.S. to recall Mr. Jeannes after  
10 Mr. Guarnera testified that he relied on Mr. Jeannes's  
11 financial assurance experience; nevertheless, no  
12 cross-examination was pursued on this subject.

13 Navigant has criticized Behre Dolbear's  
14 assumption that a cash-backed financial assurance  
15 would have been required for Glami s to comply with the  
16 California backfilling measures. Yet, Mr. Kaczmarek  
17 admitted that prior to this case, he had no experience  
18 whatsoever with establishing or maintaining financial  
19 assurances for reclamation or metallic mineral  
20 deposits, and that is reflected in this exchange at  
21 the hearing, where Mr. Kaczmarek was asked what  
22 professional experience he had prior to

1689

11:12:26 1 September 2006, when he submitted his expert report to

2 establish and negotiate multi-million dollar financial  
3 assurances to guarantee long-term reclamation  
4 liabilities at metallic mine sites, and he stated, "I  
5 didn't have any experience in that subject area."

6           Instead, Mr. Kaczmarek of Navigant relied on  
7 statements from Mr. Craig of the California Office of  
8 Mine Reclamation regarding financial assurance  
9 requirements and practices. Yet, Mr. Craig testified  
10 at the hearing that he had no knowledge about whether  
11 financial assurances in the forms of Letters of Credit  
12 could typically be obtained without cash collateral  
13 backing. Mr. Craig acknowledged that a letter from  
14 the Golden Queen Mining Company to Kern County dated  
15 April 3, 2007, indicated that a Letter of Credit for  
16 that mine's reclamation cost was, in fact, backed by a  
17 cash Certificate of Deposit.

18           And when I asked--when asked for confirmation  
19 that Mr. Craig has no idea whether such financial  
20 assurances could be obtained without cash collateral  
21 backing, Mr. Craig said, "Again, I'm not an expert on  
22 that side--on that aspect of financial assurances.

1690

11:13:33 1 I'm not an expert on Letters of Credit, so I really  
2 can't answer that."

3           Navigant relied upon the chart sponsored by  
4 Mr. Craig depicting financial assurances posted in the  
5 form of surety bonds and Letters of Credit in  
6 California. Yet, Mr. Craig admitted that he had no  
7 idea whether the Letters of Credit or surety bonds

8 depicted on the chart required cash collateral  
9 backing. In addition, the chart prepared by Mr. Craig  
10 in 2006 or prepared under his direction was  
11 demonstrated to contain out-of-date information  
12 because it included the surety bond for the Glamis  
13 Picacho Mine which had been released in 2002.

14 Although Navigant relied upon Mr. Craig's  
15 chart, the vast majority of the financial assurances  
16 listed were for less than 4 million, only a few were  
17 over 10 million, and the highest financial assurance  
18 posted by any mine in California was less than  
19 17 million.

20 And so, this chart provides no evidence that  
21 the massive financial assurances required for the  
22 Imperial Project to ensure complete backfilling

1691

11:14:34 1 estimated to be somewhere in the range of 50 to  
2 90 million by the experts could be obtained without  
3 cash collateral backing as had been Glamis's  
4 experience.

5 Now, we have had testimony in this case that  
6 there has been quite a booming gold market prevailing  
7 in the United States and in the world over the past  
8 few years, and yet we have testimony that there has  
9 not been a single offer for the Imperial Project made  
10 to Glamis Gold, Limited, or Goldcorp with knowledge  
11 that this is a noncore asset of the company. And  
12 Mr. Guarnera has testified about that fact and how it  
13 bears on the valuation and stated that he believes

14 this property has been significantly stigmatized, and  
15 that's clearly reflected in the fact that not a single  
16 offer to buy the property has arisen in this exuberant  
17 gold market.

18 Like the lack of offers for the Imperial  
19 Project, the write-off of the investment after the  
20 Secretary of the Interior's denial of the Project on  
21 January 17, 2001, is compelling evidence of the lack  
22 of market value. Mr. Kaczmarek agreed that the

1692

11:15:38 1 accounting rules essentially required Glamis to write  
2 off its sunk costs, and that should be sunk costs in  
3 the Imperial Project, as a result of the Interior  
4 Secretary's denial, and agreed that at the time Glamis  
5 took that accounting action in early 2001, it was  
6 necessary to change the reported mineral reserves to  
7 the lesser category of mineral resources, and this  
8 reclassification had arisen due to the uncertainty  
9 that had arisen over the question of whether Glamis  
10 would be able to extract the minerals.

11 Turning, finally and briefly to Navigant's  
12 option value theory, Navigant's theory that has been  
13 put forth rather briefly in their expert reports is  
14 that the mineral property holder can simply wait for  
15 better economics for starting to mine and that somehow  
16 Glamis has actually even benefited by the fact that  
17 this property has been precluded from being developed  
18 since 2001 and 2002. But as we have shown, mines  
19 typically take two to three years to approve, and as

20 Behre Dolbear has explained, mines can simply not be  
21 turned and off like light switches, and that's one of  
22 the fundamental problems with this novel option value

1693

11: 16: 48 1 theory.

2 Navigant seeks to suggest that despite the  
3 Federal and State measures deliberately applied to  
4 block the Imperial Project that it somehow retained  
5 some residual value, but it's notable that this is  
6 really just a theoretical point, and Navigant doesn't  
7 even attempt to place any estimation of what the value  
8 would be based on this option value theory, and the  
9 lack of offers demonstrates that this theory does not  
10 have merit.

11 Finally, I will briefly turn to the option  
12 value theory in the context of the Cerro Blanco  
13 project, wherein Navigant's rebuttal of August 7,  
14 2007, Navigant claimed that the Cerro Blanco project,  
15 which was also written off by Glamis in 2001,  
16 demonstrated why the Glamis Imperial Project retained  
17 value because of its option value. However, Cerro  
18 Blanco was not written off due to adverse government  
19 actions, in stark contrast to the Imperial Project.  
20 And at the time Glamis wrote off Cerro Blanco, it  
21 noted that the project warranted further work to  
22 improve the value of the project, which Glamis

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11:17:50 1 pursued.

2           As a result of a deep geologic vein formation  
3 at the Cerro Blanco project, Glamis made a major new  
4 gold ore discovery at Cerro Blanco, shortly after the  
5 time the asset was written off. Yet at the Imperial  
6 Project, more than 400 drill holes had discovered no  
7 deep geologic vein structure that would warrant any  
8 pursuit similar to Cerro Blanco. Yet, in comparing  
9 these two projects as supporting his option value  
10 theory, Mr. Kaczmarek took no account of these major  
11 geologic conferences between the ore deposits,  
12 highlighting the need for minerals expertise in making  
13 these valuations.

14           Mr. McArthur testified about the Cerro Blanco  
15 situation, explained that it was quite different from  
16 Imperial because we discovered a very high grade vein  
17 at depth. We are now relooking at the mine as an  
18 underground mine, so it's very different from  
19 Imperial. The Imperial Project has no underground  
20 mining vein. It's just a big homogenous ore body that  
21 you couldn't possibly underground mine economically,  
22 which by the way is consistent with BLM's 2002 Mineral

1695

11:18:57 1 Report finding that underground mining is not  
2 feasible, but as Mr. McArthur testified, moreover, the  
3 biggest factor is we don't have an Executive Officer  
4 of the country of Guatemala telling us that there is  
5 absolutely no way we want you to mine this mine.

6 In summary, Mr. Guarnera, President of Behre  
7 Dolbear, is one of the world's foremost experts on  
8 valuing metallic mineral deposits. In fact, Behre  
9 Dolbear values about 30 mineral projects each year.  
10 Behre Dolbear has correctly concluded the value the  
11 Imperial Project was 49.1 million as of December 11,  
12 2002. Behre Dolbear has correctly concluded that the  
13 backfilling measures adopted by California have  
14 completely destroyed the entire value of the Glamis  
15 Imperial Project. And the lack of any offers for the  
16 Imperial Project since 2002 is a telling confirmation  
17 of this conclusion.

18 That wraps up my discussion of the valuation  
19 issues, and now Mr. Schaefer is going to discuss the  
20 legal standards in the context of 1105 and 1110  
21 applied to these facts.

22 PRESIDENT YOUNG: Mr. McCrum, thank you very

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11:20:01 1 much.

2 Mr. Schaefer, we will ask you if you will try  
3 and speak more slowly, please. Thank you.

4 MR. SCHAEFER: Thank you, Mr. President.

5 At this point, I would like to spend a few  
6 minutes slowly reviewing the legal standards that  
7 apply with respect to measures that affected the  
8 significant but less than complete deprivation of the  
9 property interest.

10 The number of the considerations that I will  
11 review will be pertinent to the analysis of Glamis's

12 claim under Article 1105, as Ms. Haque will discuss.

13           As I mentioned earlier, under U.S. and  
14 customary international law, measures that deprive an  
15 investor of the full value of its investment are per  
16 se expropriatory, and compensable. But regulatory  
17 measures that do not effect a full deprivation of an  
18 investor's property right also can trigger a  
19 compensation obligation. In such instances, U.S. and  
20 customary international law both provide for a  
21 balancing process. That process weighs the rationale  
22 for the measure against its economic impact on the

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11:21:03 1 investor, the extent to which it frustrates the  
2 investor's reasonable expectations, and the character  
3 and nature of the Government measure.

4           The more substantial the deprivation, the  
5 more the measures frustrate the investor's reasonable  
6 investment-backed expectations, and more problematic  
7 their character, whether due to disproportionality,  
8 discrimination, undue burden, or a gap between the  
9 expressed justification and the actual motivation, the  
10 more likely it is that such measures will be found to  
11 be expropriatory.

12           In general the parties agree that these three  
13 factors, extent of deprivation, frustration of  
14 reasonable expectations, and character, are the  
15 appropriate benchmarks for evaluating less than full  
16 deprivations. That being the case, and with  
17 Mr. McCrum having reviewed the extent of the

18 deprivation already, I would just like to highlight a  
19 few key considerations for the Tribunal to take into  
20 account as to the other two factors should it find  
21 that the measures did not fully deprive Glamis of the  
22 value of its mining claims.

1698

11:22:06 1 First, in impartial deprivation cases both  
2 U.S. and customary international law take into account  
3 the extent to which the challenged measures frustrate  
4 an investor's reasonable expectations. Those  
5 expectations, as we've pointed out, are  
6 fact-dependent. They can be formed by a variety of  
7 factors, including in particular the applicable legal  
8 and regulatory regimes and the overall commercial  
9 circumstances. At page Roman I-22 of his report,  
10 Professor Walde summarizes the issue before the  
11 Tribunal, as whether a normal, prudent, but not  
12 unrealistic or unduly overcautious investor should  
13 have expected and internalized the risk of both the  
14 California and U.S. measures.

15 During oral argument, Respondent provided a  
16 similar formulation. They noted that, and we have the  
17 quote up, the question is whether an investor could  
18 have had a reasonable expectation that the Government  
19 would not act in a particular manner, and this is  
20 informed by the overall regulatory regime surrounding  
21 the industry and any specific assurances given to the  
22 investor by the State.

11: 23: 14 1           With respect to the Federal measures, then,  
2 under these formulations the question for the Tribunal  
3 is whether Glamis reasonably expected that the Federal  
4 Government would not react to the identification of  
5 sacred sites in the Project area by concocting a  
6 previously unheard of and, indeed, congressionally  
7 rejected discretionary denial authority like the one  
8 ultimately set forth in the Leshy Opinion.

9           We submit that Glamis did have a reasonable  
10 expectation in that regard. Respondent's argument to  
11 the contrary, is unsustainable for a number of  
12 reasons, not least that it requires Glamis to have  
13 foreseen a regulatory interpretation that even the  
14 Department of Interior personnel tasked with  
15 implementing the Mining Law didn't foresee and didn't  
16 believe to be valid once it came about.

17           Mr. McCrum is going to discuss that in  
18 further detail, and he will lay out the additional  
19 factual predicates that Glamis has established in  
20 support of its reasonable expectations that the  
21 Federal Government would not and, indeed, could not do  
22 what it did in this case.

11: 24: 13 1           With respect to the California measures,  
2 under the formulations that I mentioned a moment ago,  
3 the similar issue for the Tribunal is whether Glamis

4 reasonably expected that the State would not respond  
5 to the identification of sacred sites in the Imperial  
6 Project area by reinventing its reclamation  
7 requirements to implement a mandatory, full  
8 backfilling and site recontouring requirement for  
9 metallic, but not nonmetallic mines.

10           Glamis again submits that its expectations in  
11 this regard were reasonable. As Mr. McCrum will  
12 review, there was no indication that mandatory full  
13 backfilling and site recontouring of only metallic  
14 mines would protect Native American sacred sites  
15 except to the extent that it made mining costs  
16 prohibitive. There was no environmental analysis or  
17 support for the change, and the requirement was  
18 entirely unprecedented.

19           In evaluating these issues, the Tribunal  
20 should consider the notion of undue regulatory  
21 surprise. Professor Walde has emphasized the  
22 significance of that surprise as being indicative of

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11:25:14 1 the frustration of legitimate expectations. That  
2 concept is particularly important in this case because  
3 of Respondent's tendency to conflate "reasonably to be  
4 expected" with "theoretically possible." In other  
5 words, Respondent contends that it was always possible  
6 that the Federal or California Government would do X  
7 or Y, but that, of course, isn't the issue. The issue  
8 is whether Glamis should or could have reasonably  
9 expected that action on the one hand or whether it

10 amounted to undue regulatory surprise on the other.

11 That's an issue that my colleagues will  
12 review in more detail in the context of the evidence  
13 as to Glamis's reasonable expectations.

14 Respondent also seeks to elevate specific  
15 assurances from one of a number of competing factors  
16 in the consideration of reasonableness to an  
17 inviolable requirement. That is, Respondent contends  
18 that Glamis could not have had reasonable expectations  
19 as to the Imperial Project because the Federal and  
20 California State Governments never promised Glamis  
21 that they wouldn't take the actions that they took.  
22 My colleagues will review Mr. McArthur's testimony

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11:26:17 1 about the assurances that the California Desert  
2 Protection Act's no buffer zone language provided, as  
3 well as the assurances that State BLM Director Haste  
4 provided with respect to the approval.

5 But even setting those key facts aside, as  
6 we've pointed out, customary international law doesn't  
7 support their position. The precedent indicates only  
8 that such contract type assurance can be the basis for  
9 legitimate expectations and perhaps that they are  
10 necessary for Claimant to show reasonableness in some  
11 circumstances. Thus, if, as was the case in  
12 Thunderbird, your business venture is gaming machines,  
13 and there is a preexisting prohibition in effect on  
14 gambling, it may be that you can't have a reasonable  
15 expectation that the Government won't shut you down

16 unless it specifically assures you that it won't, but  
17 those aren't the facts here.

18 As Professor Wälde points out, reasonable  
19 expectations can be triggered by specific assurances,  
20 but they can also be formed by a reasonable view of  
21 the general, what he refers to as the legitimate  
22 expectations horizon.

1703

11:27:19 1 Let me just say a few words about the other  
2 factor to be weighed in cases of less than full  
3 deprivations, which is the character. Character of  
4 the measures can be evaluated on the basis of a number  
5 of different criteria, rationality, proportionality,  
6 whether the public interest outweighs the harm done,  
7 and whether a small group is being asked to bear a  
8 burden that society as a whole should bear, good  
9 faith, and perhaps most importantly, whether the  
10 measure is discriminatory.

11 The Tribunal has posed a question about to  
12 what extent it can look behind the California measures  
13 and undertake a more probing examination. We submit  
14 that as the Tribunal considers and weighs these  
15 various factor, evaluation of the motivation behind  
16 the measures is necessary. There can be no meaningful  
17 evaluation, for instance, of whether the measures were  
18 arbitrary or rationally crafted without consideration  
19 of why it was that the State undertook them.  
20 Respondent would prefer that the Tribunal not engage  
21 in that analysis and instead simply accept the

22 justifications that it proffers; namely, that these

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11:28:20 1 were bona fide, nondiscriminatory regulations. What  
2 we said in a number of cases that stand for the  
3 proposition that bona fide, nondiscriminatory  
4 regulatory measures don't enjoy immunity from  
5 expropriation liability. But even if the Tribunal  
6 were to accept that they do, that would apply only to  
7 nondiscriminatory regulations. Thus, in Methanex, one  
8 of the cases that Respondent cites, the record was  
9 devoid of any evidence that the measures had targeted  
10 the Claimant at all.

11 The key question for the Tribunal here, then,  
12 is assuming a less than full deprivation, were the  
13 measures discriminatory? Glamis submits that there is  
14 no way to make that determination without considering  
15 the motivation behind those measures as well as their  
16 scope.

17 Here is what I mean by that. Respondent  
18 asserts that the California measures are generally  
19 applicable, but this amounts to an argument of facial  
20 neutrality. U.S. taking jurisprudence, for  
21 instance, focuses less on facial neutrality than  
22 intent and effect. Who was the target of the measures

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11:29:20 1 and to whom were they applied? Thus in the Whitney

2 Benefits case, the Federal circuit emphasized that  
3 Congress had been carefully attentive to the question  
4 of which particular coal properties it was affecting.

5 Likewise, in the Sunset View decision, the  
6 California Court of Appeals held that the generality  
7 of the language of the ordinance does not conceal its  
8 single realistic purpose, the prohibition of  
9 Respondent's mortuary. Respondent nevertheless  
10 insists that since the California measures are  
11 facially neutral, it's inappropriate for the Tribunal  
12 to indulge Glamis by searching for some hidden agenda.

13 As Mr. Gourley pointed out, that might Mike  
14 sense in a case in which the agenda was, in fact,  
15 hidden, but it wasn't here. As we previously  
16 demonstrated and as Mr. Ross will highlight, the  
17 record of this case is rife with indications that the  
18 California measures were intended to and did target  
19 Glamis's Imperial Project.

20 So to sum up, in less than full deprivation  
21 cases under U.S. and customary international law,  
22 character is a factor to be weighed, and

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11:30:20 1 discrimination, arbitrariness, rationality, and so on  
2 are evidence of character, and they're all impossible  
3 to evaluate absent consideration of the motivation  
4 that drove the measures. So if the Tribunal finds an  
5 incomplete deprivation, not only may it look behind  
6 the measures to consider the motivation, it, in fact,  
7 must do so as part of the weighing exercise.

8           That concludes my remarks on these issues at  
9 this point, and at this time I would like to turn the  
10 floor over to my colleague, Ms. Haque, who is going to  
11 be reviewing Article 1105's requirements.

12           PRESIDENT YOUNG: Mr. Schaefer, thank you.

13           Ms. Haque?

14           MS. HAQUE: Good morning, Mr. President and  
15 Members of the Tribunal. I will be presenting an  
16 overview of Claimant's argument with respect to  
17 Article 1105.

18           To start, Article 1105 of NAFTA provides that  
19 each party shall accord to investments of investors of  
20 another party treatment in accordance with  
21 international law, including fair and equitable  
22 treatment and full protection and security. Notably,

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11: 31: 22 1 despite the plain language of Article 1105, which  
2 clearly includes the fair and equitable treatment as a  
3 minimum standard of protection afforded to all foreign  
4 investors under international law, Respondent has  
5 avoided saying those words during this proceeding as  
6 if they had never been included in Article 1105.

7           Similarly, in its Counter-Memorial,  
8 Respondent stated that broad State practice and opinio  
9 juris have coincided in only a few areas. Respondent  
10 identified those areas--if I could get the slide.  
11 Respondent identified those areas as a minimum level  
12 of internal security and law and order, a denial of  
13 justice in the judiciary context, and the rule barring

14 expropriation without compensation.

15           Thus, in the context of this case, Respondent  
16 seems to question whether fair and equitable treatment  
17 is even recognized as a standard of protection  
18 afforded by the minimum standard of treatment under  
19 customary international law. But that question, to  
20 the extent that it ever was one, was answered by the  
21 NAFTA Free Trade Commission in its July 2001 note of  
22 interpretation in which it clarified that Article 1105

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11:32:42 1 refers to a standard existing under customary  
2 international law.

3           Furthermore, the United States itself has  
4 already accepted that fair and equitable treatment is  
5 required under customary international law in context  
6 outside of this case. For example, in its fourth  
7 Article 1128 submission in the Pope & Talbot case,  
8 dated November 1, 2000, as well as in its BIT  
9 transmittal statements, for example, as the one in the  
10 U.S. - Albania BIT of 1995, the United States has  
11 explicitly identified fair and equitable treatment as  
12 one of the customary international law standards.

13           Yet, now, when the standard is to be applied  
14 against it, Respondent seems to deny the existence of  
15 this standard or otherwise render it hollow by taking  
16 two very constrictive approaches to interpreting  
17 Article 1105.

18           First, it takes the position that Article  
19 1105 of NAFTA requires something less than the fair

20 and equitable treatment standard afforded under  
21 thousands of similar investment treaties, even those  
22 to which the United States is a party.

1709

11:33:47 1           Second, it suggests that the Claimant has an  
2 obligation to establish that the specific measures  
3 constituting a breach of the fair and equitable  
4 treatment standard are individually unlawful under  
5 customary international law.

6           Neither of Respondent's positions have any  
7 merit.

8           First, the fair and equitable treatment  
9 standard under Article 1105 is not less protective  
10 than the treatment required under most similar  
11 investment treaties. They are all firmly grounded in  
12 the established standard under international law.

13           In addressing this issue, I would like to  
14 start with the response to the Tribunal's first  
15 question on Article 1105 that was submitted to us, the  
16 question being whether Claimant agrees that the  
17 context of fair and equitable treatment is to be found  
18 in the international minimum standard under customary  
19 international law.

20           Claimant does not agree that there is any  
21 restriction that fair and equitable treatment be  
22 defined only by customary international law rather

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11: 34: 41 1 than international law in general, given that the  
2 plain language of Article 1105 requires treatment in  
3 accordance with international law. The *Mondev*  
4 Tribunal, which included the distinguished  
5 international jurist Stephen Schwebel as the United  
6 States' s chosen Arbitrator, also stated that the  
7 content of the standard is to be found by reference to  
8 international law. This is in paragraph 120 of the  
9 *Mondev* award, where it said that the standard of  
10 treatment is to be found by reference to international  
11 law; i. e., by reference to the normal sources of  
12 international law.

13           The Tribunal in *ADF* also agreed, stating that  
14 the fair and equitable treatment standard is to be  
15 based upon state practice and judicial or arbitral  
16 case law or other sources of customary or general  
17 international law. Thus, there is no rule that fair  
18 and equitable treatment be defined only by customary  
19 international law.

20           In any case, though, BIT jurisprudence has  
21 converged with customary international law in this  
22 area, and thus, Respondent has no basis to argue that

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11: 35: 44 1 BIT jurisprudence should be excluded because Article  
2 1105 standard is somehow different and less  
3 protective. That the standards are generally the same  
4 is demonstrated by the OECD Draft Convention, which  
5 Respondent indicated in its *Pope & Talbot* Article 1128

6 submission as being the most direct antecedent to  
7 international investment agreements. The Draft  
8 Convention included a fair and equitable treatment  
9 standard that, like the NAFTA standard, has conformed  
10 to the minimum standard under customary international  
11 law. The United States has recognized that it  
12 incorporated the same standard as that in the Draft  
13 Convention in its various bilateral investment  
14 treaties.

15           As the United States stated in its Pope &  
16 Talbot submission, from its first use in investment  
17 agreements, fair and equitable treatment was no more  
18 than a shorthand reference to elements of the  
19 developed body of customary international law. It is  
20 in this sense, moreover, that the United States  
21 incorporated fair and equitable treatment into its  
22 various bilateral investment treaties.

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11:36:50 1           Thus, for the U. S. to now argue that  
2 jurisprudence relating to other BITs should be  
3 disregarded because they involved autonomous standards  
4 should be rejected, at least with respect to cases  
5 involving U. S. BITs. Moreover, Mondev confirms that  
6 all BIT jurisprudence and not U. S. BIT cases are  
7 relevant, particularly considering that the minimum  
8 standard of treatment is an evolving one, as all NAFTA  
9 parties have acknowledged. The meaning of the  
10 standard thus must incorporate current international  
11 law. As the Mondev Tribunal stated, the content of

12 current international law is shaped by the conclusion  
13 of more than 2,000 bilateral investment treaties and  
14 many treaties of friendship and commerce.

15           The Tribunal also addressed and rejected any  
16 concerns like those that have been raised in this case  
17 about BITs failing to meet the necessary elements of  
18 customary international law, finding that BIT  
19 jurisprudence demonstrates both elements, state  
20 practice and *opinio juris*, and thus informs the  
21 international standard of treatment owed to foreign  
22 investors under customary international law. This

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11:37:55 1 discussion of the *Mondev* case is detailed in  
2 Claimant's Memorial at pages 121 to 123.

3           Additional evidence that BIT jurisprudence is  
4 relevant to interrupting Article 1105 lies in the  
5 statements of the BIT tribunals themselves. Many  
6 tribunals, such as those in *Occidental* and *CMS*, for  
7 example, have affirmatively stated that the Treaty  
8 standard at issue is no different from the customary  
9 international law standard. Put simply by the *Saluka*  
10 versus *Czech Republic Tribunal*, differences between  
11 the Treaty standard and the customary minimum  
12 standard, when applied to the specific facts of a  
13 case, may well be more apparent than real, and any  
14 such differences could be explained by the contextual  
15 and factual differences of the cases to which the  
16 standards have been applied. Thus, Respondent's  
17 attempt to exclude BIT jurisprudence from the content

18 of customary international law not only lacks any  
19 basis, but would greatly limit the body of case law  
20 that is interpreted the same or similar fair and  
21 equitable treatment standard as that in NAFTA's  
22 Article 1105.

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11:38:59 1 I turn now to Respondent's second legal  
2 position that attempts to constrain the meaning of  
3 Article 1105. Respondent argues that Claimant has an  
4 obligation to establish that the specific measures  
5 constituting its infringement of the fair and  
6 equitable treatment standard are individually unlawful  
7 under customary international law. For example, on  
8 day six of the hearing in August, Respondent stated:  
9 "The first thing to note when looking at Glamis's  
10 Article 1105 claim is that Glamis has not identified  
11 any international law rule governing what types of  
12 mine reclamation measures a State may adopt. "

13 In the Occidental versus Ecuador case, the  
14 Tribunal addressed similar argument regarding whether  
15 the particular measure at issue in that case was a  
16 violation of customary international law. It held  
17 that the investor was not required to identify such a  
18 rule.

19 The Occidental Tribunal stated, "The relevant  
20 question for international law in this discussion is  
21 not whether there is an obligation to refund  
22 value-added taxes," which were at issue in that case,

11: 40: 04 1 "but rather whether the legal and business framework  
2 meets the requirements of stability and predictability  
3 under international law." It was earlier concluded  
4 that there is not a VAT refund obligation under  
5 international law, but there is certainly an  
6 obligation not to alter the legal and business  
7 environment in which the investment has been made. In  
8 this case, it is the latter question that triggers the  
9 treatment that is not fair and equitable.

10           Similarly in this case, contrary to  
11 Respondent's argument, there is no duty for Glamis to  
12 demonstrate customary international rules regarding  
13 mine reclamation. What it must demonstrate, as it  
14 has, is that there are established and accepted  
15 principles embodied in the fair and equitable  
16 treatment standard that have been violated.

17           What are those standards? The fair and  
18 equitable treatment standard protects certain  
19 fundamental rule of law concepts that are common to  
20 principal legal systems throughout the world. As  
21 stated by Elihu Root in 1910, "There is a standard of  
22 justice, very simple, very fundamental, and if such

11: 41: 02 1 general acceptance by all civilized countries as to  
2 form a part of the international law of the world."

3           These principles so basic that they are

4 required by all countries include, for example, good  
5 faith, due process, fairness, and protection from  
6 arbitrariness. These general principles have been  
7 given greater specification through judicial practice  
8 as summarized, for example, by the Waste Management  
9 Tribunal, which found that conduct that is arbitrary,  
10 grossly unfair, unjust, idiosyncratic, discriminatory,  
11 or involving a lack of due process or transparency and  
12 candor would be in breach of the fair and equitable  
13 treatment standard.

14 In cases involving the review of  
15 administrative decisions in particular, tribunals have  
16 predominantly been concerned with two principles:  
17 One, due process or the protection from arbitrariness;  
18 and, two, legitimate expectations. These principles  
19 are most relevant to this case; and in response to the  
20 Tribunal's question, they are the accepted standards  
21 in customary international law that the Tribunal  
22 should apply in evaluating Claimant's 1105 claim.

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11:42:09 1 I will speak now a little about the meaning  
2 of these principles and how they should be evaluated  
3 in light of the facts. The first relevant principle  
4 is that of due process. The minimum standards  
5 requirement to accord foreign investors fair and  
6 equitable treatment requires host States to provide  
7 due process to their foreign investors. This inquiry  
8 is concerned primarily with arbitrariness and the  
9 character of the administrative decision-making

10 process and has developed as analog to the denial of  
11 justice standard applied to judicial proceedings. In  
12 addressing Glamis's argument that the minimum standard  
13 requires protection from arbitrary measures,  
14 Respondent professes uncertainty as to the meaning of  
15 this rule. Respondent stated: "Like its transparency  
16 claim, Glamis invokes this term "arbitrary," but it's  
17 not clear what it actually claims States are required  
18 to do or in what manner they are required to act in  
19 order to abide by this so-called rule. "

20 This so-called rule is an application of the  
21 denial of justice concept in the administrative  
22 context. Procedural fairness, an elementary

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11:43:09 1 requirement of the rule of law, is also a vital  
2 element of the fair and equitable treatment standard  
3 as recognized in CMS which stated, "Any measure that  
4 might involve arbitrariness is, in itself, contrary to  
5 fair and equitable treatment." Tribunals and  
6 authorities have defined arbitrary in a variety of  
7 ways. For example, the Restatement Third of Foreign  
8 Relations Law, Section 712, Footnote 11--note 11,  
9 rather--defines an arbitrary act as one that is,  
10 "unfair and unreasonable and inflicts serious injury  
11 to establish rights of foreign nationals though  
12 falling short of an act that would constitute an  
13 expropriation. "

14 The Tribunal in *Lauder versus Czech Republic*  
15 defined it as an act that is not founded on reason or

16 fact nor on the law.

17           And in the ELSI case, which shows the  
18 position of the United States when it's not the  
19 Respondent, the United States argued that the  
20 arbitrary actions include those which are not based on  
21 fair and adequate reasons, including sufficient legal  
22 justification, but rather arise from the unreasonable

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11: 44: 12 1 or capricious exercise of authority. However, as Pope  
2 & Talbot has established, there is no threshold  
3 limitation that the conduct complained of be  
4 egregious, outrageous, or shocking, or otherwise  
5 extraordinary.

6           The Tecmed Tribunal has enumerated what the  
7 minimum standard requires of host States. It stated:  
8 "The foreign investor also expects the host State to  
9 act consistently; i. e., without arbitrarily revoking  
10 any preexisting decisions or permits issued by the  
11 State that were relied upon by the investor to assume  
12 its commitments. The investor also expects the State  
13 to use the legal instruments that govern the actions  
14 of the investor in conformity with the function  
15 usually assigned to such instruments, and not to  
16 deprive the investor of its investment without the  
17 required compensation."

18           Thus, in light of the authorities discussing  
19 arbitrariness, the Tribunal should keep in mind the  
20 following inquiries as it evaluates the facts that it  
21 will be hearing more about later this morning to

22 determine whether Respondent has acted arbitrarily and

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11:45:12 1 denied Glamis due process.

2           Was the administrative decision reached  
3 through a fair process? No. As my colleagues are  
4 going to discuss in much greater detail, the  
5 unfairness of the process is clearly demonstrated by  
6 the 1999 Leshy Opinion upon which the Secretary  
7 Babbitt denial was based. This opinion changed the  
8 meaning of the undue impairment standard disregarding  
9 years of settled law. There is nothing fair about  
10 that process.

11           Did the host State use its administrative  
12 powers for improper purposes or inconsistently? Yes.  
13 Both the Federal and State Governments used the denial  
14 of the Imperial Project as a way to achieve political  
15 ends, and as Mr. Ross will detail, the California  
16 mandatory backfilling requirements were imposed  
17 without any reference to any scientific or technical  
18 reports. They were concerned only with stopping the  
19 Imperial Project.

20           Did the host State use the legal instruments  
21 that govern the actions of the investor in conformity  
22 with the function usually assigned to such

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11:46:18 1 instruments? No. In this case, Respondent used

2 emergency powers to block the Imperial Project.  
3 Professor Wälde has explained that emergency powers  
4 are generally reserved for situations where, without  
5 action, the safety of the public is seriously  
6 imperilled. This is in Chapter 4, page 28 of his  
7 report.

8 Thus, emergency powers are not to be used to  
9 achieve political purposes.

10 Finally, was there a disproportionate impact  
11 on the foreign investor? The answer to this is yes.  
12 Glamis has been uniquely affected and targeted, as  
13 Mr. Ross will further discuss.

14 Respondent seeks to dismiss the significance  
15 of these red flags on the basis of deference, arguing  
16 that Glamis is asking this Tribunal -- Glamis is asking  
17 this Tribunal to accord no deference whatsoever to the  
18 several administrative and legislative decisions and  
19 measures that it happens to disagree with.

20 This is not the case. Referencing the  
21 eminent international jurist George Schwarzenberger,  
22 Professor Wälde opined that areas where Government

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11:47:24 1 authorities have discretion are particularly conducive  
2 to arbitrariness since it is easier for the host  
3 government to mask an arbitrary reason with a  
4 colorable excuse. While tribunals cannot substitute  
5 their policy judgments for the States, they can and  
6 must probe the host State's rationale to see whether  
7 its measures matched its objectives.

8           The recent decision in the Tokios Tokelés  
9 versus Ukraine case also demonstrates that tribunals  
10 must look to the host State's motives. In Tokios all  
11 Members of the Tribunal agreed that if the Claimant  
12 had proven that the State's actions were politically  
13 motivated and that the audits and investigations  
14 imposed on the Claimant were not valid, it would have  
15 established a breach of the fair and equitable  
16 treatment standard. Tribunals simply cannot turn a  
17 blind eye to evidence of a discriminatory and targeted  
18 regulation. Here, too, the Tribunal should take a  
19 close look at the arbitrariness of Respondent's  
20 Federal and State measures, consider their  
21 disproportionate and targeted nature, and find that  
22 Glamis's Imperial Project has been denied due process

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11: 48: 26 1 in breach of the fair and equitable treatment standard  
2 of Article 1105.

3           The next strand of the fair and equitable  
4 treatment standard that Respondent has violated  
5 relates to the protection of legitimate expectations.  
6 The U.S. argument that protection of legitimate  
7 expectations is not part of international state  
8 practice is disingenuous, particularly when the United  
9 States itself has in domestic takings law, as well as  
10 other areas, recognized this concept also expressed as  
11 detrimental reliance or estoppel.

12           All members of the NAFTA Tribunal in  
13 International Thunderbird versus Mexico have accepted

14 that the principle of legitimate expectations forms  
15 part of the duty to afford fair and equitable  
16 treatment to investors. The Award states: "Having  
17 considered recent investment case law and the good  
18 faith principle of international customary law, the  
19 concept of legitimate expectations relates, within the  
20 context of the NAFTA framework, to a situation where a  
21 contracting party's conduct creates reasonable and  
22 justifiable expectations on the part of an investor or

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11:49:31 1 investment to act in reliance on said conduct, such  
2 that a failure by the NAFTA party to honor those  
3 expectations could cause the investor or investment to  
4 suffer damages. "

5           The Tecmed decision grounded in the good  
6 faith principle and international law provides a good  
7 summary of what the protection of legitimate  
8 expectations requires of a host State. The foreign  
9 investor expects the host State to act in a consistent  
10 manner, free from ambiguity, and totally transparently  
11 in its relations with the foreign investor so that it  
12 may know beforehand any and all rules and regulations  
13 that will govern its investments, as well as the goals  
14 of the relevant policies and administrative practices  
15 to be able to plan its investment and comply with such  
16 regulations.

17           A recently published treatise entitled  
18 "International Investment Arbitration" also provides a  
19 helpful framework for assessing cases involving

20 legitimate expectations. This book, which was written  
21 specifically to address a gap in literature stemming  
22 from the fact that most important studies on the

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11: 50: 37 1 application of the standards of treatment were written  
2 before BIT protections had been tested to any  
3 significant degree, analyzed the relevant cases, and  
4 the authors confirm that the stability of the legal  
5 and business framework is a core element of fair and  
6 equitable treatment.

7           With this as the underlying principle, the  
8 authors of the treatise suggest the following as the  
9 relevant considerations: The law of the host State at  
10 the time of investment under this factor will be  
11 relevant whether there are any specific assurances  
12 which the investor may have received at the time of  
13 investment, as well as the legitimate scope for  
14 regulatory activity. The starting point, thus, for  
15 determining whether the investor's legitimate  
16 expectations have been violated in breach of the fair  
17 and equitable treatment standard is the law of the  
18 host State at the time of the investment. As stated  
19 recently in the *Saluka v. Czech Republic* case, an  
20 investor's decision to make an investment is based on  
21 an assessment of the state of the law and totality of  
22 the business environment at the time of the

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11:51:41 1 investment, as well as on the investor's expectation  
2 that the conduct of the host State subsequent to the  
3 investment will be fair and equitable. Under the  
4 legal regime existing at the time of Glamis's  
5 investment in the Imperial Project, Glamis's Plan of  
6 Operation met all applicable requirements, as  
7 Mr. Leshendok's report and his testimony demonstrated.  
8 This regime was radically transformed, however,  
9 through measures at the Federal and State level,  
10 including, for example, the Federal Government's  
11 arbitrary casting aside of years of settled mining and  
12 public land law to apply a discretionary veto  
13 authority that no one, including BLM, ever believed  
14 existed.

15           This regime was further transformed by the  
16 California Government's enactment of unprecedented  
17 complete backfilling and site recontouring  
18 requirements.

19           As stated by the Waste Management Tribunal,  
20 it is also relevant whether the treatment is in breach  
21 of representations made by host State which were  
22 reasonably relied upon by the Claimant. Respondent

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11:52:42 1 has argued in its Rejoinder that Glamis had no such  
2 assurances. As Mr. Schaefer mentioned, such  
3 assurances are not required, but in any case they  
4 exist in this case. As Professor Walde has noted in  
5 his report, there are two types of assurance, both of

6 which Glamis had in this case. The first is specific  
7 representations, and two, the other is more general  
8 assurance based on how the host State projects its  
9 investment regime and how the investor reasonably  
10 views it.

11 Glamis reasonably viewed the host State's  
12 investment regime at the time of its investment--you  
13 heard much about this, and you will continue to hear  
14 more about it later this morning--and had a reasonable  
15 expectation under this regime that it would be able to  
16 mine the Imperial Project for an economic profit.

17 In addition, Glamis had the benefit of  
18 specific assurances in the form of the CDPA which  
19 precluded the establishment of buffer zones around the  
20 withdrawn wilderness areas and the assurances of BLM  
21 Director Mr. Ed Hastey.

22 Finally, the Tribunal must also balance the

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11:53:43 1 protection of legitimate expectations by the host  
2 State's right to regulate. This, however, does not  
3 command the sort of blanket approval based on  
4 deference that Respondent would have you give to all  
5 acts of the host State. Respondent cited Saluka v.  
6 Czech Republic on page 189 of its Rejoinder for  
7 stating that it was clearly not for this Tribunal to  
8 second-guess the Czech Government's privatization  
9 policies.

10 The follow-up to that, however, clarified  
11 that the Tribunal must still evaluate whether the host

12 State has complied with its international obligations.  
13 The Tribunal stated: "The Czech Republic, once it  
14 decided to bind itself by the Treaty to accord fair  
15 and equitable treatment to investors of the other  
16 contracting party, was bound to implement its  
17 policies, including its privatization strategies, in a  
18 way that did not lead to unjustified differential  
19 treatment unlawful under the Treaty. "

20 Respondent is similarly bound here.

21 The balancing approach advanced by the Saluka  
22 Tribunal is helpful in assessing the competing

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11: 54: 43 1 interests. It provides that the determination of a  
2 breach of fair and equitable treatment standard by the  
3 host State therefore requires a weighing of the  
4 Claimant's legitimate and reasonable expectations on  
5 the one hand and Respondent's legitimate regulatory  
6 interests on the other. The specific facts  
7 establishing the reasonableness of Glami's  
8 expectations and legitimacy and character of  
9 Respondent's regulatory interests have already been  
10 alluded to. Let me, however, suggest that the  
11 legitimacy of Respondent's interest is cast into  
12 serious doubt by the targeted and retroactive nature  
13 of the measures at issue designed specifically to stop  
14 the Imperial Project long after its Plan of Operations  
15 had already been submitted.

16 Thus, the facts here render highly  
17 questionable the legitimacy of Respondent's interest

18 and weighs strongly in favor of finding that Glamis's  
19 rights under Article 1105 have been breached.

20 In sum, Article 1105 includes an obligation  
21 to protect a reasonable and legitimate expectations of  
22 a foreign investor determined by looking at the laws

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11:55:47 1 in place at the time of the investment and any  
2 assurances that the investor had and weighing the host  
3 State's regulatory interests. Article 1105 also  
4 includes an obligation to provide the foreign investor  
5 with due process and protect against arbitrary actions  
6 by the host State. The totality of the facts in this  
7 case which must be considered, and as my colleagues  
8 will further detail this morning, clearly demonstrate  
9 that both of these obligations have been breached in  
10 violation of the fair and equitable treatment standard  
11 required by Article 1105.

12 I will now turn it over to Mr. McCrum, who  
13 will discuss Glamis's reasonable expectations with  
14 respect to the Imperial Project. Thank you.

15 PRESIDENT YOUNG: Thank you.

16 Mr. McCrum?

17 MR. McCRUM: Thank you, Mr. President. We  
18 will now review Glamis's reasonable expectations to  
19 conduct conventional open-pit gold mining at the  
20 Imperial Project site in the California Desert.

21 The BLM regulations and the California Desert  
22 Conservation Area plan provide for mine approval if

11: 56: 52 1 economically and technically feasible mitigation  
2 measures were employed. California SMARA regulatory  
3 practices were consistent with this at the time Glamis  
4 made its investments.

5 Mr. Leshendok, former senior BLM minerals  
6 official, his reports and his testimony confirm that  
7 the Glamis Imperial Plan of Operations met all  
8 applicable preexisting regulatory requirements, and  
9 this testimony is un rebutted. Glamis had no  
10 expectation of complete backfilling because it was not  
11 economically feasible, and complete backfilling was  
12 repeatedly rejected by BLM and California lead  
13 agencies, and even by BLM in 2,000 rule revisions  
14 which, in any event, would not have applied to Glamis  
15 as a pending plan, which is specifically referenced in  
16 the BLM 2000 and 2001 rule revisions, which did not  
17 subject any new performance standards to pending plans  
18 of operations.

19 But as I noted, BLM specifically rejected the  
20 infeasibility of even a presumption of backfilling in  
21 2000, based on the National Academy of  
22 Sciences/National Research Council Report.

11: 58: 00 1 Glamis also had assurances from the 1994  
2 California Desert Protection Act on which Glamis  
3 reasonably relied in making its investment. The

4 Indian Pass Wilderness and the Picacho Peak Wilderness  
5 were permanently protected in large part for cultural  
6 resource protection purposes. The Imperial Project  
7 was outside of those protected areas. No buffer zone  
8 language was set forth in the statute by Congress to  
9 ensure the fact that a mining operation can be seen or  
10 heard from a point within a wilderness is not a  
11 sufficient reason to impose restrictions on that  
12 mining operation, yet that is essentially what  
13 Interior Secretary Babbitt did in the January 17,  
14 2001, denial of the Imperial Project, which was based  
15 upon the determination of Native American cultural  
16 resources being in a designated area of traditional  
17 cultural concern.

18           Glami s had no expectation that the discovery  
19 of cultural resources would block the mi ne because  
20 mi ning was only subject to economi cally feasible  
21 mi tigation measures. Never had such cultural  
22 resources been used to stop a mi ne in the California

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11: 59: 06 1 Desert. Glami s could not have known in advance that  
2 the Imperial Project was considered a uni que,  
3 i mportant, sacred site in any event, as we will  
4 review.

5           BLM California State Director Hastey gave  
6 personal assurances to Mr. McArthur that the plan  
7 would be approved at the Imperial Project, and this  
8 also confirms the reasonableness of Glami s' s  
9 expectation. Mr. McArthur has testified to that

10 personal assurance. It was also contained in  
11 Mr. McArthur's prior signed statements, and it has not  
12 then contradicted by the Respondent.

13           The 2002 BLM Mineral Report further confirms  
14 the reasonableness of Glamis's expectation that had  
15 the law been properly applied, even if significant  
16 cultural resources were documented at the site, a  
17 reasonable and prudent investor would proceed with the  
18 Project, which is a finding made by the BLM in  
19 September 2002, and not rescinded to the present date.

20           The Imperial Project was located in the 1990s  
21 in the heart of an active gold mining district. Three  
22 modern open-pit mines were located within a dozen

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12:00:13 1 miles of the Imperial Project, including the Mesquite  
2 Mine, the American Girl Mine, and Glamis's own Picacho  
3 Mine just several miles away.

4           By operating the Glamis, Picacho, and Rand  
5 Mine in the CDCA, Mr. McArthur testified that Glamis  
6 became very familiar with the Federal and State  
7 regulatory requirements affecting gold mining. And  
8 open-pit gold mines in the California Desert were not  
9 subject to complete backfilling as a reclamation  
10 requirement, as Mr. Leshendok has confirmed at length.

11           The 1995 Briggs Mining EIS/EIR in the record  
12 is reflective of that practice, and the specific  
13 finding by BLM and the Inyo County, the lead county  
14 implementing SMARA in California makes the statement:  
15 "Backfilling has not been a customary or usual

16 practice in mining reclamation and is not required by  
17 BLM regulation and policy. "

18           We've also heard testimony and seen evidence  
19 that open-pit mining was and is a common practice  
20 throughout California and the western United States.  
21 Mr. Leshendok has testified to that and addressed it  
22 in reports at length and explained that the Imperial

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12: 01: 23 1 Project lies within the Great Basin geologic province,  
2 which is considered a world-class gold and copper  
3 mining district and one of the major producers for  
4 those minerals in the world. We have seen this map  
5 that Mr. Leshendok has prepared to depict that.

6           Mr. Leshendok has also testified that the  
7 predominant method of mining in the Great Basin  
8 province is open-pit mining and that open-pit mining  
9 is also the most typical method for mining aggregates  
10 and industrial minerals throughout the United States  
11 and in California. As of 1998, approximately 955  
12 mines were operating in California subject to SMARA  
13 regulation.

14           However, only 24 of those mines were active  
15 gold mines. Thus, less than 3 percent of the  
16 California mines were gold mines.

17           Mr. Leshendok has also testified regarding  
18 the Glamis two open-pit gold mines that operated under  
19 State and Federal regulation in the 1980s and 1990s,  
20 that the Picacho and Rand Mines had good compliance  
21 records with regard to State and Federal regulations.

Complete backfilling generally was and is

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12: 02: 29 1 recognized as infeasible by the National Academy of  
2 Sciences. National Research Council at the request of  
3 the U. S. Congress has issued two reports that are  
4 reflected in the record in this case, the first one  
5 was in 1979, the second in 1999--specifically dealing  
6 with the subject of environmental regulation of  
7 hardrock mining on Federal lands. It was the '99  
8 report.

9 The various findings made by the NRC about  
10 the feasibility of backfilling have been presented in  
11 the case. Even Mr. Parrish acknowledged that the SMGB  
12 regulations were contrary to the recommendations of  
13 the National Research Council, which advised against  
14 the adoption of inflexible, technically prescriptive  
15 standards, and that if backfilling was to be  
16 considered, it should be considered on a case-by-case  
17 basis, as previously recognized by the NRC in 1979.

18 The NRC in the 1999 report also found that  
19 there were adverse environmental effects for mandatory  
20 complete backfilling, which was a further reason why  
21 any such backfilling should be considered on a  
22 site-specific basis.

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Mr. Leshendok has testified that the BLM

2 specifically rejected a proposed presumption in favor  
3 of backfilling in the--based on the 1999 NAS/NRC  
4 report recommendations in a 2000 rulemaking during the  
5 Clinton Administration. The Glamis Imperial Project  
6 included substantial partial backfilling, and  
7 Mr. Leshendok explained that the proposed operation  
8 was based on standard and similar engineering and  
9 environmental principles used for gold mining  
10 operations in California, the CDCA, and the Basin and  
11 Range Province.

12           There were at least 12 open-pit gold mines  
13 within the CDCA, and these are reflected in the draft  
14 and final Glamis Imperial EIS/EIRs, and we've also  
15 heard testimony that Glamis operates open-pit gold  
16 mines in Mexico, Honduras, and Guatemala, and none of  
17 these open-pit gold mines are required to be  
18 backfilled.

19           Glamis was also recently permitted open-pit  
20 mining operations in Nevada on BLM lands at the  
21 Marigold Mine, with seven open pits not subject to  
22 complete backfilling requirements. And Mr. Guarnera,

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12:04:48 1 President of Behre Dolbear, has testified that his  
2 firm is working in 57 countries, none of which have  
3 complete backfilling requirements.

4           Glamis had successfully reclaimed its Picacho  
5 Mine, subject to BLM and SMARA regulations without  
6 complete backfilling, and obtained successful final  
7 bond release in 2002, and Glamis was recognized for

8 its successful reclamation practices of that mine  
9 which were carried out without complete backfilling.

10           According to Mr. Leshendok, Glamis had a  
11 reasonable expectation of approval because it was  
12 consistent with the 43 CFR 3809 regulations and  
13 consistent with the practices of other open-pit gold  
14 mining operations throughout this area through the use  
15 of appropriate economic and technically feasible  
16 mitigation measures.

17           The reasonableness of Glamis's expectations  
18 are confirmed by the January 10, 1995 briefing memo to  
19 the National Director which praised Glamis, Chemgold,  
20 Glamis's former name, as being a good steward, sharing  
21 BLM's management responsibilities for proper use,  
22 development, and land reclamation of desert lands.

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12:05:57 1           That memo dated January 10, 1995, was  
2 prepared by the BLM internally within one month of the  
3 submission of the Glamis Imperial Plan of Operations  
4 in December of 1994, and this memo specifically refers  
5 to the Imperial Project Plan of Operations and makes  
6 the statement that local Government agencies and  
7 officials support existing and proposed mining  
8 operations in Imperial County.

9           Turning to the background of the California  
10 Desert Conservation Area, this is a 25-million-acre  
11 area designated by the Congress and Federal Land  
12 Policy and Management Act of 1976. We have heard  
13 testimony in this case and seen evidence that within

14 the CDCA there are at least a dozen major open-pit  
15 gold mines. One of the largest mines in California,  
16 the U. S. Borax Mine mining boron; one of the largest  
17 trash landfills in the United States now underway  
18 approved originally back in 1996, the Mesquite  
19 regional landfill, which also includes a new rail  
20 spur; and major gas pipeline construction, the North  
21 Baja Pipeline projects.

22           These activities are consistent with the

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12:07:07 1 standard that Congress set forth in 1996, providing  
2 that multiple use activities are to occur in this area  
3 and shall take into account the principles of multiple  
4 use, providing for resource use and development,  
5 including maintenance of environmental quality,  
6 rights-of-way, and mineral development, so this was  
7 supposed to be a multiple use area.

8           Congress provided \$40 million in funding to  
9 the BLM to develop the CDCA Plan, and that planning  
10 included from the late 1970s significant attention to  
11 Native American cultural resources.

12           Following the adoption of the CDCA Plan in  
13 1980, there was a specific standard set for mining on  
14 the multiple use lands where the Glamis Imperial  
15 Project was located, and that standard was mitigation  
16 subject to technical and economic feasibility will be  
17 required.

18           The BLM 1980 regulations were quite similar  
19 and complementary to that CDCA Plan statement and

20 contained a specific statement in 1980 that, if upon  
21 compliance with the National Historic Preservation  
22 Act, cultural resources cannot be salvaged or damage

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12:08:18 1 to them mitigated, the plan must be approved. And  
2 Mr. Leshendok has testified that this reflected BLM's  
3 consistent regulatory practice during his significant  
4 tenure at the BLM

5 Back to the CDCA Planning process, the  
6 cultural resources were considered in consultation by  
7 BLM with Native Americans, and there was significant  
8 Tribal input, which is reflected in the record of this  
9 place quite indisputably. At least three Tribal  
10 orders identified Pilot Knob as a significant area to  
11 the history of the Quechan Tribe citing BLM  
12 ethnographic interviews from 1977 and 1978. Not one  
13 of those interviews elicited information indicating  
14 that the proposed Imperial Project site was  
15 particularly significant.

16 Dr. Kaldenberg, the BLM California  
17 archeologist, asserted in written testimony that there  
18 was limited input from Native American Tribes in the  
19 planning process. However, at the hearing  
20 Dr. Kaldenberg admitted that he had never read the BLM  
21 ethnographic notes because they were not available to  
22 him, although those notes were cited and supplied with

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12: 09: 32 1 the Glamis Memorial originally filed in this case.  
2 BLM integrated the cultural resource  
3 information with regard to Native Americans into a map  
4 designating very high and high areas of Native  
5 American concern, and this map reveals that the Glamis  
6 Imperial Project was outside those designated areas.  
7 BLM then made recommendations to Congress  
8 specifically on those--based on that type of  
9 information and recommended the Indian Pass and  
10 Picacho Peak Wilderness among millions of other acres  
11 to be set aside for permanent protection. The Glamis  
12 Imperial Project was not inside those recommended BLM  
13 wilderness areas, nor in the Congressionally  
14 designated wilderness areas under the 1994 Act.  
15 The Act designated a total of 7.7 million  
16 acres, and those acres did not include the Glamis  
17 Imperial Project area as being set aside for permanent  
18 protection. That 1994 Act contained the no buffer  
19 zone language stating that Congress does not intend to  
20 designate these wilderness areas to lead to the  
21 creation of protected buffer zones around any such  
22 wilderness area.

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12: 10: 52 1 As Mr. McArthur has testified, the passage of  
2 the 1994 Act and the buffer zone language gave us  
3 comfort that the Imperial Project was clear and that  
4 those lands would remain open for a multiple use  
5 activity, and he was particularly concerned to make

6 sure that the no buffer zone language was present in  
7 the Act, and he specifically relied on that as Glamis  
8 moved forward with its Plan of Operations in December  
9 of '94, after passage of that Act.

10 At the August 2007 hearing, counsel for the  
11 United States made the surprising assertion that the  
12 Indian Pass and Picacho Peak Wilderness areas had not  
13 been designated, in part, for Native American cultural  
14 purposes.

15 But as the 1994 House Report on the  
16 California Desert Protection Act clearly shows, Indian  
17 Pass was designated. The wilderness designation was  
18 based on Native American cultural resources. Those  
19 resources were taken into account in setting the  
20 boundaries of the designated area.

21 And the same is true for Picacho Peak in  
22 1994. Native American cultural resources were clearly

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12:11:54 1 considered by BLM and the Congress in making those  
2 designations.

3 As stated, the Imperial Project is not within  
4 the designated areas, and the major 1986 study by  
5 Woods under BLM contract did not identify the Imperial  
6 Project area as being near any Quechan Creation  
7 myth-related locale. And BLM's Dr. Kaldenberg  
8 testified that he had a great deal of respect for  
9 Dr. Woods.

10 Let's take a look at the map, which this map  
11 is taken from, the 1986 Woods study with the Imperial

12 Project site and some other sites depicted, and the  
13 closest Quechan-related site according to that Wood  
14 study is Picacho Peak, which is several miles away.

15 Mr. McArthur testified that during the  
16 operation of the Picacho Mine, there had never been  
17 Native American concerns raised during his years of  
18 operation there, and that while he was aware of trails  
19 all over the desert, he had never heard a reference to  
20 any Trail of Dreams until it arose in connection with  
21 the Glamis controversy.

22 Now, the 1986 Woods map did not identify

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12:13:10 1 Indian Pass as a Quechan Creation myth-related locale,  
2 and Professor Caron asked this question during the  
3 hearing. And I wanted to point out that this was not  
4 an oversight by Woods in '86 because Indian Pass had  
5 already been designated as an ACEC by BLM in 1980, so  
6 it wasn't that this area wasn't known. This was not  
7 identified as a Quechan creation myth-related site,  
8 and the ACEC boundaries that had been designated by  
9 BLM in '86 did not include the Imperial Project site.

10 Reflecting what was known about the Imperial  
11 Project in 1988 is that Dr. von Werlhof study which  
12 identified the Imperial Project site as minor in use  
13 and purpose, serving as an outreach area for Native  
14 American groups. Dr. Kaldenberg did not dispute the  
15 accuracy of this characterization.

16 And Dr. Lynne Sebastian has explained that  
17 she could find no reference in the ethnographic

18 literature for a Trail of Dreams in the California  
19 desert or elsewhere until assertions were made  
20 regarding that feature.

21 Dr. Sebastian has also stated consistently in  
22 her reports that the area of cultural concern

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12:14:19 1 identified by the Tribe encompassed a vast area from  
2 Pilot Knob over 170 miles to the north, and I'm sorry,  
3 Avikwaame or Spirit Mountain, 170 miles to the north,  
4 and Pilot Knob, 15 to 25 miles to the south.

5 Dr. Sebastian's views have been corroborated  
6 by the June 6, 2007, disclosure of the 2001 era Boma  
7 Johnson Xam Kwatcan trail map which was presented at  
8 the hearing.

9 Turning to Mr. McArthur's statements about  
10 the reasonable expectations that Glamis had, he  
11 summarized them by saying, "Well, yes, we had  
12 reasonable expectations. I mean, we had been  
13 operating in the desert for 15 years. I personally  
14 have been there since 1988, enjoyed a tremendous  
15 relationship with all of the Government agencies, had  
16 seen mines be permitted, projects be permitted without  
17 any requirement for backfilling. Had seen that  
18 cultural resources were encountered very similar to  
19 what we had in our project and could be mitigated and  
20 were not used to stop projects, and so there was no  
21 way to anticipate this kind of treatment."

22 So, in summary, Glamis had a clear reasonable

12: 15: 28 1 expectation of approval. The Project was consistent  
2 with BLM regulations. And this is confirmed by the  
3 issuance of the BLM Mineral Report in 2002, which was  
4 issued with full knowledge of Native American cultural  
5 resources that had been identified at the site by that  
6 time, and yet BLM, in 2002, found that Glamis would be  
7 warranted as a prudent operator to continue with that  
8 investment at that particular time, which was  
9 September 2002, shortly before the adoption of the  
10 California measures.

11 Let's take a look at the specific finding of  
12 the BLM Mineral Report, if we can. We have a specific  
13 quotation of that finding that, frankly, we are all  
14 familiar with, so I will pass on that, but that is the  
15 finding that the evidence is of such a character that  
16 a reasonable person would be warranted in proceeding  
17 with the Project with a reasonable prospect of success  
18 in developing a valuable mine.

19 Now, this was the background of the  
20 reasonable expectations that Glamis had as of  
21 September between the period from 1994 through the  
22 2002 time frame, but along that way there were

12: 16: 45 1 significant new developments by the Interior  
2 Department, and I'm going to turn now to the topic of  
3 the Federal measures that were introduced between 1998

4 and 2001, which derailed the Glamis project in a way  
5 that could not have been anticipated by Glamis.

6 By 1996 and 1997, BLM and Imperial County had  
7 prepared two Draft EIS/EIRs. They both identified the  
8 approval of the Glamis Imperial Project without  
9 complete backfilling as the preferred alternative that  
10 best fulfills the agency's statutory mission and  
11 responsibilities giving consideration to economic,  
12 environmental, technical and other factors.

13 But in 1998, the Glamis Imperial Project came  
14 to a grinding halt, and this was at the direction of  
15 Interior Solicitor Leshy and other senior political  
16 operatives at the Interior Department. By July 27,  
17 1998, BLM's internal schedule on the Imperial Project  
18 called for a Final EIS by September 18, 1998, in a  
19 Record of Decision by October 18, '98.

20 A BLM mineral examination was already  
21 underway by July '98, and found that Glamis appears to  
22 have conducted necessary work of a prudent operator in

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12: 18: 09 1 the usual and proficient operations of similar  
2 character. However, by October 30, 1998, Solicitor  
3 Leshy directed BLM to delay completion of the validity  
4 exam and a Final EIS.

5 And while Solicitor Leshy was clearly  
6 involved for months as of this point as is documented  
7 in our Memorial, this is a memo from the office of the  
8 Solicitor letterhead to the BLM State Director, and  
9 Solicitor Leshy does unquestionably direct the BLM to

10 delay completion of the validity exam and the Final  
11 EIS.

12 Now, at the August 2007 hearing, counsel for  
13 the United States appeared to suggest that this delay  
14 was only intended to last a couple of weeks until  
15 Mr. Leshy returned from travel out of the country.  
16 However, Solicitor Leshy's memo directed that BLM  
17 validity exam to be delayed and the Final EIS to be  
18 delayed until his legal review was concluded, and the  
19 resulting legal opinion was never issued until  
20 January 2000. It was actually released by a press  
21 release dated January 14, 2000.

22 The BLM Imperial Project schedule dated

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12:19:21 1 12/4/98 reveals that the mineral examination was  
2 expected to be complete by December 18, 1998, but that  
3 the EIS process was delayed waiting for the  
4 Solicitor's opinion, and the mineral examination  
5 ultimately did not conclude until 2002, as we know.

6 This reflects the status as of December 1998.  
7 This was after the Leshy memo stating that actions are  
8 waiting for the conclusion of the Leshy Solicitor's  
9 opinion, which did not come out for over a year later  
10 until January 2000.

11 Although a draft of this Leshy Solicitor's  
12 Opinion existed by January 1999, it was not issued for  
13 an entire additional year. Once Solicitor Leshy did  
14 announce his position, he announced that Interior now  
15 possessed a previously unrecognized discretionary

16 authority to deny the Glamis Imperial Project which  
17 the Interior Secretary could choose to exercise.  
18 Interior's press release stated on January 14, 2000,  
19 "If BLM agrees with the Advisory Council on Historic  
20 Preservation, it has, in our view, the authority to  
21 deny the Glamis Imperial Plan of Operations."  
22 This new Interior announcement of a

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12: 20: 35 1 discretionary denial authority conflicted with the  
2 following statements in a May 7, 1998, BLM option  
3 paper. That 1998 option paper on the Imperial Project  
4 specifically stated that the denial of the Plan of  
5 Operations could constitute a taking of rights granted  
6 to the Claimant of the Mining Law. If such a finding  
7 is made, compensation would be required under this  
8 option. While no precise estimate of the mineral  
9 value is known by BLM, reasonable compensation can be  
10 expected to be substantial, and that document is  
11 certainly consistent with the views prior to the  
12 issuance of the Leshy Opinion.

13 The Leshy Opinion, which has later been  
14 rescinded on legal grounds, directly resulted in the  
15 January 17, 2001, denial of the Imperial Project,  
16 announced via press release by former Secretary  
17 Babbitt three days before leaving office. The  
18 secretarial decision stated that the proposed Glamis  
19 Imperial Project would destroy portions of the Trail  
20 of Dreams, running through this vast area up to  
21 Newberry Mountain, 115 miles to the north. Solicitor

22 Leshy' s opinion was later rescinded on legal grounds

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12: 21: 44 1 by the Interior Department on October 23, 2001, in  
2 part, on the grounds that any such discretionary  
3 denial authority needed to be implemented by duly  
4 promulgated regulations, and that remains the view of  
5 the Interior Department today.

6 A BLM Director' s briefing document dated  
7 December 19, 2002, described the situation by stating  
8 that the last administration rejected the plan of  
9 operations based on undue impairment, the basis of  
10 which the current Solicitor found to be illegal.

11 Glamis then suffered nearly two years of  
12 additional harmful delay, all of 2001 and most of  
13 2002, as Interior slowly took steps to reverse and  
14 retract Secretary Babbitt' s unlawful denial, but the  
15 Project was never approved during this time.

16 Secretary Babbitt' s denial was rescinded by Interior  
17 Secretary Norton on November 23, 2001, but the  
18 long-delayed BLM Mineral Report finding Glamis' s  
19 mining claims valid was never released for another  
20 year, until September 27, 2002.

21 The effect of Solicitor Leshy' s 1998  
22 directive to delay the Project resulted in delays of

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12: 22: 56 1 nearly four years, and this was after the Glamis

2 Imperial Project had been pending since December of  
3 1994 and had been the subject of two Draft EIS/EIRs.  
4 Accordingly, the unlawful delay by Secretary Babbitt  
5 was associated a four-year unlawful and deliberate  
6 delay of the Glamis Imperial Project.

7 Now, like Secretary Babbitt, Solicitor Leshy  
8 generally opposed the Mining Law of 1872 and believed  
9 that time had come for change or repeal. Indeed, he  
10 noted in his 1987 book that the law had not been  
11 amended to bring it in line with the necessities of  
12 the modern administrative state, in his view.

13 In his 1987 book, he advised that the  
14 Executive Branch should take bold measures to  
15 dramatically raise the level of attention paid to this  
16 issue and facilitate congressional modification of the  
17 law. Secretary Babbitt expressed similar opinions to  
18 Congress in May of 1993, soon after arriving at  
19 Interior.

20 Secretary Babbitt urged the Congress to  
21 replace the Mining Law with a different legislative  
22 scheme that would increase the level of Government

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12: 23: 58 1 control dramatically over an industry already highly  
2 regulated. Congress failed to change the Mining Law  
3 in the manner advocated by Secretary Babbitt and  
4 Solicitor Leshy.

5 In addition to those officials, the Interior  
6 Office of Congressional and Legislative Affairs was  
7 headed by Dave Alberswerth, who had published an

8 article in 1991, advocating that land-management  
9 agencies should have authority to deny certain mineral  
10 exploration and development activities. But such  
11 views were contrary to Interior's long-standing and  
12 contemporaneous interpretations announced since 1980  
13 that the Interior had the authority--Interior had  
14 authority to minimize impacts and regulate mining to  
15 minimize impacts but not to prevent all impacts, and  
16 that mitigation must be subject to economic and  
17 technical feasibility.

18 Similarly, Interior had recognized back in  
19 1980 that applicable laws did not authorize denial of  
20 mining activities because of unavoidable impacts.  
21 Yet, without any change in the Mining Law, FLPMA, or  
22 Interior's regulations, the Lesly Solicitor's opinion

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12:25:02 1 concluded that such a discretionary denial existed in  
2 January of 2000 which could then be exercised to deny  
3 the Imperial Project.

4 Now, at the August 2007 hearing, U.S. counsel  
5 suggested that this Lesly Opinion was undertaken as a  
6 matter of first impression because the issue of  
7 possible conflict between the Mining Law and Native  
8 American rights had not arisen previously. However,  
9 this issue had arisen previously during Secretary  
10 Babbitt's tenure at Interior, and it arose after the  
11 issuance of the 1996 Executive Order 13007 on Indian  
12 Sacred Sites, which provided that, in managing Federal  
13 Lands, executive agencies should take into account

14 Native American cultural concerns to the extent  
15 practicable, permitted by law, and not clearly  
16 inconsistent with essential agency functions.

17           Shortly, one year after that, May 27, 1997,  
18 Interior Secretary Babbitt transmitted a report to  
19 Bruce Reed, Assistant to the President for Domestic  
20 Policy, which identified the Federal Mining Law as one  
21 of the most serious impediments which cannot be  
22 alleviated administratively with regard to the

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12: 26: 15 1 implementation of the Executive Order. This was  
2 transmitted, and this is reflected on our original  
3 Memorial, the secretarial transmittal of these views  
4 to the White House, as is reflected in this letter,  
5 and specifically states: "Our review did identify a  
6 number of impediments hindering the Department's  
7 capacity to implement the Executive Order in complete  
8 accordance with the wishes of many of the tribunal  
9 representatives with whom we consulted. Virtually,  
10 also two impediments are statutory in nature and would  
11 require legislative action." So, that was 1997.

12           The report that was transmitted included the  
13 statement with regard to the Mining Law and the 43 CFR  
14 3809 Regulations that the Department lacks authority  
15 to unilaterally include a new basis for the denial of  
16 a patent application, even where exploration for and  
17 development of minerals impede access to and religious  
18 use for sacred sites or physical integrity. While  
19 this particular text uses the term "patent

20 application, " the reference to the 43 CFR 3809  
21 regulations makes it clear that this is also referring  
22 to activities governing exploration for and

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12: 27: 22 1 development of minerals which will be governed by 43  
2 CFR 3809.

3           The same--this is part of the same 1997  
4 report transmitted by Secretary Babbitt to the  
5 Congress--also notes that compensation could be  
6 effective to resolve these disputes. An outright  
7 purchase of third-party interest, for example, would  
8 be one option to consider. So, these were the views  
9 that had been formed in 1997 before this matter arose  
10 at the Imperial Project, and Interior, in fact, had  
11 adopted recognized limits on their discretionary  
12 authority.

13           When the Interior Department rescinded the  
14 Leshy Opinion in 2001, it also rescinded a regulation  
15 adopted in October of 2000--it also adopted--it  
16 rescinded a regulation that had been adopted by  
17 Secretary Babbitt that would have imposed this  
18 standard of a mine veto authority across the industry.

19           So, in other words, the substantial  
20 irreparable harm standard that was imposed to Glamis  
21 had been adopted in a regulation, in a final  
22 regulation, that took effect on January 20, 2001, and

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12: 28: 34 1 would have applied this authority across western  
2 mining sites, but that regulation was rescinded in  
3 2001, and it was rescinded specifically on the basis  
4 that it would be highly subjective and could be  
5 extensively supplied particularly in the context of  
6 Native American sacred sites, and it was found to have  
7 too much adverse environmental impact to western  
8 mining investment if such a standard was allowed to  
9 remain. So, the standard was rescinded by a  
10 regulatory change in 2001, and the Glamis Imperial  
11 Project is effectively the only mine that had this  
12 denial authority exercised upon it.

13           This is the finding of the Interior  
14 Department in 2001. When they rescinded this denial  
15 of authority for the rest of the industry, they said  
16 it would be--they should not have adopted this truly  
17 significant revision without notice and comment  
18 procedures. It was inserted into a final rule without  
19 advance notice. And beyond that, it would be very  
20 difficult to apply this standard fairly.

21           So, the standard was eliminated for the rest  
22 of the industry. The Interior Department is the only

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12: 29: 43 1 project denied on this basis prior to or since that  
2 time. Then Interior issued the Mineral Report in  
3 2000, confirming Glamis--that Glamis would be  
4 justified in proceeding. But, by this point, the  
5 issuance of the Mineral Report was too late--these

6 issues had been delayed far too long--and just three  
7 days later, on September 30, 2002, former California  
8 Governor Gray Davis directed his Secretary of  
9 Resources to take action to stop the Glamis Imperial  
10 Project. And what this illustrates is how the Federal  
11 denial is clearly part of the expropriation claim.  
12 The denial by Secretary Babbitt was never cured, and  
13 it led to the blockage of the Imperial Project which  
14 lead directly to the adoption of the California  
15 measures.

16 At this point I'm going to turn to Ms. Hall,  
17 who will proceed with some further aspects of the way  
18 the Glamis project was treated differently.

19 PRESIDENT YOUNG: Thank you.

20 Ms. Hall, please.

21 MS. HALL: Good afternoon, President Young  
22 and Members of the Tribunal.

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12:30:51 1 I first wanted to quickly begin by pointing  
2 out that my--I'm going to be talking for about the  
3 next 10 minutes about cultural resources, but I want  
4 to point out that I won't be discussing the location  
5 of any particular sites. I will be discussing  
6 generally concerns raised in connection with various  
7 projects, so...

8 PRESIDENT YOUNG: I take it from that, then,  
9 there is no sense--you don't have any sense you will  
10 be discussing confidential information for which we  
11 need to close the hearing; is that correct?

12 MS. HALL: I don't, but I just wanted to  
13 alert the Tribunal and the Respondent to the general  
14 nature of my presentation.

15 PRESIDENT YOUNG: Are Respondents comfortable  
16 with that?

17 MS. MENAKER: Yes.

18 PRESIDENT YOUNG: Thank you.

19 If you do identify something that we begin to  
20 get into which we need to close the hearing, please  
21 alert us.

22 Thank you.

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12: 31: 41 1 MS. HALL: I'm going to be talking briefly  
2 about the unique and discriminatory treatment to which  
3 Glamis's Imperial Project was subject.

4 First, I would like to talk about the first  
5 set of unique arbitrary standards applied to Glamis  
6 has to do with how cultural resources were identified  
7 and evaluated at the Imperial Project site.

8 Glamis was the only project for which an area  
9 of traditional cultural concern was identified, and  
10 that was the traditional cultural property which was  
11 cited in turn by the United States as the basis to  
12 deny the Project, and nobody has disputed this. In  
13 fact, Mr. Kaldenberg testified that this was and still  
14 is the only project which he is aware in which a  
15 cultural property in the immediate vicinity of a mine  
16 was defined for valuation purposes. As Mr. Kaldenberg  
17 testified, the term "was created for this project

18 through consultation with the SHPO and at the  
19 direction of the State Director. "

20           Respondent claims repeatedly that BLM's  
21 decision not to name the Tribe's traditional territory  
22 of approximately 500 square miles as a traditional

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12:33:26 1 cultural property was found because "surveying such a  
2 large area to determine the existence of one or more  
3 TCPs would have imposed an onerous burden on Glamis. "  
4 And that's at transcript page 1469. And also again in  
5 the Respondent's Counter-Memorial, Respondent claims  
6 that BLM determined that could not burden Glamis with  
7 the expense of surveying the entire Quechan  
8 traditional territory, so again instructed KIA to  
9 examine a smaller area boundary bounded by culturally  
10 significant sites the Quechan had identified.

11           But, at the hearing in August, Dr. Cleland  
12 admitted that the leading policy statement on TCPs,  
13 identifying traditional cultural properties, which is  
14 Bulletin 38, does not actually require a pedestrian  
15 survey of an entire traditional cultural property. As  
16 you can see, Dr. Cleland's testimony stated that, "No,  
17 and I don't think anybody, even to save--even in the  
18 discussions of saving Glamis money that we were  
19 looking at a complete pedestrian survey of that entire  
20 area, no. "

21           And Dr. Cleland further admitted at the  
22 hearing that he was not personally aware of offers

12: 34: 49 1 made to Glamis about using the ATCC concept to save  
2 the company money.

3 Now, Respondent also claims that there can be  
4 two levels of traditional cultural properties,  
5 including more localized areas, and that Dr. Cleland  
6 testified that KIA had "quite extensive archeological  
7 and ethnographic information for identifying the  
8 boundaries of the district which encompassed the  
9 ATCC. "

10 But Dr. Cleland admitted that the  
11 straight-line drawing of the ATCC around the Imperial  
12 Project did not correspond directly to a special name  
13 for the region that the Quechan Nation had withheld  
14 from him. And he admitted that Dr. Baksh, who was the  
15 hired ethnographer to work with the Quechan Cultural  
16 Committee, had gotten information from the Tribe that  
17 suggested that the special name might "extend all the  
18 way to Picacho," meaning all the way to Picacho Peak,  
19 which is in a withdrawn wilderness area.

20 Now, turning to how cultural resources were  
21 actually evaluated at the Imperial Project site,  
22 Dr. Sebastian testified that she compared the extent

12: 36: 06 1 and types of cultural resources at the Imperial  
2 Project with those at other projects in the CDCA, and  
3 "what I found was that the archeological record, just

4 the archeological manifestations themselves in the  
5 Imperial Project, appeared to be identical to those in  
6 the general vicinity. "

7           Now, the similar artifacts that she was  
8 talking about including things like bits of broken  
9 pottery, stone materials left over the manufacture of  
10 stone tools and earth disturbances and earth figures,  
11 those sorts of artifacts. Nonetheless, the U.S. cited  
12 the adverse effects on these cultural resources as the  
13 basis for denying approval only at the Imperial  
14 Project.

15           Now, Respondent tries to discount the  
16 discriminatory treatment received by Glamis by arguing  
17 that there were four things that differentiate the  
18 Imperial Project from all other development projects  
19 that were approved in the CDCA. Respondent's  
20 arguments, however, are based on facts that have been  
21 cherry-picked from the record and made--nor that the  
22 alleged bases for distinguishing the Imperial Project

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12: 37: 21 1 from other projects are directly attributable to the  
2 discriminatory treatment to which Glamis was  
3 subjected.

4           Now, Respondent has put forth four main bases  
5 on which to differentiate Glamis's Imperial Project.  
6 As you can see, these are listed on the slide.

7           Now, many of the classifications that  
8 Respondent makes to argue that Glamis's Imperial  
9 Project can be distinguished on these four criteria

10 are not actually based on an analysis of the  
11 evidentiary record, however, but rather a selective  
12 sampling of information. For example, the existence  
13 of Native American concerns is one basis on which  
14 Respondent attempts to differentiate the Imperial  
15 Project, the way that it was treated, from other  
16 projects. For example, Respondent suggests that no  
17 Native American concerns were raised at the Mesquite  
18 Mine.

19           Respondent suggested in August that "The  
20 Record of Decision for the Mesquite Mine expansion  
21 clearly states that no sites eligible for the National  
22 Register of Historic Places were found in the Project

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12: 38: 38 1 area. The Quechan did not indicate that there are  
2 such religious or culturally significant properties  
3 within the proposed expansion area. "

4           Now, what Respondent fails to mention is  
5 that, after the Mesquite Mine expansion, EIS was  
6 issued, stating that none of the 27 sites that were  
7 examined for potential eligibility to the National  
8 Register were actually eligible. The Tribe actually  
9 expressed to BLM that it continues to be concerned  
10 about the mine expansion's impact on its cultural  
11 resources, and it asks that the issues be revisited.  
12 And you can see from this letter where the Tribe  
13 expressed its continuing concern, and then again where  
14 it asked for the issues to be revisited. This is on  
15 the slide in front of you, I believe.

16                   Now, furthermore, the Quechan asked, given  
17 that the mine expansion Draft EIS had stated simply  
18 that the Quechan had not identified any historic  
19 properties in a project area, the Tribe asked the BLM  
20 to seek "a more positive statement" from the Tribe  
21 about the potential existence of historic properties  
22 within the Project area. But, in response to that

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12: 40: 11 1 concern, BLM simply restated that the Quechan hadn't  
2 said--hadn't identified any historic properties in the  
3 mine expansion area.

4                   Now, Respondent also claims that the  
5 convergence of Native American concerns in  
6 archeological evidence is another factor on which to  
7 distinguish Glamis's Imperial Project from others, but  
8 the record shows--I'm sorry, the record does not  
9 actually show what Respondent claims. For example,  
10 for the Castle Mountain Mine, Respondent claims that  
11 "While the Fort Mohave Tribe expressed concern that  
12 the Castle Mountain Mine project was located in a  
13 sacred area, the mine was actually seven miles from  
14 the area identified by the Tribe, and the comment  
15 appeared to be based on a misunderstanding."

16                   Now, there simply is no basis for determining  
17 that the Mohave Tribe's comments were based on a  
18 mistaken belief about the location of the project. In  
19 fact, the Tribe's concerns were about impacts, direct  
20 impacts, including visual impacts, of the project on  
21 an area called "Castle Mountain Peaks," which is

22 located about seven miles from the proposed Castle

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12: 41: 29 1 Mountain Project. In fact, the Quechan expressed very  
2 similar concerns about the alleged adverse effects of  
3 the Imperial Project on Picacho Peak, which is also  
4 about seven miles from the Project area and is within  
5 a withdrawn area, as Mr. Gourley pointed out, the  
6 no-buffer-zone language precludes the denial of a  
7 project on the basis of indirect impacts such as  
8 visual impacts.

9 Now, the ROD denying the Imperial Project, in  
10 fact, was based in part on the assumption that it  
11 would have adverse visual impacts to features in the  
12 landscape, including Picacho Peak. Now, you can see  
13 from the letter from the Tribe on the Castle Mountain  
14 Mine project that the Tribe had expressed concerns  
15 about the potential religious significance of the  
16 site, including artifacts on the site that may have  
17 originated in the Castle Mountain Peaks area which the  
18 Tribe regarded as religious, and they also again  
19 expressed their concern about visual impacts to Castle  
20 Peaks, which you can see here beginning in paragraph  
21 four.

22 Finally, the Tribe expressed their concern

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12: 42: 52 1 that they hadn't adequately been consulted about the

2 Project and hadn't been given an opportunity to voice  
3 all of their concerns. So, for Respondent to suggest  
4 that there was no convergence between the concerns  
5 expressed at the Project and the archeological  
6 evidence there really ignores these facts that are  
7 shown by the letter that the Tribe wasn't given an  
8 opportunity to voice those concerns.

9 Now, Respondent also claims that concerns  
10 raised over the Mesquite Landfill were of a different  
11 character than those expressed at the Imperial site,  
12 and those concerns did not match up with the evidence  
13 at the site, which is what Respondent claimed.

14 Now, you can see parts of--

15 ARBITRATOR CARON: Excuse me, Counsel. Could  
16 I ask one question?

17 MS. HALL: Sure.

18 ARBITRATOR CARON: The last letter from the  
19 Fort Mohave Indian Tribe, can you indicate where that  
20 is in the record?

21 MS. HALL: From the Mohave.

22 Are you referring, Professor Caron, to the

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12: 44: 09 1 Castle Mountain's project?

2 ARBITRATOR CARON: Yes.

3 MS. HALL: Okay. That is attach--we provided  
4 that attached to the PowerPoint presentation, and  
5 the--okay, that's taken from the Castle Mountain  
6 EIS--correct?

7 ARBITRATOR CARON: Well, perhaps you could

8 indicate it later.

9 MS. HALL: Yes, certainly.

10 Okay. Turning to the Mesquite Landfill,  
11 Respondent made several claims about the Tribe's  
12 concerns raised in connection with the Mesquite  
13 Landfill. You can see that Respondent stated that  
14 their concern for the landfill were about studying the  
15 archeological evidence further to determine if there  
16 had been a historic or prehistoric permanent  
17 settlement in that area; and, furthermore, now BLM  
18 reviewed the archeological evidence in the landfill  
19 area and concluded that it did not indicate that there  
20 had been a settlement, any permanent settlement, in  
21 the area; and that the Quechan did not present the BLM  
22 with any evidence similar to that which it presented

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12: 45: 15 1 regarding the cultural resources in connection with  
2 the Imperial Project review.

3 Now, what Respondent fails to mention is that  
4 shortly after the Record of Decision for the Mesquite  
5 Landfill issued, Quechan representatives wrote to BLM  
6 expressing their view that the Record of Decision was  
7 based on inaccurate information, and they continued to  
8 have real and serious concerns about the cultural and  
9 religious significance of this site.

10 In fact, the Tribe noted the presence of  
11 important archeological features that they didn't  
12 believe had been adequately inventoried or cataloged  
13 during surveys of the project, and that they believed

14 that the Project would "erase for all time the remains  
15 of a significant ancient Indian settlement or  
16 religious center or a combination of the two." And  
17 that's taken from the letter projected on the screen.

18 Thus, for Respondent to suggest that there  
19 was no convergence between the Native American  
20 concerns expressed at the Project and the  
21 archeological evidence there misses the fact that the  
22 Tribe requested the same kind of intensive study that

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12: 46: 30 1 only happened at the Imperial Project, and this study  
2 was taken and undertaken for the sole purpose of  
3 elevating the cultural concerns at the Imperial  
4 Project as a basis to deny that project.

5 Moreover, Respondent ignores the fact that  
6 the United States had a chance to reconsider approval  
7 of the Mesquite Landfill again in 2002, which was  
8 after the Imperial Project was already denied, and  
9 that it had additional information in the form of the  
10 Boma Johnson map showing the exact parts of the  
11 location of the Xam Kwatcan Trail network, including  
12 the Trail of Dreams, that previously were not known to  
13 exist in such a broad array of the California Desert.

14 Now, Dr. Sebastian also had stated that the  
15 Mesquite Landfill that trails that exist there are--do  
16 match up very closely with the trails that are  
17 exhibited in the Boma Johnson Xam Kwatcan map, and she  
18 has also photographed segments of trails there that  
19 she considered quite significant.

20 I would like just to conclude by suggesting  
21 that Glamis was also subject to unique standards by  
22 the Advisory Council on Historic Preservation. As

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12:48:15 1 Dr. Sebastian had testified at hearing and as she had  
2 stated many times in her report, the Advisory Council  
3 generally works to find negotiated settlement and  
4 solutions to adverse impacts on cultural resources.  
5 And, from her review of the record, there was not a  
6 similar attempt made at the Imperial Project site to  
7 find a set of acceptable mitigation measures, the kind  
8 of effort that was made at other sites at which there  
9 was real expression of concern raised, and that was  
10 the second main basis on which Glamis was subject to  
11 discriminatory treatment.

12 Again, cultural resources were used and  
13 elevated at the Imperial Project site as the factual  
14 predicate--to serve as the factual predicate to deny  
15 that project and that project alone.

16 And now I would like to turn it over to my  
17 colleague, Mr. Ross.

18 PRESIDENT YOUNG: Thank you, Ms. Hall.

19 Mr. Ross?

20 MR. ROSS: Thank you, Mr. President.

21 I'm going to speak to you today about the  
22 SMGB backfilling regulations and S. B. 22.

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12: 49: 34 1 In this presentation, I'm going to make four  
2 basic points: First, S.B. 22 and the emergency  
3 backfilling regulations adopted by the SMGB targeted  
4 the Glamis Imperial Project.

5 Second, those measures were inextricably  
6 linked.

7 Third, their true purpose was to permanently  
8 prevent the approval of the Glamis Imperial Project.

9 And fourth, those measures were successful.

10 Based on what California--

11 PRESIDENT YOUNG: Mr. Ross, you have been  
12 taking speaking lessons from Mr. Schaefer. We are  
13 going to have to ask you to slow down, if you would be  
14 kind enough to do that.

15 Thank you.

16 MR. ROSS: Based on California's new complete  
17 backfilling requirements, the Glamis Imperial Project,  
18 and I quote, remains "dead in its tracks."

19 Now, to begin, I'm going to talk about  
20 California's initial efforts to shut down the Imperial  
21 Project: S.B. 1828 and S.B. 483. Now, Respondent has  
22 tried to characterize those measures as a kind of

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12: 50: 40 1 legitimate outgrowth of the Sacred Sites Act to  
2 preserve cultural resources. Now, as we heard earlier  
3 today by Mr. Schaefer, that argument is without merit  
4 because the Sacred Sites Act does not apply to Federal  
5 Lands. This argument is also without merit from a

6 factual standpoint as well, as I'm going to talk about  
7 right now.

8           Now, it's a matter of public knowledge at the  
9 time these initial measures were being prepared that  
10 the genesis of the Bill 1828, which was authored by  
11 Senator Burton, was the result of lobbying by the  
12 Quechan Tribe. In fact, I will just quickly move  
13 along here, but after the Clinton Administration  
14 efforts to shut down the project were overturned by  
15 the Bush Administration, the Bush Administration led  
16 the Tribe to try to stop--block the Glamis project  
17 from receiving State permits and gave rise to the  
18 Burton Bill.

19           Now, this same information was confirmed  
20 basically in the first day of our hearing when the New  
21 York Times article had about the same information.

22           And as we demonstrated in our Memorial on

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12:51:42 1 page 198, about this time a lawyer for the Tribe was  
2 working with the Department of Conservation and the  
3 State legislature in their lobbying efforts, and  
4 that's on page 198 of our Memorial.

5           Now, we don't need to rely on newspaper  
6 articles to prove our point, obviously. The State of  
7 California legislative history does that for us. Now,  
8 for example, in this piece of legislative history, it  
9 states: "This bill was introduced as a result of a  
10 particular situation in which a proposed capital  
11 project in Imperial County would cause adverse impacts

12 to Native American sacred sites." That site, of  
13 course, was identified as the Glamis Imperial Project.

14 Again, this Enrolled Bill Report by an  
15 executive branch identifies the Glamis Imperial  
16 Project as the initial stated purpose and the Project  
17 identified that gave rise to the bill.

18 Now, the reason for the bill was stated  
19 fairly succinctly by Senator Burton, the author of the  
20 bill. He said, in a letter to Gray Davis imploring  
21 the Governor to sign the legislation once it made its  
22 way out of the State legislature, he said, "There are

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12: 52: 50 1 no State or Federal laws that specifically recognize  
2 and protect these sacred sites. "

3 Now, the Respondent has argued as a  
4 litigation strategy that the Sacred Sites Act provided  
5 more than enough power to block the projects like the  
6 Glamis Imperial Project. But while that's a novel  
7 argument, the author of the bill states fairly  
8 succinctly here and very clearly that there are no  
9 State and Federal laws that specifically recognize and  
10 protect these sacred sites. It's stating that, you  
11 know, essentially, if the Sacred Sites Act was a  
12 background principle and could have shut down the  
13 Imperial Project, Senator Burton, presumably an expert  
14 on California law, would have known that.

15 Now, despite Senator Burton's best  
16 efforts--despite Senator Burton's best efforts, Gray  
17 Davis ultimately didn't sign 1828--in fact, vetoed

18 it--essentially because it was overly broad, and I  
19 will talk about that in a second. But, in his veto  
20 message--and I think we are fairly familiar with this  
21 quote from our earlier hearing--he identified that he  
22 was particularly concerned about the proposed Glamis

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12:53:59 1 project, and directed the Secretary of Resources to  
2 pursue all possible legal and administrative remedies  
3 that will assist in stopping the development of that  
4 mine.

5 Now, one of the reasons why it was overly  
6 broad, as this Enrolled Bill Report said, was that  
7 essentially the bill unnecessarily expands the local  
8 situation, the Glamis Gold Company project, to a  
9 statewide issue. The rest of the quote on the screen  
10 basically goes on to say that the State was worried  
11 about an overly broad application about new powers  
12 granted to tribes by 1828, and was essentially a veto  
13 of authority over projects throughout the State,  
14 including State projects.

15 So, 1828 was a failed effort to stop the  
16 Imperial Project, unlike its companion bill, 483,  
17 which I will talk about next.

18 483, like 1828, was initially drafted with a  
19 very specific purpose in mind. As the fax that you  
20 see on the screen in front of you says--and this was a  
21 fax from Mary Shallenberger of Senator Burton's office  
22 to Will Brieger of the California Department of

12: 54: 58 1 Justice--and we explain how we know that in the  
2 Memorial at page 198--it says, "I would appreciate  
3 your advice on whether either/or both of the attached  
4 amendments would hold up to blocking the Glamis  
5 Imperial Project." So, from its start, it's pretty  
6 obvious what the target of the legislation was.

7 That's confirmed in the Enrolled Bill Report  
8 by another executive branch, the Governor's Office of  
9 Planning and Research, which it says, "S. B. 483  
10 contains a narrowly crafted language intended to  
11 prevent approval of a specific mining project." And  
12 that, of course, was identified as the Glamis Imperial  
13 Project.

14 Now, like 1828, the legislative history  
15 demonstrates that 483 was needed because--the bill was  
16 needed because it targets a specific project that  
17 would otherwise be allowed to go forward under current  
18 law. Again, this refutes the State Department or the  
19 Respondent's arguments that the Sacred Sites Act  
20 provided ample authority to shut down projects like  
21 the Imperial Project on their existing background  
22 principles, as Mr. Schaefer discussed earlier today on

12: 56: 08 1 a rapid pace.

2 Like his colleague Senator Burton, Senator  
3 Sher implored Gray Davis to sign 483; and, again, in

4 his letter to the Governor, he identified a need to  
5 stop the Glamis Imperial Project and identified it as  
6 a Canadian-based company, and he says that the new  
7 backfilling--the new backfilling requirements imposed  
8 by S.B. 483 would make the Glamis Imperial Project  
9 infeasible.

10 Now, because the Governor wasn't concerned  
11 about 483 being overly broad--and he actually signed  
12 that bill into law--unfortunately, it didn't  
13 take--well, unfortunately for the Respondent and the  
14 State of California--it didn't take effect because it  
15 was basically tied to 1828. They were joint bills,  
16 and the Governor's veto on 1828 shut down 483.

17 So, again, in his veto message, the Governor  
18 directed his Secretary of Resources to pursue all  
19 possible legal and administrative remedies to shut  
20 down the Imperial Project.

21 Now, within days or at least within a couple  
22 of weeks, there is a chain of events that went into

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12:57:12 1 place that quickly moved from the Governor's directive  
2 over to the Surface Mining and Geology Board. As  
3 evidenced by this remarkable E-mail--and I believe it  
4 starts about October 11th or 12th and ends on  
5 October 15th--there is correspondence between a  
6 staffer in Senator Sher's office, Mr. Jeff Shellito,  
7 who said, and it's fairly small up there, "So, where  
8 are we at on the legal feasibility of the State Mining  
9 Board adopting emergency regulations that would at

10 least for 120 days mirror the substance of 483?"

11 He says--and I will move on--"Alison Harvey,"  
12 Senator Burton's Chief of Staff, "and I both suggested  
13 last week to the Resources Agency that the Davis  
14 Administration put these emergency regs--to put these  
15 emergency regs in place, essentially, to give us time  
16 to enact legislation that essentially would delink  
17 1828 and 483. "

18 Now, the Department of Justice lawyer  
19 responded that he would rather not communicate about  
20 this on E-mail because they don't have any  
21 attorney/client relationship, and Jeff Shellito  
22 responds, "I will deal with the Resources Agency

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12:58:23 1 directly if you are worried about the attorney/client  
2 privilege, but--however, I thought that Alison  
3 Harvey"--again, Senator Burton's staff member--"and I  
4 were working with the Resources Agency on an informal  
5 and collegial basis to stop the Glams Mine. I recall  
6 sending you that the text of S.B. 483--I recall  
7 sending you that text and asking your informal opinion on  
8 whether its contents could be adopted as emergency  
9 regulations by the State Mining Board. "

10 Mr. Thahammer responded, of course, and said  
11 basically to not communicate by E-mail because "I  
12 don't want my opinions discussed in open court. That  
13 would never be helpful." That depends on your  
14 perspective, I would imagine.

15 Within days, the Secretary of Resources sent

16 a letter to the State Mining Resources Board, asking,  
17 and I quote--and it's quoted on the screen--on  
18 October 17, "for the State Board to consider adopting  
19 state regulations that would alter current state  
20 reclamation policies and consider the formal adoption  
21 of the regulations to achieve these purposes at the  
22 very earliest opportunity." So, she's asking for new

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12: 59: 26 1 reclamation policies.

2 Now, within a month, the State Board puts  
3 that topic on their agenda, and a month later they  
4 adopt the emergency backfilling regulations. It's  
5 interesting to note the Secretary of Resources did not  
6 pursue and attempt to shut down the mine under the  
7 Sacred Sites Act by contacting the Native American  
8 Heritage Commission.

9 I will briefly just mention, there are  
10 standards for the enactment of emergency regulations.  
11 You will see the long quote on the board, but  
12 essentially the standards must include a specific  
13 description of the emergency. It demonstrate that the  
14 need for the emergency is supported by substantial  
15 evidence, that the findings shall identify the  
16 reports, if any, that are identified in support of the  
17 emergency; essentially, technical reports. And I  
18 think during the hearing this was mentioned as just a  
19 form requirement, but it's actually standard in law  
20 under the emergency regulation provision.

21 The finding can't be based--the finding of

22 the emergency can't be based on expediency,

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13:00:26 1 convenience, best interest, general public need or  
2 speculation. It also says, if the emergency was  
3 well-known at the time, the Board must identify why it  
4 couldn't adopt the regulation through normally  
5 rule-making procedures.

6 Now, we heard testimony from Dr. Parrish  
7 during our hearing that, in 11 years serving as an  
8 executive officer on the Board, that the Board had  
9 only used the emergency provisions to essentially  
10 adopt mining fees. They had frequently--I shouldn't  
11 mischaracterize that--they had received requests to  
12 address particular mining projects, but it never used  
13 emergency rules to address this line of projects. He  
14 also identified that the Executive Branch had never  
15 before asked the SMGB to amend its Mining Laws before  
16 it adopted the emergency regulations at issue in this  
17 arbitration.

18 Now, the Respondent has argued that the  
19 emergency regulations simply clarified what was  
20 already an existing requirement under SMARA. For  
21 example, Respondent claims--and at the transcript at  
22 1093--that the SMGB regulation reflects an objectively

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13:01:24 1 reasonable application of preexisting SMARA

2 requirements, but the facts simply do not support this  
3 claim. Dr. Parrish testified that the triggering  
4 mechanism for the Imperial Project, which at the time  
5 was believed to be on the verge of being approved by  
6 Imperial County, the issue before the Board was  
7 whether it would be approved under SMARA for mining.  
8 As the record shows, that answer was "no."

9           We saw this report. It's basically defining  
10 emergency condition of the executive officer's report  
11 from December 12, and it essentially identifies the  
12 Glamis Imperial Project as the only stated emergency  
13 condition for which this emergency regulation was  
14 needed.

15           Now, in a recommendation from Dr. Parrish to  
16 the Executive Officer at that time, he says there was  
17 a strong and compelling evidence that suggests that  
18 local approvals by the lead agency are imminent, and  
19 unless the approval of the regulation is adopted  
20 through the emergency provisions, reclamation  
21 regulations that address--that basically expand the  
22 backfilling requirements cannot be adopted in time to

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13: 02: 29 1 affect this particular mining operation.

2           Now, the compelling evidence that was just  
3 quoted is totally identified by this letter from  
4 Senator Sher to Senator Burton to Chairman Jones,  
5 saying that the Federal Government is racing to  
6 complete an environmental analysis of the Glamis  
7 Imperial Project, and it essentially says that you

8 must adopt these provisions, that it implores the  
9 Board to adopt these measures on an emergency basis.

10 Now, the Board did identify and did consider  
11 whether or not we could do this on a nonemergency  
12 basis, but it said, and it found: "However, the SMGB  
13 noted that the adoption of regulatory language by the  
14 emergency process may be the only method available at  
15 this time to address the imminent threat to the  
16 State." Of course, they're talking about the Imperial  
17 Project there.

18 Now, what I want to talk about is essentially  
19 the Respondent has said that existing State law  
20 allowed the--essentially allowed the counties to  
21 interpret SMARA regulations and require complete  
22 backfilling and otherwise shut down a mine, but this

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13: 03: 46 1 is a misinterpretation of SMARA. As Mr. Schaefer  
2 mentioned earlier, SMARA is a mixed-use statute. It  
3 says, "The Legislature further finds that the  
4 reclamation of mined lands as provided in this chapter  
5 will permit the continued mining of minerals. The  
6 production and conservation of minerals are  
7 encouraged, while giving consideration to values such  
8 as recreation and wildlife and things like that."  
9 Now, Teddy Roosevelt, President Teddy Roosevelt,  
10 instructs that conservation means development as much  
11 as it does preservation. It's a quote you can see  
12 over on Roosevelt Island, a couple of miles to the  
13 west of here.

14 SMARA specifically anticipated that mining  
15 would be allowed to go forward, and it's not--it's a  
16 mixed-use statute. It's a balancing statute. And the  
17 statute also must be applied on a site-specific basis.  
18 It says in Section 2773: "These standards shall apply  
19 to each mining operation but only to the extent they  
20 are consistent with planned and actual uses of the  
21 mining site."

22 Mr. President, I would ask, how much time do

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13:04:47 1 we have at this point?

2 PRESIDENT YOUNG: Two minutes.

3 MR. ROSS: Even Mr. Schaefer couldn't cover  
4 this in two minutes.

5 You will see in the slides essentially what I  
6 was going to demonstrate is that earlier mining  
7 operations had actually identified SMARA and  
8 considered the balancing that I just actually talked  
9 about and rejected backfilling as an alternative  
10 essentially because it shut down the future potential  
11 of mined minerals. It actually happened at several  
12 mines, including the Rand Mine, which was Glamis's  
13 project. But I think what I'm going to do is move  
14 forward here.

15 Again, there was testimony in the record  
16 about other uses of mined lands for wildlife habitat  
17 and things like that, and the Board out of hand  
18 rejected them saying often with very technical  
19 findings that--that essentially they disagreed with

20 the commenters about whether or not there are  
21 alternative uses for these mines, using technical  
22 findings, even though they didn't rely on any

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13:06:04 1 technical or theoretical reports in support of their  
2 findings.

3           Anyway, what I'm going to do is quickly talk  
4 about S.B. 22. Once the emergency regulation is in  
5 place, the State moved quickly to try to adopt  
6 legislation. And as identified in this Enrolled Bill  
7 Report, with the emergency regulations in place, the  
8 State now had 120 days to pass the law. It began the  
9 process very quickly to pass that law with S.B. 22  
10 clearly being clearly a targeting of the Glamis  
11 Imperial Project. Part of the legislative history  
12 says the authors of the bill believe that the  
13 backfilling requirements established by S.B. 22 make  
14 the Glamis Imperial Project infeasible.

15           Now, what does "infeasible" mean? Well, it  
16 essentially means cost-prohibitive, as the Department  
17 of Finance and Enrolled Bill Report said.  
18 Cost-prohibitive, as the Assembly Committee on  
19 Appropriation said, "You can't take all the material  
20 that's taken out of the pit and put it back in." And  
21 because of that, the provisions of the reclamation, of  
22 S.B. 22, make the Glamis Imperial Project that we have

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13:07:14 1 permanently prohibitive.

2           Gray Davis actually signed the bill on the  
3 law on April 7, and at that point he identified the  
4 Glamis Imperial Project we heard several times.

5           One point I would like to make about this  
6 legislation is that, if the purpose was to protect  
7 cultural resources, the way that it did that was by  
8 requiring backfilling of all open pits. And if you  
9 think about, it's not rationally related, the stated  
10 purpose of protecting cultural resources is not  
11 rationally related to the measure with which they  
12 tried to achieve that objective; in other words,  
13 complete backfilling. Once you take the material out  
14 the ground and if there are cultural resources on the  
15 surface, they're destroyed. Putting the dirt back in  
16 the pit actually doesn't protect those resources.

17           MS. MENAKER: Mr. President, I would just ask  
18 if we could confirm if Claimant is going to continue  
19 that this time would come out of its rebuttal time on  
20 Wednesday?

21           PRESIDENT YOUNG: You have a choice, to  
22 either stop at this point or take that out of your

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13:08:26 1 rebuttal time. What would you like to do?

2           MR. ROSS: We will take it out, particularly  
3 because there are a couple of issues we do need to  
4 address, which the Tribunal had procedurally asked us  
5 to address.

6           When Gray Davis signed the bill into law on  
7 April 7, 2003, at the same time he identified the  
8 State Mining and Geology Board was about to adopt the  
9 most stringent backfilling requirements in the  
10 country. We heard testimony that Gray Davis has  
11 absolutely no power over the Board. The Board is  
12 totally independent. But the record demonstrates that  
13 those regulations weren't adopted until April 10 and  
14 at which there was actually significant debate--well,  
15 not significant debate, but the Board actually debated  
16 whether they should adopt it and they voted and they  
17 adopted the permanent backfilling regulations.

18           So, Gray Davis is forecasting that the Board  
19 will adopt it, but yet the Board didn't adopt it until  
20 three days later, and one of the questions is: Well,  
21 how do you know?

22           As we identified a long time ago, on

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13:09:38 1 February 15, 2006, there are about six documents that  
2 the Tribunal said are potentially still available  
3 under the privileged dispute. There are a series of  
4 six documents that all are from April 4th to April  
5 7th, and each of them deal with deliberations about  
6 what the Government is going to do with S.B. 22 and  
7 the backfilling regulations, and these are  
8 communications between the high-level executive branch  
9 agencies and the Governor's Office.

10           Well, if the Governor has no ability or no  
11 control over the backfilling regulations, what is the

12 Governor's Office deliberating about? And our theory  
13 is that these six documents--and I will identify them  
14 on the screen--may suggest and provide additional  
15 information as to why--what the Government or the  
16 rationale for S.B. 22 and the backfilling regulations,  
17 we submit, was focused on the Glamis Imperial Project.  
18 The Government has said that they're reasonable  
19 regulations.

20 Now, these documents are protected by  
21 deliberative-process privilege, and that's a qualified  
22 privilege. There is a balancing that must be--that

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13: 10: 56 1 must be weighed. And essentially, if our need for the  
2 documents outweighs the Government's interests in  
3 protecting them, that balancing tips in favor of  
4 turning these documents over.

5 So, we ask the Tribunal to--essentially, the  
6 Tribunal in its letter of a few weeks ago indicated or  
7 indicated that if in the context--after in the context  
8 of this hearing it has been demonstrated that these  
9 additional documents may provide further information  
10 to the Tribunal's deliberations on this particular  
11 issue, we should identify those documents and request  
12 that they be turned over, and I'm doing that now.  
13 These are the six documents identified in Attachment A  
14 to our February 16, 2000, letter, the six documents  
15 that were left open for consideration under the  
16 privilege dispute.

17 At this point, I will rely on my PowerPoint

18 which you have in your binder. Oh, continue? All  
19 right.

20 All right. When the Board adopted final  
21 regulations, we have put forward in our brief--these  
22 had disproportionate impact, and they are

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13:12:11 1 discriminatory and target the Glamis Imperial Project,  
2 and some of the evidence that points to that is in  
3 Gray Davis's statement where he identifies only  
4 3 percent of the industry will be affected by these  
5 new regulations. Well, if there are about 1,100 mines  
6 in the State of California in 2003, 3 percent of the  
7 industry is metallic, 97 percent is nonmetallic.  
8 That's actually existing mines. The question is how  
9 many actually new mines or potential mines are on the  
10 horizon. And we suggest--and there is no evidence to  
11 refute it--that the Glamis Imperial Project was the  
12 only mine at that time that would be affected by these  
13 new backfilling regulations.

14 So, the initial legislative efforts of 483  
15 and 1848 were aimed at it, the emergency backfilling  
16 regulations after the Governor vetoed those initial  
17 efforts, the emergency backfilling regulations as  
18 identified specifically to the Glamis Imperial Project  
19 as "the emergency" by which they need to pass the law  
20 to change state policy and adopt new backfilling  
21 regulations. And those regulations are, when they  
22 were finalized, again were only finalized for very,

13:13:21 1 very, very small percentage of the industry that  
2 essentially deal with open pits.

3           Now, Dr. Parrish testified that the Board  
4 didn't consider other mines because it wasn't asked  
5 to. Now, he did testify that they could have  
6 considered other mines if they saw a reason to it, but  
7 there is no evidence in the administrative record that  
8 shows that the Board actually performed the  
9 comparative analysis of the metallic mines and  
10 nonmetallic mines. Principally, we are talking here a  
11 lot about aggregate operations.

12           Now, Dr. Parrish attempted to provide post  
13 hoc rationalizations why those mines are different,  
14 but, as a threshold matter, Dr. Parrish was only  
15 allowed and should have only been able to testify  
16 about what the Board did, not about what the Board was  
17 thinking, and there is no record to indicate--to  
18 support Dr. Parrish's post hoc rationalizations.

19           In any event, what the record doesn't explain  
20 is why the so-called "variance provision" that was  
21 included in the backfilling requirements for the  
22 metallic mines couldn't have also applied to other

13:14:25 1 mines in the State. That so-called "variance"--and it  
2 really isn't a variance. It was testified that it  
3 was, but it basically says metallic mines have to

4 backfill--they're basic regulations, that mines have  
5 to put all of the material back into the pit and  
6 recontour to essentially 25 feet or less. If there is  
7 not enough material to put it back in the pit, then  
8 the mine has to do whatever it can to take whatever is  
9 available and put it back into the pit, even if it  
10 doesn't come to the surface.

11 Now, If one of the theoretically stated  
12 concern is safety and recontouring and making this  
13 land go back to a usable condition, there is no  
14 explanation, no rational explanation, of why this  
15 particular kind of provision couldn't have been  
16 applied to all open pits in the State. The variance  
17 provision would apply equally to aggregate mines and  
18 open-pit metallic mines. And if there is less  
19 material in some of those other pits, they could put  
20 it back in to the extent it is available, but this  
21 particular variance provision again only applies  
22 because the regulations only apply to metallic mines.

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13: 15: 34 1 In summary, I want to say that the  
2 backfilling regulations and the other provisions had a  
3 disproportionate impact that was borne by the Glamis  
4 Imperial Project. It was the only mine that was  
5 identified at the time that had a pending Plan of  
6 Operations. The State took some very significant  
7 drastic and very quick measures to identify it, target  
8 it, shut it down on a temporary basis, went to the  
9 State to pass a law to shut it down, and those

10 regulations--that eventually--that initially were done  
11 on an emergency basis were adopted without change.  
12 And again, the Glamis Imperial Project was the only  
13 project that was potentially impacted by those  
14 regulations.

15           There is no rational--and I explained  
16 briefly, there is no rational relationship between the  
17 measures of S. B. 22 to protect cultural resources and  
18 the impact that the requirement to put material back  
19 into the pits because the cultural resources wouldn't  
20 be protected, those that exist on the surface; and the  
21 Quechan and others testified that, from a spiritual  
22 standpoint, even backfilling won't help out. They

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13:16:48 1 didn't want development, period.

2           So, the regulations and requirements put in  
3 place, as we have demonstrated, targeting Imperial  
4 Project and, as its initial effort, shut down the  
5 Project and made it cost-prohibitive, and at this  
6 point I think I will move on to Mr. Gourley, if he had  
7 some closing thoughts.

8           PRESIDENT YOUNG: Thank you, Mr. Ross.

9           Mr. Gourley?

10          MR. GOURLEY: We will reserve the rest of our  
11 time for rebuttal at this point.

12          PRESIDENT YOUNG: Thank you.

13          How much time, Eloise? How much time do they  
14 have for rebuttal?

15          (Pause.)

16                   PRESIDENT YOUNG: You have 51 minutes  
17 remaining for rebuttal.  
18                   And I take it we also have a renewed request  
19 for the six documents listed in here, which the  
20 Tribunal will take under consideration.  
21                   MR. ROSS: That's correct.  
22                   PRESIDENT YOUNG: Okay. We will reconvene

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13: 18: 05 1 tomorrow at 9:00 a.m. with a schedule parallel to  
2 today's for Respondent.  
3                   With regard to Wednesday, we have taken under  
4 advisement Respondent's request for a schedule that  
5 would have us go from 9:00 until 9:51, and then from  
6 12:30 to 1:30. I take it that was the essence of your  
7 request? And that is the schedule we will have on  
8 Wednesday. Then we will meet here from 9:00 to 10:00,  
9 and then we will meet again, reconvening at 12:30 to  
10 1:30.  
11                   Thank you. We will see you tomorrow.  
12                   (Whereupon, at 1:38 p.m., the hearing was  
13 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