In the Matter of Arbitration
Between:
GLAMIS GOLD, LTD.,
Claimant,
and
UNITED STATES OF AMERICA,
Respondent.

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
APPEARANCES:

On behalf of the Claimant:

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MR. R. TIMOTHY MCCRUM
MR. ALEX SCHAEFER
MR. DAVID ROSS
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On behalf of the Respondent:

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Chief, NAFTA Arbitration Division, Office of International Claims and Investment Disputes

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PROCEDINGS

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

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

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

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

Looking at the schedule for Wednesday morning, since we have at least one hour each and want to finish in the morning, we thought it might be useful to plan on--and Claimant has overnight to prepare for that one hour--perhaps we could have the nine to 10:00 for the Claimant and then take a two-hour break or two-and-a-half-hour break and start at 11:30 and go from 11:30 to 12:30 for us, and that

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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
10 Thank you.
11
12 Mr. Gourley.
13
14 MR. GOURLEY: Good morning, Mr. President and
15 Members of the Tribunal. I'm going to make a few
16 brief remarks before turning this over to my
17 colleagues for our closing.
18
19 I want to express first that this is a very
20 important case, not just to Claimant who has lost--

(1nterruption.)

22 PRESIDENT YOUNG: Continue.
23
24 CLOSING ARGUMENT BY COUNSEL FOR CLAIMANT
25
26 MR. GOURLEY: This is a very important case
27 not just for Claimant, who has lost a very significant
28 investment of $49.1 million in value and $15.2 million

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

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significant economic loss to a foreign investor.

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

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

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

First of all, Glamis had a perfectly acceptable Plan of Operation for the Imperial Project.
There really is no dispute about that. Mr. Leshendok, with 30 years of experience with BLM in approving such plans, is unrebutted in his testimony that this plan was an acceptable mining plan that should have been approved, even with the discovery of significant Native American cultural values at that site.

Now, the actions of Respondent in denying the plan were not mistakes or administrative errors, as you're often--is often suggested by the cases on which Respondent relies. These were deliberate, intentional acts to elevate, contrary to the existing law, cultural resource values above the rights of the mineral right holder, Glamis Gold.

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

Now, the Leshy Opinion clearly and unlawfully imposed a new legal standard for mines on Federal land, one that Interior had never thought previously existed, and one that Interior itself didn't itself seek to impose retroactively to pending plans of operation when it inserted a similar discretionary authority in the 2000 amendments to the 3809
Accordingly, it was only the Imperial Project that was ever subjected to this discretionary veto authority.

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

So, the very connection of connecting the Imperial Site to those was exactly what the no-buffer-zone language was intended to prohibit, and yet that's what the Interior Department did. Now, this expropriation of Claimant's mineral rights was never cured. You will hear frequently from
Respondent that it was ephemeral, that the denial was rescinded, and that is true, but rescinding the denial does not approve the Plan of Operations, and that's what Glamis was entitled to. And because that was never corrected, the Federal measures have resulted in violations of both Articles 1110 and 1105.

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

And this is not a case where the Tribunal has to search for some hidden meaning or motive. Governor Davis, the Legislature, and numerous executive agencies have made it abundantly clear what their intent was, and it was to draw a statute and a regulation as narrowly as possible to affect only the Imperial Project. And they succeeded. They may have expressed other rationales, but the record clearly demonstrates that it was the Imperial Project they were after.

Now, just a few words about our presentation today. We are going to present it in a little
different structure. We will start with Article 1110, but only an aspect of it, and that is the aspect of categorical takings. Mr. Schaefer will first address the ripeness argument defense that Respondent has raised, and then he will address the law of categorical takings, showing that where the measures result in a full deprivation of the value of the property interest, then that ends the inquiry for the Tribunal.

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

After that, and only if the Tribunal doesn't find a full categorical taking, then it has to engage in the balancing that is required under less than categorical takings in expropriation under 1110, under the elements of fair and equitable treatment under 1105, due process, arbitrariness, and legitimate expectations.

So, Mr. Schaefer will return to discuss the elements that you need to consider for a less than categorical taking under 1110, and Ms. Haque will address the standards of fair and equitable treatment under 1105.
After which we will then apply the facts to those standards, and Mr. McCrum will return to address the character of the Federal measures, both in terms of 1110 and 1105, as well as the reasonable expectations.

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

And, finally, Mr. Ross will address the character of the California measures. And if we can, in fact, do that all in three-and-a-half hours, I will return briefly to discuss the compensation we seek.

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

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

I would like to begin by explaining why the 1110 claim is actionable now. This is what Respondent has referred to as ripeness, which, of course, is a
Before I get into the scope of 1110's coverage and what a Claimant is required to show in terms of merits, I would like to talk a little bit about the jurisdictional issue that Respondent has raised; namely, its argument that Glamis's claim is not yet ripe because the measures allegedly had not been applied.

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

This is particularly true with respect to the Iran-U.S. Claims Tribunal cases that Respondent cites. For example, in the Mohtadi case that Respondent
cites, the measure at issue was a law that provided that the Iranian Government would expropriate the Claimant's property if that property was not developed or improved within three years. Because there were contingent findings and events that had to take place before the Government would take the property, the Tribunal determined the mere passage of the Act had not effected a taking of that property. We'd note, too, that that case, like most of the cases cited by the Respondent in this regard, was brought as an actual expropriation case which, of course, typically requires the transfer of title as a precondition for bringing a claim.

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

This is from footnote 526 to Respondent's Counter-Memorial. The mere enactment of a law under which property may later be nationalized does not create a claim. A claim for nationalization or other taking of property does not arise until the possession of the owner is interfered with. The Malek Decision that the Respondent cites involves yet another situation in which the deprivation had not yet occurred and indeed, was uncertain. In that case,
which involved what the Claimant alleged to be a forced sale of real property to an Iranian bank, the Tribunal pointed out that, and we have this on the screen as well, according to Article 34, the debtor had eight months within which to pay the debt and thereby retain title to the building. Alternatively, within six months after the same date, i.e., 9 November, 1981 or until 9 May, 1982, the owner of the property had the right to request that the building be sold at action with the surplus being returned to the debtor. Thus, the alleged loss of property did not become irreversible until May 1982.

So, the upshot of all of these cases, as well as Williamson County, which I will discuss in a moment, is that passage of a measure which creates only the possibility of a future deprivation, whether by the later exercise of discretion or contingent on intervening events, or by the later implementation of a statutory procedure, isn't sufficient to support an expropriation claim. As I said, that's not our case. Glamis's situation, as we will review later on this morning, is entirely different because Glamis already has experienced an actual deprivation rather than the threat of a possible one, with no possibility of relief. This is more than adequately demonstrated by the fact that neither BLM nor Imperial County have seen fit in over six years to take any further action on Glamis's still pending Plan of Operations. The
deprivation began when the Federal Government
unlawfully refused to approve Glamis's Plan of
Operations in January 2001. As Mr. Gourley mentioned,
it has never been cured.

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

Now, Respondent would like to lay the
responsibility for its own continued inaction at the
Federal level at Glamis's feet. They argue that
Glamis should have more forcefully insisted that
Respondent fulfill its own obligation. Of course,
Respondent hasn't identified a single action that
Glamis could have taken that would have any legal
significance or that could in any way compel
Respondent to continue the processing. And Glamis
isn't aware of any means by which it can do so. The
fact is that Respondent has always been free to
process Glamis's plan and it's just refused to do so.

The reason that it's refused to do so is that
everybody involved, again other than perhaps the State
Department lawyers, accepts that the California
measures killed the Project and ensured that the
Federal expropriation couldn't be cured. That's why
Respondent couldn't introduce any testimony from any California or Interior officials which could even suggest that there was anything that Glamis could do that would make any difference.

And also, with respect to Respondent's surprising notion that Glamis's pursuit of this proceeding somehow stopped the processing, I guess we'd just note that Glamis's actions to enforce its rights should motivate Respondent to correct the problem not to quarantine it. In fact, encouraging that sort of correction is precisely why NAFTA's Article 1118 urges negotiated settlement of claims, and why it further provides in Article 1119 a mandatory consultation period. Respondent in this case didn't take advantage of that period, again because it knows futility when it sees it. Indeed, there are numerous cases, Metalclad is a good example, in which the host country continued to act after the initiation of the arbitration. Respondent hasn't identified anything that precluded it from doing so in this case.

Now, on the subject of futility, the Tribunal has requested that we discuss the Whitney Benefits decision and its implications for the ripeness issue. As we've said in our papers, Whitney Benefits is squarely on point. In that case, the Court of Federal Claims and the Federal Circuit rejected the very same argument that the Respondent now offers; namely, that
plaintiff's property, and I'm quoting here, "could not have been taken until their application for a mine permit actually was denied." The Court held that further processing of plaintiff's permit would have been futile because--and if we could have that quote on the screen--"when a statute prohibiting surface coal mining is enacted, at least in part, specifically to prevent the only economically viable use of a property, an official determination that the statute applies to the property in question is not necessary to find that a taking has resulted."

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

Now, we think their argument about discrimination is unsustainable on the facts here; but in any event, it's clear the measures were enacted, at least in part, to stop the Project. Here there is no
economically viable plan, as Mr. McCrum will demonstrate in a few moments, that could extract gold from the Imperial Project while satisfying the mandatory complete backfill and site recontouring requirements.

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

And that, by the way, is why the Williamson County decision Respondent has relied upon is inapposite. The law at issue in that case explicitly included a variance procedure that Claimant didn't invoke, so the Supreme Court said that the impact of the law on the property couldn't be determined. Here, unlike in Williamson County, there is, "a definitive position regarding how it will apply the regulations at issue to the particular land in question, and that's the formulation from the Whitney Benefits, because only one way that the law can be applied. We'd also note that in response to the Tribunal's question on the subject of variances, Respondent pointed out the only exception, which
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
6 Finally, just a quick word about preemption.
7 In desperation, to suggest something that Glamis might
8 do, Respondent has argued that Glamis should have
9 pursued a preemption claim in Federal court prior to
10 bringing this action simply because Glamis previously
11 sought to encourage Respondent to rein in the State of
12 California. Putting aside that NAFTA doesn't include
13 an exhaustion requirement, we'd note that Claimant has
14 never argued in this arbitration that the California
measures were preempted. In any event, literally,
just pages after arguing that Glamis should have
pursued that avenue, Respondent rejects its own
suggestion and notes that, "In any event, neither the
Sacred Sites Act or SMARA is preempted by Federal
law." That appears on page 16 of Respondent's
Rejoinder Memorial.

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

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

To sum up, Glamis already has been deprived
of the value of its investment. Glamis cannot mine
absent approval by Interior, and the agency has
steadfastly refused to grant such approval,
notwithstanding the total absence of any legal basis
for withholding it. Even if it were to approve it,
there are no variance procedures in the California
requirements that Glamis can invoke, and there is no
exception to them for which Glamis could qualify.

Under Whitney Benefits, the fact that Glamis has not
undertaken a review process with a predetermined
outcome does not compromise the ripeness of the claim,
and, accordingly, the Tribunal should reject
Respondent's ripeness argument.
I would like to turn at this point to Article 1110 and briefly summarize the legal standards that it incorporates with respect to complete takings.

In our opening statement, we pointed out that Article 1110 incorporates the international law standard as to what constitutes measures tantamount to expropriation; and that that standard, in turn, is heavily influenced by U.S. Fifth Amendment takings jurisprudence. Under U.S. law, measures that do not merely implement preexisting background principles are, per se, compensable where their effect is to entirely destroy the value of the property interest at issue. In such instances, which the Lucas court referred to as categorical takings, no further inquiry or balancing of other factors is required or appropriate. It is only where a measure affects a substantial but incomplete reduction in the value of property right that U.S. courts will undertake the balancing exercise laid out in the Penn Central line of cases. The Supreme Court's recent decision in Lingle v. Chevron lays this framework out quite clearly. Here is what the Lingle court said, if we could have that quote: "Our precedents stake out two categories of regulatory action that generally will be deemed a per se takings for Fifth Amendment purposes.
A second categorical rule applies to regulations that completely deprive an owner of all economically beneficial use of her property. We held in Lucas that the Government must pay just compensation for such total regulatory takings except to the extent that background principles of nuisance and property law independently restrict the owner's intended use of the property. Outside these relatively narrow categories and the special context of land use exactions, regulatory takings challenges are governed by the standards set forth in Penn Central."

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

As Professor Wälde has pointed out, international law incorporates the same standard with respect to expropriation that Lucas and Penn Central lay out for takings. You see this, for example, in the Tecmed decision in which the Tribunal used the severity of economic impact as the basis for distinguishing between regulatory measures on the one hand and de facto expropriations on the other. And that brings me to the Tribunal's question...
about the methodology that it should employ to
evaluate Glamis’s 1110 claim. Because the
international law standard for expropriation is in
harmony with U.S. jurisprudence as to categorical
takings, we submit that if the Tribunal finds that the
Federal and California measures deprived Glamis of the
full value of its property right, then no assessment
of reasonable investment-backed expectations or
character is required. If, on the other hand, the
Tribunal should find a significant but not total
deprivation, then assessment of those factors is
appropriate. And I will discuss the mechanics of that
assessment later on this morning.

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

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

Even as to just to California measure,
though, Respondent is simply wrong both on the law and
on the facts. There's been a great deal of ink spilled on this question already, but I would like to highlight just a few of the key points that demonstrate why neither of the California measures was or could have been the specification of a background principle that limited Glamis's property rights under the Lucas framework.

Former Solicitor General Olson has opined in this case that neither the Sacred Sites Act nor SMARA is a preexisting background principle that circumscribed Glamis's rights within the meaning of Lucas. Relying on Lucas's plain language, Mr. Olson's rebuttal statement notes that since the prohibition must already exist, any grandfather clause is inconsistent with a finding that the measure is the mere expression of a background principle. In other words, if the use is already unlawful--

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

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

If the use is already unlawful, the time for grandfathering is over. Your grandfather, as Professor Sax submits, preexisting projects from new requirements, not from existing ones. Mr. Olson points to the language in Lucas indicating that differential treatment of similarly situated parties
ordinarily indicates the absence of a background principle. Since both of the California measures include grandfather clauses that treat similarly situated mines differently, based entirely on whether or not they had approved reclamation plans, he concludes that they cannot be the expression of a background principle.

Mr. Olson also points out that this differential treatment distinguishes the California measures from the one at issue in the American Pelagic case on which Respondent relies. In that case, there was no suggestion that the law at issue, which was a Federal statute that abrogated the right to fish in a particular zone, applied to some fishermen but not to others. And we would simply add that in American Pelagic the Federal Circuit found that fishing in that zone was entirely subject to the preexisting discretion of the U.S. Government. There was simply no unqualified right to fish in that area. The background principle was the preexisting absolute discretion to give or withhold a fishing permit. There was no such absolute discretion in this case either at the Federal or at the State level. Respondent attempts to refute Mr. Olson's report in several different ways. None of them survive scrutiny.

First, in oral argument, Respondent noted
that, and if we could have the next slide. Respondent noted that future and existing mines are not necessarily similarly situated, and thus, they need not be subject to the same controls. This is at page 1064 of the transcript. I apologize. I think that we may have a cross-up with the slides.

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

But that's circular. It's the mandatory reclamation requirements that are at issue. The fact that existing mines are exempted while future mines are not is the very inconsistency that Mr. Olson identifies. It proves that the requirement is new and not preexisting. That disparate treatment can't be a basis for a finding that the mines are not similarly situated.
requiring the government to apply preexisting prohibitions in all possible cases. Well, that's bootstrapping because it presupposes that which is to be proved; namely, that there is a preexisting prohibition in the first place. The question is not whether given such a existing prohibition the Government must implement it at every possible opportunity or whether failure to do so confers a property right. The question is what differential treatment of similarly situated actors tells us about whether there is such a preexisting prohibition at all. As Mr. Olson points out, Lucas is clear on this, holding that such differentiation indicates an absence of a preexisting prohibition.

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

excuse me, a common law principle such as nuisance.

As a result, Respondent seeks to foreclose any inquiry into whether there is, indeed, a background principle, since it has helpfully pointed the Tribunal to the pertinent statutes. This is wrong-headed. Respondent doesn't provide any authority for this proposition; and, indeed, it cannot because there is no basis in Lucas to distinguish between common law and statutory background
principles. If anything, the converse of Respondent's argument is true. Common law principles must be discerned through their application in specific cases, but for a statutory prohibition to be a background principle, it must as written prohibit the use contemplated for the property. Neither statute on which Respondent relies does that.

As Mr. Olson points out, the background principles exception in Lucas is an affirmative defense. It falls to Respondent to demonstrate that there was such a principle and that it effected a prohibition of the activity in question. Respondent has failed to make that showing as to either the Sacred Sites Act or SMARA, and I would like to review those quickly, in turn.

During oral argument, Respondent conceded that Lucas requires that the expression of a background principle mere duplicate the result that could have been obtained in court. Yet with respect to the Sacred Sites Act, there is simply no indication anywhere on the record that the Act's prohibition on causing severe or irreparable damage to Native American sacred sites ever was intended to or could prohibit activities on Federal lands, much less that it could have served as the basis for an injunction of the Imperial Project. Indeed, prohibition of such activities would be unconstitutional, as Mr. Olson's expert report points out. Article IV(3) clause two of
the U.S. Constitution states that, "Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. Glamis's mining claims on Federal lands are property rights defined by the Federal Government. Although the State with Federal permission may regulate how these activities are conducted, it may not affect a de facto prohibition of them. So the Sacred Sites Act cannot, as Respondent suggests, be the basis for any prohibition of mining on Federal lands.

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

In addition, we've pointed out that neither the Federal nor California State Government ever raised it during the nearly decade-long review of the Imperial Project or, indeed, with respect to any other project in California, including, as I will discuss a moment, the road at issue in Lyng Case. We pointed out that each of the two EIS/EIRs includes a laundry list of applicable statutes. Neither of those mentions the Sacred Sites Act.
We pointed out that the Sacred Sites Act was not raised in the context of the Lyng Case in which California was desperately trying to prevent a road from being built on Federal lands to facilitate private logging in a national forest. In short, the first time anybody ever heard of the Sacred Sites Act as being specifically applicable to the Imperial Project or, indeed, any other mining project on Federal lands was in this arbitration.

Now, Respondent would have the Tribunal believe that this was simply a strategic decision by California. At oral argument, Respondent speculated that the State could have gone to court and used the Sacred Sites Act to ensure the same requirements as those set forth in S.B. 22, but may simply have chosen not to do so for tactical reasons. Of course, Respondent hasn't provided any authoritative opinion from California's Attorney General or indeed from any California officials to support that position, or even to support the position that the Act could restrict activity on Federal lands. It's not surprising that they haven't provided that because the State clearly disagrees. As we've pointed out, the Enrolled Bill Report of S.B. 22 report itself warned that without
the legislation, the project would otherwise go forward under current law. That's in paragraph 374 of our Memorial.

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

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

During oral argument Respondent sought to turn this around with a double negative contending that there's no evidence that the Sacred Sites Act wasn't enforced with respect to those other projects. In other words, Respondent argues that there isn't any evidence that the Act didn't apply. Respondent elaborated on this during oral argument noting that the fact that the State chooses to clarify a background principle with a particular piece of legislation rather than going to court doesn't demonstrate the nonexistence of the background principle.

But that turns the burden of proof on its head. Again, as former Solicitor General Olson points out, the background principles argument is an
affirmative defense. As such, it is not Glamis's duty to using Respondent's formulation demonstrate the nonexistence of the background principle. Rather, it falls to Respondent to prove the elements of its defense, including that the Sacred Sites Act did apply to the Imperial Project. They failed to do that.

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

What SMARA does is empower the SMQMG to issue reclamation regulations that implement SMARA's explicit balancing of mineral development on the one hand and site reclamation on the other. In that sense, SMARA is a mixed use statute, as its language clearly shows.

The statute provides that reclamation of mined lands which are elsewhere defined as lands where mining was, is, or will be conducted, will permit the continued mining of minerals. In that context, it provides that reclamation must provide for the protection and subsequent beneficial use of the mine and reclaimed lands. When you read these provisions together, it's clear that the subsequent beneficial use could include further mining. It's an important
fact because, as Mr. Ross is going to discuss this morning, it was that consideration, among others, that lead the lead agencies in California to reject complete backfilling in numerous mining operations. It was not, as Respondent contends, a simple case of the agency's failing to implement SMARA standards. Regulations based on this principle of mixed use were in place when Glamis filed its Plan of Operations, and they did not mandate complete backfilling and site recontouring from metallic mines. In fact, generally speaking, they didn't mandate any particular reclamation requirements for metallic mines or for any other type of mine because reclamation under SMARA is explicitly a site-specific process. Indeed, SMARA Section 2773(a) states, and let's put this on the screen as well. The Reclamation Plan shall be applicable to a specific piece of property or properties, shall be based upon the character of surrounding area and such characteristics of the property as the type of overburden, soil stability, topography, geology, climate, stream characteristics and principal mineral commodity, and shall establish site-specific criteria for evaluating compliance with the approved reclamation plan including, including topography, revegetation, and sediment and erosion control. Now, let's put Section B of that same provision up on the screen. This provision requires
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.
Turning back to the Lucas framework, then, SMARA could not be a background principle that the measures merely expressed. Since SMARA is explicitly site-specific and does not mandate any backfilling, let alone complete backfilling and site recontouring, a measure that create such a mandate while simultaneously eliminating the site-specific consideration required by the statute cannot possibly be the mere expression of a principle in that statute.

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

Likewise, those measures could not have been the expression of a background principle in SMARA because they ignored SMARA's directive that reclamation be site-specific, and they created a mandatory full backfilling requirement that the statute doesn't contain and that is inconsistent with the statute's very design. Accordingly, and consistent with both U.S. Fifth Amendment jurisprudence and international law, to the extent that the Tribunal finds that the measures at issue in this proceeding deprived Glamis of the full value of...
its investment, the Tribunal must also find that compensation is owing.

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

Thank you.

PRESIDENT YOUNG: Thank you.

MR. McCrum?

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

We will now turn to the issue of the valuation of the Glamis Imperial Project before and after adoption of the California measures, and we will summarize the evidence that has been put forth into the record on this issue as a result of the hearing and the memorial submissions.

Now, Claimant relies on the findings of Mr. Bernard Guarnera, President of Behre Dolbear, who you heard testify, and he has concluded that the fair market value of the Glamis Imperial Project as of December 11, 2002, was $49.1 million, and after enactment of California complete backfilling and site regrading regulations, the value was minus 8.9 million.
And as Mr. Guarnera has testified, the effect of the measures obviously was to completely destroy any economic value that was present, and the destruction of the economic value has been very clearly demonstrated by the fact that nobody wants it. Mr. Guarnera's testimony has been corroborated by the testimony of Mr. Kevin McArthur, CEO of Goldcorp, Inc., Glamis Gold, Limited, who testified that California's complete backfilling regulations had a stunning, devastating effect on our company and the Imperial Project's value. I mean, it rendered the Imperial Project worthless.

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

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

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

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available to determine the rock type and what did it indicate? What geotechnical reports were available to classify the rock type and what did they indicate? Would a site visit have assisted with the valuation? Were rock core samples available and what did they indicate? What swell factor would apply to the rock types at the site and what cost implications did this pose for the backfilling?

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

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

And so, let's turn to our review of the experience that we have associated with the experts in this case.

Mr. Guarnera, President of Behre Dolbear, has
a B.S. degree in geological engineering, master's degree in economic geology. He is a longstanding Certified Mineral Appraiser, Registered Professional Engineer, and professional geologist, member of the Society of Mining Engineers and serves on their Special Committee for Resources and Reserves.

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

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

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

Mr. Guarnera personally has valued mineral deposits on every continent of the world, except Antarctica he testified.

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

Turning to the qualifications and experience of the Norwest team-I'm sorry, the Navigant team-the primary valuation expert for the United States,
Mr. Kaczmarek, relied on Norwest for all geologic and mining engineering aspects of the valuation.

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

Mr. Houser is not a Certified Mineral Appraiser. He had a variety of past involvement with fuel minerals, including coal and synfuels and a particular experience with the Wold Trona Company, involving a sodium mineral operation that resulted in no trona being produced, but he clearly did not have a demonstrated involvement with metallic mining operations. In fact, he has no demonstrated qualifications with a valuation of disseminated gold deposits, which we have at issue here. Mr. Houser acknowledged that he was assisted by Mr. Stubblefield, who was primarily experienced with coal mining and some iron ore mining. And Mr. Houser was largely unfamiliar with the questionable gold mining operation experience of his one colleague, Mr. Moore, whose resume indicated some gold mining experience.

Turning to the Navigant team, Mr. Kaczmarek is the lead author of the Navigant reports. He also has no degree in mining engineering or geology, worked on one mineral valuation project prior to this case involving a nonmetallic mine. He admitted that he did
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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 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
with the Canadian valuation standards known as CIMVal,

and he said that he believed his valuation was
100 percent in accordance with those standards, and he
didn't find one aspect that was not in compliance.

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

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

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

Reports, there is no explanation why a site visit was
not undertaken. No explanation offered at the hearing. Certainly a site visit would have helped assess the rock type and swell factor, so we have a clear failure to comply with the CIMVal standards.

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

We also reviewed the Canadian standards applicable to mineral disclosure reports for public corporations in Canada, the Canadian National Instrument 43-101 that Mr. Kaczmarek said he was aware of, and he agreed that he was not a qualified person to submit a technical report concerning a mineral property for investors to rely on, and he was unfamiliar with Mr. Conrad Houser’s experience of Norwest in that regard.

Next, we asked Mr. Kaczmarek if he was familiar with the U.S. Government standards regarding mineral appraisers, the Uniform Appraisal Standards for Federal Land Acquisitions. We submitted that to
the Tribunal per authorization on August 14, 2007, referring to the standards which are contained on the Web site of the U.S. Justice Department, and the latest edition in 2000 is sponsored by the Assistant Attorney General, and the foreword by her states that these standards have earned a prestigious position published since 1991, frequently cited by Congress.

The Federal U.S. standards specifically provide regarding valuation of mineral properties that the appraisal of properties containing valuable minerals is a complex, specialized subject. As a result, appraisers must have specialized training and experience to properly understand and apply the proper methodologies established for estimating market value of these properties. The Norwest and Navigant team members who have submitted expert reports on the valuation of the Glamis Imperial Project failed to meet this U.S. Government standard.

Now, let's turn to the issues involved in the valuation. We have the first category of the pre-backfill measures. This is the value of the deposit before the adoption of the California measures. Behre Dolbear has stated that the value of the Imperial Project was 49.1 million. Navigant has stated that the property value was 32.7 million, in their opinion. Some of the key issues bearing on this difference in approach of 16 million reflects the determination of the proper discount rate, which is a
Let's turn to the appraisal approach. Navigant seeks to depress the value of the Imperial Project by suggesting that the income approach for valuation, which would yield a 35 million-dollar value in their view, should be averaged with values calculated from allegedly comparable sales of mineral properties and values calculated based solely on Glamis's purchase of mineral interests in the Imperial area in 1994, at a time when the reserves were not yet proven.

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

Second, Behre Dolbear has pointed out that the reliance on 1994, in Glamis's purchase of a 35 percent interest was of resources, which sell at a discount, whereas the December 2002 expropriation is
primarily of proven and probable reserves, which Behre Dolbear has explained there is a vast difference between those concepts when conducting a mineral appraisal.

Other factors at issue on the pre-backfilling valuation is that Navigant proposed to add resources to the income calculation. Behre Dolbear has pointed out that the CIMVal standards warn that resources should not be based—should not be value based on an income approach because resources would face a significantly different risk profile than reserves. And then we turn to the issue of the selection of the proper discount rate. Both experts agree that the appropriate discount rate should be an after-tax rate applied to the after-tax net income stream, and both experts agree that the buildup rate method is the appropriate method. The experts disagree on whether the buildup rate reflects pre- or after-tax rates, and whether a particular Capital Asset Pricing Model, CAPM, relied on by Navigant may be used to value a mineral property. Behre Dolbear has explained its rationale for valuating discount rates, which is the standard approach it uses in mineral valuations. It's described in detail in its initial report and its
reply report. Behre Dolbear has explained how the selection of the discount rate requires a calculation determination first of what is a risk-free rate of return, in this case at this time 2 percent, and then site-specific risks, geologic, et cetera, are added to that, the risk-free rate of return, and then global risks in the form of market and country risks are added as well. Navigant has not identified any risks that it claims Behre Dolbear failed to consider.

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

Instead, Navigant relies on this Capital Asset Pricing Model, but the Capital Asset Pricing Model is a model that's used for valuing corporations and corporate values, not the value of individual mineral properties. This approach is used for valuing companies, and even literature which Navigant relies on acknowledges that the basis of this CAPM method is the return on an individual corporate stock that can be related to the stock market as a whole and notes that there are a number of problems with using a
market-based beta to evaluate an individual mineral property. And this is the conclusion that Behre Dolbear has reached, that the CAPM method is entirely inappropriate for valuing an individual mineral property.

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

In sum, the 49.1 million dollar pre-evaluation is the correct valuation of the mine as of December 12, 2002 that should be. I apologize for that error. It should be December 12, 2002 in the slide. There is nothing inappropriate about the 6.5 discount rate determined by Behre Dolbear; and the higher discount rate of 9.2 percent selected by Navigant would actually result in a lower valuation after backfilling regulations were effective, which is really where the main dispute between the parties is focused.
Now we will turn to the key issues on the post-backfilling measures valuation. Behre Dolbear has identified three key issues that are accounting for the vast majority of the economic valuation dispute between the parties. Not all of the dispute, but for purposes of illustrating the key issues, we will identify these: The swell factor, engineering the backfill—that is, hauling the backfilled material to the bottom of the pit and filling it in lifts to minimize the long-term settlement, as the California regulations require—and the use of a cash-backed financial assurance for the increased reclamation costs.

Behre Dolbear has summarized the economic impact to these issues to the valuation using the current 35 percent swell factor that Behre Dolbear has relied on as $8.03 million to the reclamation costs determined by the Norwest/Navigant team hauling the backfilled material to the bottom and filling in lifts to minimize long-term settlement, which also relates to the swell factor, adds $7.25 million to the reclamation costs. And when those costs are added to the reclamation costs determined by Navigant/Norwest, that brings the reclamation costs to $70.7 million. With those adjustments and the use of a cash-based financial assurance, as Behre Dolbear has indicated is appropriate, the value of the project is essentially
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18 destroyed.
19 Now, we will turn to these issues in some
detail.
20 The U.S. experts, Navigant and Norwest, have
21 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
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.
        Now, let's turn again to Mr. Houser. He
2 admitted that he never made any request to examine the
3 rock core samples. Never made any request through the
4 United States counsel to examine core samples that
5 might be available, saw no need to do so. Yet he
6 repeatedly assumed and stated that 79 percent of the
7 overburden was unconsolidated alluvial gravel.
8
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
19 Mr. Guarnera testified that the pit slope
20 stability report showed that the pits would be in the
21 range of 45 to 50 degrees, that is quite steep, and
22 that if it was--the overburden had a significant
23 amount of gravel in it, the deposit would have, number

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10:14:27 1 one, been uneconomic, or the whole pit walls would
2 have collapsed and slid down.
3
4 Behre Dolbear also contained in their

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

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

Now we have the cross-sections that are--that come from this 2000 report, and we see that TCG unit at the top, several hundred feet thick, clearly identified as tertiary conglomerate, and again, the alluvial surficial gravel on the surface is so thin it doesn't even show up on the cross-section.

Now, the cross-section has two different sections of the pit. They both show the same thing essentially. The TCG is the major dominant unit here. Some of the darker units are--the darker units are volcanics and other metamorphic rocks that would even
have higher swell factors than the conglomerate.

Now, this report was available as of 2002, the cross-section, and when a geologist like Mr. Guarnera goes out to the Project site and takes a rock hammer and sees an outcropping of conglomerate, this type of cross-section allows him to note that that's what goes down several hundred feet, particularly in an area that already has had 400 drill holes and has had a detailed geologic cross-section prepared based on it. And that's consistent with Mr. Guarnera's testimony, that when he went out to the site, he saw the conglomerate, and he was able to understand the nature of that rock down far below the surface.

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

The opinion of Behre Dolbear on the
35 percent swell factor is corroborated by the 1979 National Academy of Sciences/National Research Council Report to the U.S. Congress which stated that rock at metallic ore mines expanded an average of about 30 to 40 percent, so there was nothing on the face of this number that was in any way inflated. In fact, it was what was would be expected at this type of mine. It is also corroborated by other evidence in the record; that the Castle Mountain EIS BLM in 1990 calculated a swell factor of 36 percent at that mine in the California Desert.

Also supported by the finding in the SMGB rulemaking which noted that the swell factors of 30 to 40 percent were common at metallic mines. And it even is consistent with the swell factor reported in the application at the Soledad Mountain Project of the Golden Queen Mining Company, which calculates--which lists a swell factor of 35 percent.

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

As noted, the BLM Mineral Report of 2002 contained a geologic cross-section showing
conclusively the overburden material was understood to be tertiary conglomerate, and it contained other findings about the average bulk density that are entirely consistent with the findings contained in the Behre Dolbear Report, which is based on the 1996 Final Feasibility Study.

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

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

Now, we've heard a lot from Norwest about various preliminary Glamis internal documents that reported assumed swell factors starting back in November 16, 1994. What's important about these documents is they expressly state in every case that the swell factor of 15 percent for gravel and...
particular numbers are repeated with the same qualification whenever they're presented in these documents. The first document, November 16, 1994, specifically states the swell factor is assumed. Behre Dolbear wasn't going to rely on an assumed swell factor. It did an independent evaluation of what the swell factor is concerning all available evidence. The other documents that Norwest has relied on are dated November 9, 1995, and March 1996. These documents also state that the swell factors there are, "assumed." And, unlike Behre Dolbear, Norwest has specifically acknowledged that Norwest did not independently confirm the nature of the swell factor at the Imperial Project dominant waste material. In other words, Norwest chose to rely on these assumed swell factors regardless of all the other available evidence.

We can look through these other documents and see in each case that the swell factors, where they are presented, are stated as assumed, and these are not calculated numbers, nor can swell factors be calculated from the data presented here.

Let's turn to the March 5, 1996 Glamis document regarding the swell factor. Again, we see the statement that the swell factors are assumed. There was a particular document that Norwest put forward and the Respondent has relied on which had the terms on it bankable feasibility dated March 1996.
Notably, this is not the final bankability Feasibility Study, which is the Final Feasibility Study of April 1996. The assumed swell factors that are reported in this internal working document of several pages are not included in the April 1996 Final Feasibility Study.

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

Then, finally, Norwest relies on a 339 AU spreadsheet dated 2003, which also includes the early assumed swell factors from November 1994. Behre Dolbear specifically noted that swell factors listed in the spreadsheet are not used anywhere else in the 339 AU spreadsheet, and Behre Dolbear has explained in its report from December 2006, that this was a relic or artifact from prior uses of the spreadsheet and never used in the actual spreadsheet analysis, and this was explained specifically in Behre Dolbear's December 2006 reply report, and they explained why this was an artifact in the spreadsheet, but that, in fact, there were references to the data that--from the Final Feasibility Study that do translate to the 35 percent swell factor, which Behre Dolbear has
Behre Dolbear summarized its opinions regarding the swell factor in the December 2006 report. We have hit on most of these points; I will go through them very briefly. Behre Dolbear explained the 35 percent swell factor is appropriate, that the 79 percent of the material is clearly not unconsolidated alluvium with a swell factor of 15 percent. Behre Dolbear pointed out the Church Handbook supported its swell factor conclusions. Behre Dolbear pointed out the BLM Mineral Report geologic cross-sections supported their conclusions. The WESTEC’s pit slope stability recommendation report supported their conclusions, but clearly classified that overburden as tertiary conglomerate, and the pit slope data itself was clearly inconsistent with the idea that there would be any significant degree of alluvium or gravel units in that overburden. And Behre Dolbear finally again pointed out that the 35 percent figure is, if anything, conservative.

Now, we have some other Glamis internal documents that bear on the swell-factor issue, and one of them is a memo by Mr. Jim Voorhees dated December 2, 2003, and it expressly specifies an average swell factor of 35 percent at the Imperial Project and notes that the application of the California backfilling regulations, because of this...
swell factor, will cause the area of disturbance to
increase by 21 percent, up to 1,571 acres.

The Glamis internal memo by Mr. Voorhees is

entirely consistent with the same calculation set
forth in January 9, 2003, which also states that the
area of disturbance will increase by 20 percent up to
1,571 acres, indicating that the same 35 percent swell
factor was used by Glamis in January--in December of
2003, and this refutes the U.S. assertion that Glamis
never internally used the 35 percent swell factor and
the inference that Behre Dolbear had inflated the
swell factor.

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

Mr. Houser admitted that the February 1996
pit slope stability report showed the pit slopes in
the range of 50 to 55 degrees. He did not dispute the findings by WESTEC in 1996 that as much as a 700 foot thickness of conglomerate would be exposed, and he admitted that the February 1996 WESTEC Report was relied on by the 1996 Feasibility Study.

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

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

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

A direct corollary to the swell factor issue is the issue of how much settlement would occur over time in the backfilled pit of a swelled waste rock material. Mr. Guarnera testified, we reviewed the California regulations that were part of the backfill requirement, and it calls for an engineered design to assure there would be minimal settlement of the
He explained, one of the things about swell factor is the first time you dig the rock up, you have an initial swell factor, but then every time you move it again, you have an additional swell factor.

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

Now, the California backfilling regulations provide that the backfilling shall be engineered and that all fills and slopes shall be designed to prevent surface water ponding, to convey runoff, and to account for long-term settlement. While Mr. Parrish of the SMGB had offered various post hoc opinions citing no official SMGB guidance documents in his declarations about what the regulation required, he has no engineering qualifications, and the United States confirmed he was merely a fact witness.

Norwest's 2007 report admitted that this California regulation required engineered backfilling, including engineered the backfilled pit slope to prevent surface water ponding and long-term...
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settlement. Mr. Guarnera stated his conclusion that what was needed was to be done was to haul the material down into the pit, place it into the pit, and then compact it by the movement of the trucks as the lifts were built up in gradual levels. This is significantly different than Norwest's program of just going to the edge of the pit and dumping.

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

Mr. Guarnera testified about the Glamis internal assessment of the backfilling regulations on January 9, 2003. He testified that Glamis's assessment was consistent with their analysis that it showed a $300 an ounce gold price, which was the price Glamis used at the time for ore reserve calculations and that the Project was considered to have negative value by the application of the California regulations as of January 9, 2003.

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

Mr. McArthur testified that in January 2003,
just three weeks after the emergency regulations had been adopted, we asked Jim Voorhees to provide an analysis of the impact of the consequence of backfilling. Mr. McArthur testified that this analysis did not include additional capital costs to the Project that were going to be involved in using the equipment more, which means getting new equipment or rebuilding the equipment, and Mr. McArthur testified we didn't look at the additional financial assurances we would have to put up for the Project. And, even so, with this very conservative view, the Project came up with a negative net present value. Finally, Mr. McArthur explained that at the time the company was using $300 gold price for its reserve calculations, for valuations for new projects, and in that case they had a negative net present value, even with the conservative approach they took and the incomplete approach, and he also pointed out that given the Governor's express intent to stop our project, it didn't make any business sense to move forward at that time. It would have been reckless and wouldn't have been rational to continue with the Project.

Notably, Mr. McArthur was not challenged with a single cross-examination question. I would be happy to go on at this point, 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
6 Thank you.
7 (Brief recess.)
8 PRESIDENT YOUNG: I note, by the way, for
9 Claimant that we both started five minutes late, and
10 we have taken five extra minutes on the break, so we
11 will give you, if you need it at the end of today, 10
12 extra minutes, in particular to see if we can get
13 Mr. Schaefer to speak more slowly. We are about to
14 lose our Court Reporter.
15
16 MR. SCHAEFER: Thank you.
17
18 PRESIDENT YOUNG: Mr. McCrum you may resume.
19
20 MR. MCCRUM: Okay. Thank you, Mr. President.
21
22 And I will just take another 10 minutes or so
23 to wrap up the valuation topic.
24
25 Now, Behre Dolbear’s opinions that complete
26 backfilling is economically infeasible is consistent
27 with the findings of the Bureau of Land Management’s
28 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
the waste rock piles and leach pads to a 25-foot height level and the massive financial assurance costs per the California regulations because those requirements were not yet in effect when BLM's Mineral Report was released in September 2002.

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

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

Quite--Behre Dolbear's estimate falls right within that range.

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

Now, these BLM findings are supported by or stated in the final EIS, and they are supported by a California Registered Engineers assessment of these costs. Mr. Smith, which is referenced in the Final
Navigant has criticized BLM’s per ton cost estimates of 40 to 50 cents for complete backfilling, stating that this analysis that BLM relied on was just a back-of-the-envelope analysis which lacked the rigor required. Notably, the engineering firm Norwest, provided no critique of the Sage Engineering cost estimates which BLM chose to rely on in the Final EIS/EIR.

And the Respondent again has proffered no BLM witness to retract the cost estimates for complete backfilling set forth in the Final EIS/EIR from 2000. In fact, Sage Engineering was retained by Environmental Management Associates, the BLM’s EIS contractor, to provide an independent review of the current industry practices and costs, and Sage Engineering determined the backfilling haulage costs would be in the range of 40 to 50 cents per ton and found it to be appropriate after reviewing costs presented by Newmont Mining Company relating to a Nevada mining project.

Again, these estimated costs from Sage are higher than the Behre Dolbear estimated costs, and looking at the actual document from Sage Engineering provided to the BLM, we can see that this statement regarding the cost estimates is submitted by Michael Smith, P.E., President of Sage Engineering with a sealed certified stamp as a California Registered Engineer.
Turning now to the financial assurance cost requirements, Behre Dolbear has expressed the view that Glamis would have had to use a cash-backed financial assurance, and he has testified that this was based on our firm's experience in working with companies to get reclamation bonds at that point in time, and he specifically relied on Mr. Jeannes's testimony and personal discussions.

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

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

Mr. Jeannes testified that starting in late 2001 to 2002, all our new financial assurances as
Mr. Jeannes was asked, based on his experience, could Glamis Gold, Limited, have obtained a Letter of Credit without cash on the order of 50 to $60 million? He answered no.

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

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

September 2006, when he submitted his expert report to
establish and negotiate multi-million dollar financial assured to guarantee long-term reclamation liabilities at metallic mine sites, and he stated, "I didn't have any experience in that subject area."

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

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

I'm not an expert on Letters of Credit, so I really can't answer that."

Navigant relied upon the chart sponsored by Mr. Craig depicting financial assurances posted in the form of surety bonds and Letters of Credit in California. Yet, Mr. Craig admitted that he had no idea whether the Letters of Credit or surety bonds...
depicted on the chart required cash collateral backing. In addition, the chart prepared by Mr. Craig in 2006 or prepared under his direction was demonstrated to contain out-of-date information because it included the surety bond for the Glamis Picacho Mine which had been released in 2002.

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

And so, this chart provides no evidence that the massive financial assurances required for the Imperial Project to ensure complete backfilling estimated to be somewhere in the range of 50 to 90 million by the experts could be obtained without cash collateral backing as had been Glamis's experience.

Now, we have had testimony in this case that there has been quite a booming gold market prevailing in the United States and in the world over the past few years, and yet we have testimony that there has not been a single offer for the Imperial Project made to Glamis Gold, Limited, or Goldcorp with knowledge that this is a noncore asset of the company. And Mr. Guarnera has testified about that fact and how it bears on the valuation and stated that he believes
this property has been significantly stigmatized, and that's clearly reflected in the fact that not a single offer to buy the property has arisen in this exuberant gold market.

Like the lack of offers for the Imperial Project, the write-off of the investment after the Secretary of the Interior's denial of the Project on January 17, 2001, is compelling evidence of the lack of market value. Mr. Kaczmarek agreed that the accounting rules essentially required Glamis to write off its sunk costs, and that should be sunk costs in the Imperial Project, as a result of the Interior Secretary's denial, and agreed that at the time Glamis took that accounting action in early 2001, it was necessary to change the reported mineral reserves to the lesser category of mineral resources, and this reclassification had arisen due to the uncertainty that had arisen over the question of whether Glamis would be able to extract the minerals.

Turning, finally and briefly to Navigant's option value theory, Navigant's theory that has been put forth rather briefly in their expert reports is that the mineral property holder can simply wait for better economics for starting to mine and that somehow Glamis has actually even benefited by the fact that this property has been precluded from being developed since 2001 and 2002. But as we have shown, mines typically take two to three years to approve, and as
Behre Dolbear has explained, mines can simply not be turned and off like light switches, and that's one of the fundamental problems with this novel option value theory.

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

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

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

Mr. McArthur testified about the Cerro Blanco situation, explained that it was quite different from Imperial because we discovered a very high grade vein at depth. We are now relooking at the mine as an underground mine, so it's very different from Imperial. The Imperial Project has no underground mining vein. It's just a big homogenous ore body that you couldn't possibly underground mine economically, which by the way is consistent with BLM's 2002 Mineral Report finding that underground mining is not feasible, but as Mr. McArthur testified, moreover, the biggest factor is we don't have an Executive Officer of the country of Guatemala telling us that there is absolutely no way we want you to mine this mine.
In summary, Mr. Guarnera, President of Behre Dolbear, is one of the world’s foremost experts on valuing metallic mineral deposits. In fact, Behre Dolbear values about 30 mineral projects each year. Behre Dolbear has correctly concluded the value the Imperial Project was 49.1 million as of December 11, 2002. Behre Dolbear has correctly concluded that the backfilling measures adopted by California have completely destroyed the entire value of the Glamis Imperial Project. And the lack of any offers for the Imperial Project since 2002 is a telling confirmation of this conclusion.

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

PRESIDENT YOUNG: Mr. McCrum, thank you very much.

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

MR. SCHAEFER: Thank you, Mr. President.

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

The number of the considerations that I will review will be pertinent to the analysis of Glamis's
claim under Article 1105, as Ms. Haque will discuss.

As I mentioned earlier, under U.S. and customary international law, measures that deprive an investor of the full value of its investment are per se expropriatory, and compensable. But regulatory measures that do not effect a full deprivation of an investor's property right also can trigger a compensation obligation. In such instances, U.S. and customary international law both provide for a balancing process. That process weighs the rationale for the measure against its economic impact on the investor, the extent to which it frustrates the investor's reasonable expectations, and the character and nature of the Government measure.

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

In general the parties agree that these three factors, extent of deprivation, frustration of reasonable expectations, and character, are the appropriate benchmarks for evaluating less than full deprivations. That being the case, and with Mr. McCrum having reviewed the extent of the
deprivation already, I would just like to highlight a few key considerations for the Tribunal to take into account as to the other two factors should it find that the measures did not fully deprive Glamis of the value of its mining claims.

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

During oral argument, Respondent provided a similar formulation. They noted that, and we have the quote up, the question is whether an investor could have had a reasonable expectation that the Government would not act in a particular manner, and this is informed by the overall regulatory regime surrounding the industry and any specific assurances given to the investor by the State.
With respect to the Federal measures, then, under these formulations the question for the Tribunal is whether Glamis reasonably expected that the Federal Government would not react to the identification of sacred sites in the Project area by concocting a previously unheard of and, indeed, congressionally rejected discretionary denial authority like the one ultimately set forth in the Leshy Opinion.

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

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

With respect to the California measures, under the formulations that I mentioned a moment ago, the similar issue for the Tribunal is whether Glamis
reasonably expected that the State would not respond
to the identification of sacred sites in the Imperial
Project area by reinventing its reclamation
requirements to implement a mandatory, full
backfilling and site recontouring requirement for
metallic, but not nonmetallic mines.

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

In evaluating these issues, the Tribunal
should consider the notion of undue regulatory
surprise. Professor Wälde has emphasized the
significance of that surprise as being indicative of

the frustration of legitimate expectations. That
concept is particularly important in this case because
of Respondent's tendency to conflate "reasonably to be
expected" with "theoretically possible." In other
words, Respondent contends that it was always possible
that the Federal or California Government would do X
or Y, but that, of course, isn't the issue. The issue
is whether Glamis should or could have reasonably
expected that action on the one hand or whether it
amounted to undue regulatory surprise on the other. That's an issue that my colleagues will review in more detail in the context of the evidence as to Glamis's reasonable expectations.

Respondent also seeks to elevate specific assurances from one of a number of competing factors in the consideration of reasonableness to an inviolable requirement. That is, Respondent contends that Glamis could not have had reasonable expectations as to the Imperial Project because the Federal and California State Governments never promised Glamis that they wouldn't take the actions that they took. My colleagues will review Mr. McArthur's testimony about the assurances that the California Desert Protection Act's no buffer zone language provided, as well as the assurances that State BLM Director Hastey provided with respect to the approval.

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

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

11:27:19 1

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

The Tribunal has posed a question about to
what extent it can look behind the California measures
and undertake a more probing examination. We submit
that as the Tribunal considers and weighs these
various factor, evaluation of the motivation behind
the measures is necessary. There can be no meaningful
evaluation, for instance, of whether the measures were
arbitrary or rationally crafted without consideration
of why it was that the State undertook them.

Respondent would prefer that the Tribunal not engage
in that analysis and instead simply accept the
were bona fide, nondiscriminatory regulations. What we said in a number of cases that stand for the proposition that bona fide, nondiscriminatory regulatory measures don't enjoy immunity from expropriation liability. But even if the Tribunal were to accept that they do, that would apply only to nondiscriminatory regulations. Thus, in Methanex, one of the cases that Respondent cites, the record was devoid of any evidence that the measures had targeted the Claimant at all.

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

Here is what I mean by that. Respondent asserts that the California measures are generally applicable, but this amounts to an argument of facial neutrality. U.S. taking is jurisprudence, for instance, focuses less on facial neutrality than intent and effect. Who was the target of the measures and to whom were they applied? Thus in the Whitney
Benefits case, the Federal circuit emphasized that Congress had been carefully attentive to the question of which particular coal properties it was affecting. Likewise, in the Sunset View decision, the California Court of Appeals held that the generality of the language of the ordinance does not conceal its single realistic purpose, the prohibition of Respondent's mortuary. Respondent nevertheless insists that since the California measures are facially neutral, it's inappropriate for the Tribunal to indulge Glamis by searching for some hidden agenda.

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

So to sum up, in less than full deprivation cases under U.S. and customary international law, character is a factor to be weighed, and discrimination, arbitrariness, rationality, and so on are evidence of character, and they're all impossible to evaluate absent consideration of the motivation that drove the measures. So if the Tribunal finds an incomplete deprivation, not only may it look behind the measures to consider the motivation, it, in fact, must do so as part of the weighing exercise.
That concludes my remarks on these issues at this point, and at this time I would like to turn the floor over to my colleague, Ms. Haque, who is going to be reviewing Article 1105's requirements.

PRESIDENT YOUNG: Mr. Schaefer, thank you.

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

To start, Article 1105 of NAFTA provides that each party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security. Notably, despite the plain language of Article 1105, which clearly includes the fair and equitable treatment as a minimum standard of protection afforded to all foreign investors under international law, Respondent has avoided saying those words during this proceeding as if they had never been included in Article 1105.

Similarly, in its Counter-Memorial, Respondent stated that broad State practice and opinio juris have coincided in only a few areas. Respondent identified those areas--if I could get the slide. Respondent identified those areas as a minimum level of internal security and law and order, a denial of justice in the judiciary context, and the rule barring
expropriation without compensation.

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

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

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

First, it takes the position that Article 1105 of NAFTA requires something less than the fair
and equitable treatment standard afforded under thousands of similar investment treaties, even those to which the United States is a party.

Second, it suggests that the Claimant has an obligation to establish that the specific measures constituting a breach of the fair and equitable treatment standard are individually unlawful under customary international law.

Neither of Respondent's positions have any merit.

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

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

Claimant does not agree that there is any restriction that fair and equitable treatment be defined only by customary international law rather
than international law in general, given that the plain language of Article 1105 requires treatment in accordance with international law. The Mondev Tribunal, which included the distinguished international jurist Stephen Schwebel as the United States's chosen Arbitrator, also stated that the content of the standard is to be found by reference to international law. This is in paragraph 120 of the Mondev award, where it said that the standard of treatment is to be found by reference to international law, i.e., by reference to the normal sources of international law.

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

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

BIT jurisprudence should be excluded because Article 1105 standard is somehow different and less protective. That the standards are generally the same is demonstrated by the OECD Draft Convention, which Respondent indicated in its Pope & Talbot Article 1128
submission as being the most direct antecedent to international investment agreements. The Draft Convention included a fair and equitable treatment standard that, like the NAFTA standard, has conformed to the minimum standard under customary international law. The United States has recognized that it incorporated the same standard as that in the Draft Convention in its various bilateral investment treaties.

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

Thus, for the U.S. to now argue that jurisprudence relating to other BITs should be disregarded because they involved autonomous standards should be rejected, at least with respect to cases involving U.S. BITs. Moreover, Mondev confirms that all BIT jurisprudence and not U.S. BIT cases are relevant, particularly considering that the minimum standard of treatment is an evolving one, as all NAFTA parties have acknowledged. The meaning of the standard thus must incorporate current international law. As the Mondev Tribunal stated, the content of
current international law is shaped by the conclusion of more than 2,000 bilateral investment treaties and many treaties of friendship and commerce. The Tribunal also addressed and rejected any concerns like those that have been raised in this case about BITs failing to meet the necessary elements of customary international law, finding that BIT jurisprudence demonstrates both elements, state practice and opinio juris, and thus informs the international standard of treatment owed to foreign investors under customary international law. This discussion of the Mondev case is detailed in Claimant's Memorial at pages 121 to 123. Additional evidence that BIT jurisprudence is relevant to interrupting Article 1105 lies in the statements of the BIT tribunals themselves. Many tribunals, such as those in Occidental and CMS, for example, have affirmatively stated that the Treaty standard at issue is no different from the customary international law standard. Put simply by the Saluka versus Czech Republic Tribunal, differences between the Treaty standard and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real, and any such differences could be explained by the contextual and factual differences of the cases to which the standards have been applied. Thus, Respondent's attempt to exclude BIT jurisprudence from the content.
of customary international law not only lacks any basis, but would greatly limit the body of case law that is interpreted the same or similar fair and equitable treatment standard as that in NAFTA's Article 1105.

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

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

The Occidental Tribunal stated, "The relevant question for international law in this discussion is not whether there is an obligation to refund value-added taxes," which were at issue in that case,
"but rather whether the legal and business framework meets the requirements of stability and predictability under international law." It was earlier concluded that there is not a VAT refund obligation under international law, but there is certainly an obligation not to alter the legal and business environment in which the investment has been made. In this case, it is the latter question that triggers the treatment that is not fair and equitable.

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

What are those standards? The fair and equitable treatment standard protects certain fundamental rule of law concepts that are common to principal legal systems throughout the world. As stated by Elihu Root in 1910, "There is a standard of justice, very simple, very fundamental, and if such general acceptance by all civilized countries as to form a part of the international law of the world."

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

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

I will speak now a little about the meaning of these principles and how they should be evaluated in light of the facts. The first relevant principle is that of due process. The minimum standards requirement to accord foreign investors fair and equitable treatment requires host States to provide due process to their foreign investors. This inquiry is concerned primarily with arbitrariness and the character of the administrative decision-making.
process and has developed as analog to the denial of justice standard applied to judicial proceedings. In addressing Glamis's argument that the minimum standard requires protection from arbitrary measures, Respondent professes uncertainty as to the meaning of this rule. Respondent stated: "Like its transparency claim, Glamis invokes this term "arbitrary," but it's not clear what it actually claims States are required to do or in what manner they are required to act in order to abide by this so-called rule."

This so-called rule is an application of the denial of justice concept in the administrative context. Procedural fairness, an elementary requirement of the rule of law, is also a vital element of the fair and equitable treatment standard as recognized in CMS which stated, "Any measure that might involve arbitrariness is, in itself, contrary to fair and equitable treatment." Tribunals and authorities have defined arbitrary in a variety of ways. For example, the Restatement Third of Foreign Relations Law, Section 712, Footnote 11--note 11, rather--defines an arbitrary act as one that is, "unfair and unreasonable and inflicts serious injury to establish rights of foreign nationals though falling short of an act that would constitute an expropriation."

The Tribunal in Lauder versus Czech Republic defined it as an act that is not founded on reason or
fact nor on the law. And in the ELSI case, which shows the
position of the United States when it's not the
Respondent, the United States argued that the
arbitrary actions include those which are not based on
fair and adequate reasons, including sufficient legal
justification, but rather arise from the unreasonable
or capricious exercise of authority. However, as Pope
& Talbot has established, there is no threshold
limitation that the conduct complained of be
egregious, outrageous, or shocking, or otherwise
extraordinary.

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

Thus, in light of the authorities discussing
arbitrariness, the Tribunal should keep in mind the
following inquiries as it evaluates the facts that it
will be hearing more about later this morning to
determine whether Respondent has acted arbitrarily and

denied Glamis due process.

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

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

Did the host State use the legal instruments that govern the actions of the investor in conformity with the function usually assigned to such instruments? No. In this case, Respondent used
emergency powers to block the Imperial Project.

Professor Wälde has explained that emergency powers are generally reserved for situations where, without action, the safety of the public is seriously imperilled. This is in Chapter 4, page 28 of his report.

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

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

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

This is not the case. Referencing the eminent international jurist George Schwarzenberger, Professor Wälde opined that areas where Government authorities have discretion are particularly conducive to arbitrariness since it is easier for the host government to mask an arbitrary reason with a colorable excuse. While tribunals cannot substitute their policy judgments for the States, they can and must probe the host State’s rationale to see whether its measures matched its objectives.
The recent decision in the Tokios Tokelés versus Ukraine case also demonstrates that tribunals must look to the host State's motives. In Tokios all Members of the Tribunal agreed that if the Claimant had proven that the State's actions were politically motivated and that the audits and investigations imposed on the Claimant were not valid, it would have established a breach of the fair and equitable treatment standard. Tribunals simply cannot turn a blind eye to evidence of a discriminatory and targeted regulation. Here, too, the Tribunal should take a close look at the arbitrariness of Respondent's Federal and State measures, consider their disproportionate and targeted nature, and find that Glamis's Imperial Project has been denied due process in breach of the fair and equitable treatment standard of Article 1105.

The next strand of the fair and equitable treatment standard that Respondent has violated relates to the protection of legitimate expectations. The U.S. argument that protection of legitimate expectations is not part of international state practice is disingenuous, particularly when the United States itself has in domestic takings law, as well as other areas, recognized this concept also expressed as detrimental reliance or estoppel. All members of the NAFTA Tribunal in International Thunderbird versus Mexico have accepted
that the principle of legitimate expectations forms part of the duty to afford fair and equitable treatment to investors. The Award states: "Having considered recent investment case law and the good faith principle of international customary law, the concept of legitimate expectations relates, within the context of the NAFTA framework, to a situation where a contracting party's conduct creates reasonable and justifiable expectations on the part of an investor or investment to act in reliance on said conduct, such that a failure by the NAFTA party to honor those expectations could cause the investor or investment to suffer damages."

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

A recently published treatise entitled "International Investment Arbitration" also provides a helpful framework for assessing cases involving
legitimate expectations. This book, which was written specifically to address a gap in literature stemming from the fact that most important studies on the application of the standards of treatment were written before BIT protections had been tested to any significant degree, analyzed the relevant cases, and the authors confirm that the stability of the legal and business framework is a core element of fair and equitable treatment.

With this as the underlying principle, the authors of the treatise suggest the following as the relevant considerations: The law of the host State at the time of investment under this factor will be relevant whether there are any specific assurances which the investor may have received at the time of investment, as well as the legitimate scope for regulatory activity. The starting point, thus, for determining whether the investor's legitimate expectations have been violated in breach of the fair and equitable treatment standard is the law of the host State at the time of the investment. As stated recently in the Saluka v. Czech Republic case, an investor's decision to make an investment is based on an assessment of the state of the law and totality of the business environment at the time of the
investment, as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable. Under the legal regime existing at the time of Glamis's investment in the Imperial Project, Glamis's Plan of Operation met all applicable requirements, as Mr. Leshendok's report and his testimony demonstrated. This regime was radically transformed, however, through measures at the Federal and State level, including, for example, the Federal Government's arbitrary casting aside of years of settled mining and public land law to apply a discretionary veto authority that no one, including BLM, ever believed existed. This regime was further transformed by the California Government's enactment of unprecedented complete backfilling and site recontouring requirements. As stated by the Waste Management Tribunal, it is also relevant whether the treatment is in breach of representations made by host State which were reasonably relied upon by the Claimant. Respondent has argued in its Rejoinder that Glamis had no such assurances. As Mr. Schaefer mentioned, such assurances are not required, but in any case they exist in this case. As Professor Wälde has noted in his report, there are two types of assurance, both of
which Glamis had in this case. The first is specific representations, and two, the other is more general assurance based on how the host State projects its investment regime and how the investor reasonably views it.

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

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

Finally, the Tribunal must also balance the protection of legitimate expectations by the host State's right to regulate. This, however, does not command the sort of blanket approval based on deference that Respondent would have you give to all acts of the host State. Respondent cited Saluka v. Czech Republic on page 189 of its Rejoinder for stating that it was clearly not for this Tribunal to second-guess the Czech Government's privatization policies.

The follow-up to that, however, clarified that the Tribunal must still evaluate whether the host
State has complied with its international obligations. The Tribunal stated: "The Czech Republic, once it decided to bind itself by the Treaty to accord fair and equitable treatment to investors of the other contracting party, was bound to implement its policies, including its privatization strategies, in a way that did not lead to unjustified differential treatment unlawful under the Treaty."

Respondent is similarly bound here. The balancing approach advanced by the Saluka Tribunal is helpful in assessing the competing interests. It provides that the determination of a breach of fair and equitable treatment standard by the host State therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and Respondent's legitimate regulatory interests on the other. The specific facts establishing the reasonableness of Glamis's expectations and legitimacy and character of Respondent's regulatory interests have already been alluded to. Let me, however, suggest that the legitimacy of Respondent's interest is cast into serious doubt by the targeted and retroactive nature of the measures at issue designed specifically to stop the Imperial Project long after its Plan of Operations had already been submitted.

Thus, the facts here render highly questionable the legitimacy of Respondent's interest.
and weighs strongly in favor of finding that Glamis's rights under Article 1105 have been breached. In sum, Article 1105 includes an obligation to protect a reasonable and legitimate expectations of a foreign investor determined by looking at the laws in place at the time of the investment and any assurances that the investor had and weighing the host State's regulatory interests. Article 1105 also includes an obligation to provide the foreign investor with due process and protect against arbitrary actions by the host State. The totality of the facts in this case which must be considered, and as my colleagues will further detail this morning, clearly demonstrate that both of these obligations have been breached in violation of the fair and equitable treatment standard required by Article 1105. I will now turn it over to Mr. McCrum who will discuss Glamis's reasonable expectations with respect to the Imperial Project. Thank you.

Mr. McCrum?

Thank you, Mr. President. We will now review Glamis's reasonable expectations to conduct conventional open-pit gold mining at the Imperial Project site in the California Desert. The BLM regulations and the California Desert Conservation Area plan provide for mine approval if
11:56:52 1 economically and technically feasible mitigation measures were employed. California SMARA regulatory practices were consistent with this at the time Glamis made its investments.

Mr. Leshendok, former senior BLM minerals official, his reports and his testimony confirm that the Glamis Imperial Plan of Operations met all applicable preexisting regulatory requirements, and this testimony is unrebutted. Glamis had no expectation of complete backfilling because it was not economically feasible, and complete backfilling was repeatedly rejected by BLM and California lead agencies, and even by BLM in 2000 rule revisions which, in any event, would not have applied to Glamis as a pending plan, which is specifically referenced in the BLM 2000 and 2001 rule revisions, which did not subject any new performance standards to pending plans of operations.

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

Glamis also had assurances from the 1994 California Desert Protection Act on which Glamis reasonably relied in making its investment. The
Indian Pass Wilderness and the Picacho Peak Wilderness were permanently protected in large part for cultural resource protection purposes. The Imperial Project was outside of those protected areas. No buffer zone language was set forth in the statute by Congress to ensure the fact that a mining operation can be seen or heard from a point within a wilderness is not a sufficient reason to impose restrictions on that mining operation, yet that is essentially what Interior Secretary Babbitt did in the January 17, 2001, denial of the Imperial Project, which was based upon the determination of Native American cultural resources being in a designated area of traditional cultural concern. Glamis had no expectation that the discovery of cultural resources would block the mine because mining was only subject to economically feasible mitigation measures. Never had such cultural resources been used to stop a mine in the California Desert. Glamis could not have known in advance that the Imperial Project was considered a unique, important, sacred site in any event, as we will review. BLM California State Director Hastey gave personal assurances to Mr. McArthur that the plan would be approved at the Imperial Project, and this also confirms the reasonableness of Glamis's expectation. Mr. McArthur has testified to that
personal assurance. It was also contained in Mr. McArthur's prior signed statements, and it has not then contradicted by the Respondent.

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

The Imperial Project was located in the 1990s in the heart of an active gold mining district. Three modern open-pit mines were located within a dozen 12:00:13 miles of the Imperial Project, including the Mesquite Mine, the American Girl Mine, and Glamis's own Picacho Mine just several miles away.

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

The 1995 Briggs Mining EIS/EIR in the record is reflective of that practice, and the specific finding by BLM and the Inyo County, the lead county implementing SMARA in California makes the statement: "Backfilling has not been a customary or usual
practice in mining reclamation and is not required by BLM regulation and policy."

We've also heard testimony and seen evidence that open-pit mining was and is a common practice throughout California and the western United States. Mr. Leshendok has testified to that and addressed it in reports at length and explained that the Imperial Project lies within the Great Basin geologic province, which is considered a world-class gold and copper mining district and one of the major producers for those minerals in the world. We have seen this map that Mr. Leshendok has prepared to depict that. Mr. Leshendok has also testified that the predominant method of mining in the Great Basin province is open-pit mining and that open-pit mining is also the most typical method for mining aggregates and industrial minerals throughout the United States and in California. As of 1998, approximately 955 mines were operating in California subject to SMARA regulation. However, only 24 of those mines were active gold mines. Thus, less than 3 percent of the California mines were gold mines. Mr. Leshendok has also testified regarding the Glamis two open-pit gold mines that operated under State and Federal regulation in the 1980s and 1990s, that the Picacho and Rand Mines had good compliance records with regard to State and Federal regulations.
recognized as infeasible by the National Academy of Sciences. National Research Council at the request of the U.S. Congress has issued two reports that are reflected in the record in this case, the first one was in 1979, the second in 1999--specifically dealing with the subject of environmental regulation of hardrock mining on Federal lands. It was the '99 report.

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

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

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

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

Glamis was also recently permitted open-pit mining operations in Nevada on BLM lands at the Marigold Mine, with seven open pits not subject to complete backfilling requirements. And Mr. Guarnera, President of Behre Dolbear, has testified that his firmis working in 57 countries, none of which have complete backfilling requirements.

Glamis had successfully reclaimed its Picacho Mine, subject to BLM and SMARA regulations without complete backfilling, and obtained successful final bond release in 2002, and Glamis was recognized for
its successful reclamation practices of that mine
which were carried out without complete backfilling.

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

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

That memo dated January 10, 1995, was
prepared by the BLM internally within one month of the
submission of the Glamis Imperial Plan of Operations
in December of 1994, and this memo specifically refers
to the Imperial Project Plan of Operations and makes
the statement that local Government agencies and
officials support existing and proposed mining
operations in Imperial County.

Turning to the background of the California
Desert Conservation Area, this is a 25-million-acre
area designated by the Congress and Federal Land
Policy and Management Act of 1976. We have heard
testimony in this case and seen evidence that within
the CDCA there are at least a dozen major open-pit
gold mines. One of the largest mines in California,
the U.S. Borax Mine mining boron; one of the largest
trash landfills in the United States now underway
approved originally back in 1996, the Mesquite
regional landfill, which also includes a new rail
spur; and major gas pipeline construction, the North
Baja Pipeline projects.

These activities are consistent with the

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

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

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

The BLM 1980 regulations were quite similar
and complementary to that CDCA Plan statement and
contained a specific statement in 1980 that, if upon compliance with the National Historic Preservation Act, cultural resources cannot be salvaged or damage to them mitigated, the plan must be approved. And Mr. Leshendok has testified that this reflected BLM’s consistent regulatory practice during his significant tenure at the BLM.

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

Dr. Kaldenberg, the BLM California archeologist, asserted in written testimony that there was limited input from Native American Tribes in the planning process. However, at the hearing Dr. Kaldenberg admitted that he had never read the BLM ethnographic notes because they were not available to him, although those notes were cited and supplied with
the Glamis Memorial originally filed in this case.

BLM integrated the cultural resource information with regard to Native Americans into a map designating very high and high areas of Native American concern, and this map reveals that the Glamis Imperial Project was outside those designated areas.

BLM then made recommendations to Congress specifically on those--based on that type of information and recommended the Indian Pass and Picacho Peak Wilderness among millions of other acres to be set aside for permanent protection. The Glamis Imperial Project was not inside those recommended BLM wilderness areas, nor in the Congressionally designated wilderness areas under the 1994 Act.

The Act designated a total of 7.7 million acres, and those acres did not include the Glamis Imperial Project area as being set aside for permanent protection. That 1994 Act contained the no buffer zone language stating that Congress does not intend to designate these wilderness areas to lead to the creation of protected buffer zones around any such wilderness area.

As Mr. McArthur has testified, the passage of the 1994 Act and the buffer zone language gave us confidence that the Imperial Project was clear and that those lands would remain open for a multiple use activity, and he was particularly concerned to make
sure that the no buffer zone language was present in
the Act, and he specifically relied on that as Glamis
moved forward with its Plan of Operations in December
of '94, after passage of that Act.

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

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

And the same is true for Picacho Peak in
1994. Native American cultural resources were clearly
considered by BLM and the Congress in making those
designations.

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

Let's take a look at the map, which this map
is taken from the 1986 Woods study with the Imperial
0917 Day 7

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

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

Now, the 1986 Woods map did not identify Indian Pass as a Quechan Creation myth-related locale, and Professor Caron asked this question during the hearing. And I wanted to point out that this was not an oversight by Woods in '86 because Indian Pass had already been designated as an ACEC by BLM in 1980, so it wasn't that this area wasn't known. This was not identified as a Quechan creation myth-related site, and the ACEC boundaries that had been designated by BLM in '86 did not include the Imperial Project site.

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

And Dr. Lynne Sebastian has explained that she could find no reference in the ethnographic
literature for a Trail of Dreams in the California desert or elsewhere until assertions were made regarding that feature.

Dr. Sebastian has also stated consistently in her reports that the area of cultural concern identified by the Tribe encompassed a vast area from Pilot Knob over 170 miles to the north, and I'm sorry, Avikwaame or Spirit Mountain, 170 miles to the north, and Pilot Knob, 15 to 25 miles to the south.

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

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

So, in summary, Glamis had a clear reasonable
expectation of approval. The Project was consistent with BLM regulations. And this is confirmed by the issuance of the BLM Mineral Report in 2002, which was issued with full knowledge of Native American cultural resources that had been identified at the site by that time, and yet BLM in 2002, found that Glamis would be warranted as a prudent operator to continue with that investment at that particular time, which was September 2002, shortly before the adoption of the California measures.

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

Now, this was the background of the reasonable expectations that Glamis had as of September between the period from 1994 through the 2002 timeframe, but along that way there were significant new developments by the Interior Department, and I'm going to turn now to the topic of the Federal measures that were introduced between 1998
and 2001, which derailed the Glamis project in a way that could not have been anticipated by Glamis.

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

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

A BLM mineral examination was already underway by July '98, and found that Glamis appears to have conducted necessary work of a prudent operator in the usual and proficient operations of similar character. However, by October 30, 1998, Solicitor Leshy directed BLM to delay completion of the validity exam and a Final EIS.

And while Solicitor Leshy was clearly involved for months as of this point as is documented in our Memorial, this is a memo from the office of the Solicitor letterhead to the BLM State Director, and Solicitor Leshy does unquestionably direct the BLM to
delay completion of the validity exam and the Final EIS.

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

The BLM Imperial Project schedule dated 12/4/98 reveals that the mineral examination was expected to be complete by December 18, 1998, but that the EIS process was delayed waiting for the Solicitor's opinion, and the mineral examination ultimately did not conclude until 2002, as we know. This reflects the status as of December 1998. This was after the Leshy memo stating that actions are waiting for the conclusion of the Leshy Solicitor's opinion, which did not come out for over a year later until January 2000.

Although a draft of this Leshy Solicitor's Opinion existed by January 1999, it was not issued for an entire additional year. Once Solicitor Leshy did announce his position, he announced that Interior now possessed a previously unrecognized discretionary
authority to deny the Glamis Imperial Project which the Interior Secretary could choose to exercise. Interior's press release stated on January 14, 2000, "If BLM agrees with the Advisory Council on Historic Preservation, it has, in our view, the authority to deny the Glamis Imperial Plan of Operations."

This new Interior announcement of a discretionary denial authority conflicted with the following statements in a May 7, 1998, BLM option paper. That 1998 option paper on the Imperial Project specifically stated that the denial of the Plan of Operations could constitute a taking of rights granted to the Claimant of the Mining Law. If such a finding is made, compensation would be required under this option. While no precise estimate of the mineral value is known by BLM, reasonable compensation can be expected to be substantial, and that document is certainly consistent with the views prior to the issuance of the Leshy Opinion.

The Leshy Opinion, which has later been rescinded on legal grounds, directly resulted in the January 17, 2001, denial of the Imperial Project, announced via press release by former Secretary Babbitt three days before leaving office. The secretarial decision stated that the proposed Glamis Imperial Project would destroy portions of the Trail of Dreams, running through this vast area up to Newberry Mountain, 115 miles to the north. Solicitor
Leshy’s opinion was later rescinded on legal grounds by the Interior Department on October 23, 2001, in part, on the grounds that any such discretionary denial authority needed to be implemented by duly promulgated regulations, and that remains the view of the Interior Department today.

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

Glamis then suffered nearly two years of additional harmful delay, all of 2001 and most of 2002, as Interior slowly took steps to reverse and retract Secretary Babbitt’s unlawful denial, but the Project was never approved during this time. Secretary Babbitt’s denial was rescinded by Interior Secretary Norton on November 23, 2001, but the long-delayed BLM Mineral Report finding Glamis’s mining claims valid was never released for another year, until September 27, 2002.

The effect of Solicitor Leshy’s 1998 directive to delay the Project resulted in delays of nearly four years, and this was after the Glamis
Imperial Project had been pending since December of 1994 and had been the subject of two Draft EIS/EIRs. Accordingly, the unlawful delay by Secretary Babbitt was associated a four-year unlawful and deliberate delay of the Glamis Imperial Project.

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

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

Secretary Babbitt urged the Congress to replace the Mining Law with a different legislative scheme that would increase the level of Government control dramatically over an industry already highly regulated. Congress failed to change the Mining Law in the manner advocated by Secretary Babbitt and Solicitor Leshy.

In addition to those officials, the Interior Office of Congressional and Legislative Affairs was headed by Dave Alberswerth, who had published an...
article in 1991, advocating that land-management agencies should have authority to deny certain mineral exploration and development activities. But such views were contrary to Interior's long-standing and contemporaneous interpretations announced since 1980 that the Interior had the authority--Interior had authority to minimize impacts and regulate mining to minimize impacts but not to prevent all impacts, and that mitigation must be subject to economic and technical feasibility.

Similarly, Interior had recognized back in 1980 that applicable laws did not authorize denial of mining activities because of unavoidable impacts. Yet, without any change in the Mining Law, FLPMA, or Interior's regulations, the Leshy Solicitor's opinion concluded that such a discretionary denial existed in January of 2000 which could then be exercised to deny the Imperial Project.

Now, at the August 2007 hearing, U.S. counsel suggested that this Leshy Opinion was undertaken as a matter of first impression because the issue of possible conflict between the Mining Law and Native American rights had not arisen previously. However, this issue had arisen previously during Secretary Babbitt's tenure at Interior, and it arose after the issuance of the 1996 Executive Order 13007 on Indian Sacred Sites, which provided that, in managing Federal Lands, executive agencies should take into account
Native American cultural concerns to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions. Shortly, one year after that, May 27, 1997, Interior Secretary Babbitt transmitted a report to Bruce Reed, Assistant to the President for Domestic Policy, which identified the Federal Mining Law as one of the most serious impediments which cannot be alleviated administratively with regard to the implementation of the Executive Order. This was transmitted, and this is reflected on our original Memorial, the secretarial transmittal of these views to the White House, as is reflected in this letter, and specifically states: “Our review did identify a number of impediments hindering the Department’s capacity to implement the Executive Order in complete accordance with the wishes of many of the tribunal representatives with whom we consulted. Virtually, also two impediments are statutory in nature and would require legislative action.” So, that was 1997. The report that was transmitted included the statement with regard to the Mining Law and the 43 CFR 3809 Regulations that the Department lacks authority to unilaterally include a new basis for the denial of a patent application, even where exploration for and development of minerals impede access to and religious use for sacred sites or physical integrity. While this particular text uses the term “patent
application," the reference to the 43 CFR 3809 regulations makes it clear that this is also referring to activities governing exploration for and development of minerals which will be governed by 43 CFR 3809.

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

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

So, in other words, the substantial irreparable harm standard that was imposed to Glamis had been adopted in a regulation, in a final regulation, that took effect on January 20, 2001, and
would have applied this authority across western mining sites, but that regulation was rescinded in 2001, and it was rescinded specifically on the basis that it would be highly subjective and could be extensively supplied particularly in the context of Native American sacred sites, and it was found to have too much adverse environmental impact to western mining investment if such a standard was allowed to remain. So, the standard was rescinded by a regulatory change in 2001, and the Glamis Imperial Project is effectively the only mine that had this denial authority exercised upon it.

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

So, the standard was eliminated for the rest of the industry. The Interior Department is the only project denied on this basis prior to or since that time. Then Interior issued the Mineral Report in 2000, confirming Glamis—that Glamis would be justified in proceeding. But, by this point, the issuance of the Mineral Report was too late—these
issues had been delayed far too long--and just three days later, on September 30, 2002, former California Governor Gray Davis directed his Secretary of Resources to take action to stop the Glamis Imperial Project. And what this illustrates is how the Federal denial is clearly part of the expropriation claim. The denial by Secretary Babbitt was never cured, and it led to the blockage of the Imperial Project which lead directly to the adoption of the California measures.

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

PRESIDENT YOUNG: Thank you.

Ms. Hall, please.

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

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

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

1761

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

Respondent claims repeatedly that BLM's decision not to name the Tribe's traditional territory of approximately 500 square miles as a traditional cultural property was found because "surveying such a large area to determine the existence of one or more TCPs would have imposed an onerous burden on Glamis."

And that's at transcript page 1469. And also again in the Respondent's Counter-Memorial, Respondent claims that BLM determined that could not burden Glamis with the expense of surveying the entire Quechan traditional territory, so again instructed KIA to examine a smaller area boundary bounded by culturally significant sites the Quechan had identified.

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

And Dr. Cleland further admitted at the hearing that he was not personally aware of offers
made to Glamis about using the ATCC concept to save the company money.

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

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

Now, turning to how cultural resources were actually evaluated at the Imperial Project site, Dr. Sebastian testified that she compared the extent and types of cultural resources at the Imperial Project with those at other projects in the CDCA, and "what I found was that the archeological record, just
the archeological manifestations themselves in the Imperial Project, appeared to be identical to those in the general vicinity."

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

Now, Respondent tries to discount the discriminatory treatment received by Glamis by arguing that there were four things that differentiate the Imperial Project from all other development projects that were approved in the CDCA. Respondent's arguments, however, are based on facts that have been cherry-picked from the record and made—nor that the alleged bases for distinguishing the Imperial Project from other projects are directly attributable to the discriminatory treatment to which Glamis was subjected.

Now, Respondent has put forth four main bases on which to differentiate Glamis's Imperial Project. As you can see, these are listed on the slide. Now, many of the classifications that Respondent makes to argue that Glamis's Imperial Project can be distinguished on these four criteria
are not actually based on an analysis of the evidentiary record, however, but rather a selective sampling of information. For example, the existence of Native American concerns is one basis on which Respondent attempts to differentiate the Imperial Project, the way that it was treated, from other projects. For example, Respondent suggests that no Native American concerns were raised at the Mesquite Mine.

Respondent suggested in August that "The Record of Decision for the Mesquite Mine expansion clearly states that no sites eligible for the National Register of Historic Places were found in the Project area. The Quechan did not indicate that there are such religious or culturally significant properties within the proposed expansion area."

Now, what Respondent fails to mention is that, after the Mesquite Mine expansion, EIS was issued, stating that none of the 27 sites that were examined for potential eligibility to the National Register were actually eligible. The Tribe actually expressed to BLM that it continues to be concerned about the mine expansion's impact on its cultural resources, and it asks that the issues be revisited. And you can see from this letter where the Tribe expressed its continuing concern, and then again where it asked for the issues to be revisited. This is on the slide in front of you, I believe.
Now, furthermore, the Quechan asked, given that the mine expansion Draft EIS had stated simply that the Quechan had not identified any historic properties in a project area, the Tribe asked the BLM to seek "a more positive statement" from the Tribe about the potential existence of historic properties within the Project area. But, in response to that concern, BLM simply restated that the Quechan hadn't said--hadn't identified any historic properties in the mine expansion area.

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

Now, there simply is no basis for determining that the Mohave Tribe's comments were based on a mistaken belief about the location of the project. In fact, the Tribe's concerns were about impacts, direct impacts, including visual impacts, of the project on an area called "Castle Mountain Peaks," which is
located about seven miles from the proposed Castle Mountain Project. In fact, the Quechan expressed very similar concerns about the alleged adverse effects of the Imperial Project on Picacho Peak, which is also about seven miles from the Project area and is within a withdrawn area, as Mr. Gourley pointed out, the no-buffer-zone language precludes the denial of a project on the basis of indirect impacts such as visual impacts.

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

Finally, the Tribe expressed their concern that they hadn't adequately been consulted about the
Project and hadn’t been given an opportunity to voice all of their concerns. So, for Respondent to suggest that there was no convergence between the concerns expressed at the Project and the archeological evidence there really ignores these facts that are shown by the letter that the Tribe wasn’t given an opportunity to voice those concerns.

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

Now, you can see parts of--

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

MS. HALL: Sure.

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

MS. HALL: From the Mohave.

Are you referring, Professor Caron, to the

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

2 ARBITRATOR CARON: Yes.

3 MS. HALL: Okay. That is attached—we provided that attached to the PowerPoint presentation, and the—okay, that's taken from the Castle Mountain

4 6 EIS—correct?

7 ARBITRATOR CARON: Well, perhaps you could
Respondent made several claims about the Tribe's concerns raised in connection with the Mesquite Landfill. You can see that Respondent stated that their concern for the landfill were about studying the archeological evidence further to determine if there had been a historic or prehistoric permanent settlement in that area; and, furthermore, now BLM reviewed the archeological evidence in the landfill area and concluded that it did not indicate that there had been a settlement, any permanent settlement, in the area; and that the Quechan did not present the BLM with any evidence similar to that which it presented regarding the cultural resources in connection with the Imperial Project review.

Now, what Respondent fails to mention is that shortly after the Record of Decision for the Mesquite Landfill issued, Quechan representatives wrote to BLM expressing their view that the Record of Decision was based on inaccurate information, and they continued to have real and serious concerns about the cultural and religious significance of this site. In fact, the Tribe noted the presence of important archeological features that they didn't believe had been adequately inventoried or cataloged during surveys of the project, and that they believed
that the Project would "erase for all time the remains of a significant ancient Indian settlement or religious center or a combination of the two." And that's taken from the letter projected on the screen. Thus, for Respondent to suggest that there was no convergence between the Native American concerns expressed at the Project and the archeological evidence there misses the fact that the Tribe requested the same kind of intensive study that only happened at the Imperial Project, and this study was taken and undertaken for the sole purpose of elevating the cultural concerns at the Imperial Project as a basis to deny that project.

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

Now, Dr. Sebastian also had stated that the Mesquite Landfill that trails that exist there do match up very closely with the trails that are exhibited in the Boma Johnson Xam Kwatcan map, and she has also photographed segments of trails there that she considered quite significant.
I would like just to conclude by suggesting that Glamis was also subject to unique standards by the Advisory Council on Historic Preservation. As Dr. Sebastian had testified at hearing and as she had stated many times in her report, the Advisory Council generally works to find negotiated settlement and solutions to adverse impacts on cultural resources. And, from her review of the record, there was not a similar attempt made at the Imperial Project site to find a set of acceptable mitigation measures, the kind of effort that was made at other sites at which there was real expression of concern raised, and that was the second main basis on which Glamis was subject to discriminatory treatment.

Again, cultural resources were used and elevated at the Imperial Project site as the factual predicate—to serve as the factual predicate to deny that project and that project alone.

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

PRESIDENT YOUNG: Thank you, Ms. Hall.

Mr. Ross?

MR. ROSS: Thank you, Mr. President.

I'm going to speak to you today about the SMQB backfilling regulations and S.B. 22.
In this presentation, I'm going to make four basic points: First, S.B. 22 and the emergency backfilling regulations adopted by the SMGB targeted the Glamis Imperial Project. Second, those measures were inextricably linked. Third, their true purpose was to permanently prevent the approval of the Glamis Imperial Project. And fourth, those measures were successful.

Based on what California--

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

Thank you.

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

Now, to begin, I'm going to talk about California's initial efforts to shut down the Imperial Project: S.B. 1828 and S.B. 483. Now, Respondent has tried to characterize those measures as a kind of legitimate outgrowth of the Sacred Sites Act to preserve cultural resources. Now, as we heard earlier today by Mr. Schaefer, that argument is without merit because the Sacred Sites Act does not apply to Federal Lands. This argument is also without merit from a
Now, it's a matter of public knowledge at the time these initial measures were being prepared that the genesis of the Bill 1828, which was authored by Senator Burton, was the result of lobbying by the Quechan Tribe. In fact, I will just quickly move along here, but after the Clinton Administration efforts to shut down the project were overturned by the Bush Administration, the Bush Administration led the Tribe to try to stop--block the Glamis project from receiving State permits and gave rise to the Burton Bill.

Now, this same information was confirmed basically in the first day of our hearing when the New York Times article had about the same information. And as we demonstrated in our Memorial on page 198, about this time a lawyer for the Tribe was working with the Department of Conservation and the State legislature in their lobbying efforts, and that's on page 198 of our Memorial.

Now, we don't need to rely on newspaper articles to prove our point, obviously. The State of California legislative history does that for us. Now, for example, in this piece of legislative history, it states: "This bill was introduced as a result of a particular situation in which a proposed capital project in Imperial County would cause adverse impacts
to Native American sacred sites." That site, of course, was identified as the Glamis Imperial Project. Again, this Enrolled Bill Report by an executive branch identifies the Glamis Imperial Project as the initial stated purpose and the Project identified that gave rise to the bill.

Now, the reason for the bill was stated fairly succinctly by Senator Burton, the author of the bill. He said, in a letter to Gray Davis imploring the Governor to sign the legislation once it made its way out of the State legislature, he said, "There are no State or Federal laws that specifically recognize and protect these sacred sites."

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

Now, despite Senator Burton's best efforts--despite Senator Burton's best efforts, Gray Davis ultimately didn't sign--in fact, vetoed
it—essentially because it was overly broad, and I will talk about that in a second. But, in his veto message—and I think we are fairly familiar with this quote from our earlier hearing—he identified that he was particularly concerned about the proposed Glamis project, and directed the Secretary of Resources to pursue all possible legal and administrative remedies that will assist in stopping the development of that mine. Now, one of the reasons why it was overly broad, as this Enrolled Bill Report said, was that essentially the bill unnecessarily expands the local situation, the Glamis Gold Company project, to a statewide issue. The rest of the quote on the screen basically goes on to say that the State was worried about an overly broad application about new powers granted to tribes by 1828, and was essentially a veto of authority over projects throughout the State, including State projects.

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

483, like 1828, was initially drafted with a very specific purpose in mind. As the fax that you see on the screen in front of you says—and this was a fax from Mary Shallenberger of Senator Burton's office 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
his letter to the Governor, he identified a need to stop the Glamis Imperial Project and identified it as a Canadian-based company, and he says that the new backfilling—the new backfilling requirements imposed by S.B. 483 would make the Glamis Imperial Project infeasible.

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

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

Now, within days or at least within a couple of weeks, there is a chain of events that went into place that quickly moved from the Governor's directive over to the Surface Mining and Geology Board. As evidenced by this remarkable E-mail—and I believe it starts about October 11th or 12th and ends on October 15th—there is correspondence between a staffer in Senator Sher's office, Mr. Jeff Shellito, who said, and it's fairly small up there, "So, where are we at on the legal feasibility of the State Mining Board adopting emergency regulations that would at
least for 120 days mirror the substance of 483?"

He says—and I will move on—"Alison Harvey,

Senator Burton's Chief of Staff, "and I both suggested

last week to the Resources Agency that the Davis

Administration put these emergency regs—to put these

emergency regs in place, essentially, to give us time

to enact legislation that essentially would delink

1828 and 483."

Now, the Department of Justice lawyer

responded that he would rather not communicate about

directly if you are worried about the attorney/client

privilege, but—however, I thought that Alison

Harvey"—again, Senator Burton's staff member—"and I

were working with the Resources Agency on an informal

and collegial basis to stop the Glamis Mine. I recall

sending you that the text of S.B. 483—I recall

sending you that text and asking your informal opinion

whether its contents could be adopted as emergency

regulations by the State Mining Board."

Mr. Thalhammer responded, of course, and said

basically to not communicate by E-mail because "I

don't want my opinions discussed in open court. That

would never be helpful." That depends on your

perspective, I would imagine.

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

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

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

The finding can't be based--the finding of
the emergency can't be based on expediency,

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

Now, the Respondent has argued that the emergency regulations simply clarified what was already an existing requirement under SMARA. For example, Respondent claims---and at the transcript at 1093---that the SMGB regulation reflects an objectively reasonable application of preexisting SMARA.
requirements, but the facts simply do not support this claim. Dr. Parrish testified that the triggering mechanism for the Imperial Project, which at the time was believed to be on the verge of being approved by Imperial County, the issue before the Board was whether it would be approved under SMARA for mining. As the record shows, that answer was "no."

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

Now, in a recommendation from Dr. Parrish to the Executive Officer at that time, he says there was a strong and compelling evidence that suggests that local approvals by the lead agency are imminent, and unless the approval of the regulation is adopted through the emergency provisions, reclamation regulations that address—that basically expand the backfilling requirements cannot be adopted in time to affect this particular mining operation.

Now, the compelling evidence that was just quoted is totally identified by this letter from Senator Sher to Senator Burton to Chairman Jones, saying that the Federal Government is racing to complete an environmental analysis of the Glamis Imperial Project, and it essentially says that you
must adopt these provisions, that it implores the
Board to adopt these measures on an emergency basis.
Now, the Board did identify and did consider
whether or not we could do this on a nonemergency
basis, but it said, and it found: “However, the SMGB
noted that the adoption of regulatory language by the
emergency process may be the only method available at
this time to address the imminent threat to the
State.” Of course, they’re talking about the Imperial
Project there.
Now, what I want to talk about is essentially
the Respondent has said that existing State law
allowed the--essentially allowed the counties to
interpret SMARA regulations and require complete
backfilling and otherwise shut down a mine, but this

is a misinterpretation of SMARA. As Mr. Schaefer
mentioned earlier, SMARA is a mixed-use statute. It
says, “The Legislature further finds that the
reclamation of mined lands as provided in this chapter
will permit the continued mining of minerals. The
production and conservation of minerals are
encouraged, while giving consideration to values such
as recreation and wildlife and things like that.”
Now, Teddy Roosevelt, President Teddy Roosevelt,
instructs that conservation means development as much
as it does preservation. It’s a quote you can see
over on Roosevelt Island, a couple of miles to the
west of here.
SMARA specifically anticipated that mining would be allowed to go forward, and it's not—it's a mixed-use statute. It's a balancing statute. And the statute also must be applied on a site-specific basis. It says in Section 2773: "These standards shall apply to each mining operation but only to the extent they are consistent with planned and actual uses of the mining site."

Mr. President, I would ask, how much time do we have at this point?

PRESIDENT YOUNG: Two minutes.

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

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

Again, there was testimony in the record about other uses of mined lands for wildlife habitat and things like that, and the Board out of hand rejected them saying often with very technical findings that—that essentially they disagreed with
the commenters about whether or not there are
alternative uses for these mines, using technical
findings, even though they didn't rely on any

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

Now, what does "infeasible" mean? Well, it
essentially means cost-prohibitive, as the Department
of Finance and Enrolled Bill Report said.
Cost-prohibitive, as the Assembly Committee on
Appropriation said, "You can't take all the material
that's taken out of the pit and put it back in." And
because of that, the provisions of the reclamation, of
S.B. 22, make the Glamis Imperial Project that we have
Gray Davis actually signed the bill on the law on April 7, and at that point he identified the Glamis Imperial Project we heard several times.

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

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

PRESIDENT YOUNG: You have a choice, to either stop at this point or take that out of your rebuttal time. What would you like to do?

MR. ROSS: We will take it out, particularly because there are a couple of issues we do need to address, which the Tribunal had procedurally asked us to address.
When Gray Davis signed the bill into law on April 7, 2003, at the same time he identified the State Mining and Geology Board was about to adopt the most stringent backfilling requirements in the country. We heard testimony that Gray Davis has absolutely no power over the Board. The Board is totally independent. But the record demonstrates that those regulations weren't adopted until April 10 and at which there was actually significant debate—well, not significant debate, but the Board actually debated whether they should adopt it and they voted and they adopted the permanent backfilling regulations.

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

As we identified a long time ago, on February 15, 2006, there are about six documents that the Tribunal said are potentially still available under the privileged dispute. There are a series of six documents that all are from April 4th to April 7th, and each of them deal with deliberations about what the Government is going to do with S.B. 22 and the backfilling regulations, and these are communications between the high-level executive branch agencies and the Governor's Office.

Well, if the Governor has no ability or no control over the backfilling regulations, what is the
Governor's Office deliberating about? And our theory is that these six documents--and I will identify them on the screen--may suggest and provide additional information as to why--what the Government or the rationale for S.B. 22 and the backfilling regulations, we submit, was focused on the Glamis Imperial Project. The Government has said that they're reasonable regulations.

Now, these documents are protected by deliberative-process privilege, and that's a qualified privilege. There is a balancing that must be--that must be weighed. And essentially, if our need for the documents outweighs the Government's interests in protecting them that balancing tips in favor of turning these documents over.

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

At this point, I will rely on my PowerPoint
which you have in your binder. Oh, continue? All right.

All right. When the Board adopted final regulations, we have put forward in our brief--these had disproportionate impact, and they are discriminatory and target the Glamis Imperial Project, and some of the evidence that points to that is in Gray Davis's statement where he identifies only 3 percent of the industry will be affected by these new regulations. Well, if there are about 1,100 mines in the State of California in 2003, 3 percent of the industry is metallic, 97 percent is nonmetallic. That's actually existing mines. The question is how many actually new mines or potential mines are on the horizon. And we suggest--and there is no evidence to refute it--that the Glamis Imperial Project was the only mine at that time that would be affected by these new backfilling regulations.

So, the initial legislative efforts of 483 and 1848 were aimed at it, the emergency backfilling regulations after the Governor vetoed those initial efforts, the emergency backfilling regulations as identified specifically to the Glamis Imperial Project as "the emergency" by which they need to pass the law to change state policy and adopt new backfilling regulations. And those regulations are, when they were finalized, again were only finalized for very,
very, very small percentage of the industry that essentially deal with open pits.

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

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

In any event, what the record doesn't explain is why the so-called "variance provision" that was included in the backfilling requirements for the metallic mines couldn't have also applied to other mines in the State. That so-called "variance"--and it really isn't a variance. It was testified that it was, but it basically says metallic mines have to
backfill—they're basic regulations, that mines have
to put all of the material back into the pit and
recontour to essentially 25 feet or less. If there is
not enough material to put it back in the pit, then
the mine has to do whatever it can to take whatever is
available and put it back into the pit, even if it
doesn't come to the surface.

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

In summary, I want to say that the
backfilling regulations and the other provisions had a
disproportionate impact that was borne by the Glamis
Imperial Project. It was the only mine that was
identified at the time that had a pending Plan of
Operations. The State took some very significant
drastic and very quick measures to identify it, target
it, shut it down on a temporary basis, went to the
State to pass a law to shut it down, and those
regulations—that eventually—were done
on an emergency basis were adopted without change.
And again, the Glamis Imperial Project was the only
project that was potentially impacted by those
regulations.

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

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

PRESIDENT YOUNG: Thank you, Mr. Ross.

Mr. Gourley?

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

PRESIDENT YOUNG: Thank you.

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

(Pause.)
PRESIDENT YOUNG: You have 51 minutes remaining for rebuttal.

And I take it we also have a renewed request for the six documents listed in here, which the Tribunal will take under consideration.

MR. ROSS: That's correct.

PRESIDENT YOUNG: Okay. We will reconvene tomorrow at 9:00 a.m. with a schedule parallel to today's for Respondent.

With regard to Wednesday, we have taken under advisement Respondent's request for a schedule that would have us go from 9:00 until 9:51, and then from 12:30 to 1:30. I take it that was the essence of your request? And that is the schedule we will have on Wednesday. Then we will meet here from 9:00 to 10:00, and then we will meet again, reconvening at 12:30 to 1:30.

Thank you. We will see you tomorrow.

(Whereupon, at 1:38 p.m., the hearing was adjourned until 9:00 a.m. the following day.)
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.

DAVID A. KASDAN