NAFTA/UNCITRAL ARBITRATION RULES PROCEEDING

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In the Matter of Arbitration Between:

GLAMIS GOLD, LTD.,

Claimant,

and

UNITED STATES OF AMERICA,

Respondent.

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HEARING ON THE MERITS

Wednesday, September 19, 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 9:04 a.m. before:

MR. MICHAEL K. YOUNG, President

PROF. DAVID D. CARON, Arbitrator

MR. KENNETH D. HUBBARD, Arbitrator

Also Present:

MS. ELOÏSE OBADIA,
Secretary to the Tribunal

MS. LEAH D. HARHAY

Assistant to the Tribunal

Court Reporter:

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P R O C E E D I N G S

PRESIDENT YOUNG: Mr. Gourley?

REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANT

MR. GOURLEY: Yesterday, we heard the Respondent's defense to our summary closing. Once again, what you heard was a distorted view of the facts and frequent misstatements of what Claimant's actual position is.

I'm going to review for you this morning a few of those exaggerations and some of the misstatements.

Let me turn first to the ripeness position, the "ripeness" defense that they've asserted. There's not much more needs to be said about this issue, other than to point out that Whitney Benefits really controls here on the futility point.

Despite their argument, Whitney Benefits did not involve a complete ban on mining. It was a surface mining ban, which left open the possibility of underground mining. It was only that underground mining, as the Court of Federal Claims determined, was uneconomical; and, therefore, there was no point in

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09:05:44 submitting a plan that, much like here, that could not

be approved because there was no economical use.

Now, they cite to Golden Queen to assert that there is actually somebody who's actually had this, the SMARA reg, applied to them, and they further misspoke by saying that it was an operating mine.

In fact, it's quite a speculative venture. There isn't even, if you look at the Houser Supplemental Report Exhibit A, the Web site pages that he pulled down, it makes clear that they don't even have a valid technical Feasibility Study for the reconfigured approach, which isn't a gold mine, as we pointed out back in August, but is a combination gold mine aggregate operation.

So, any statements they make about, as we heard yesterday, that they expect a robust profit are based on pure and utter speculation.

Addressing, then, the "background principles" defense that they've asserted, I would point first to former Solicitor General Olson's first opinion in this case in which he stated at pages 17-18, "Concurrent regulation is simply not the same thing as a

09:07:14 concurrent power to redefine the extent of the Federal property interest that was transferred to private hands."

Concurrent regulation is the preemption point. Concurrent power to define the property right that the Federal Government has given, that is not preemption; that is a constitutional issue, as we

discussed yesterday. There simply is no authority for a State statute to be a "background principle" that can confine and constrain the Federal property interest that's been granted.

But in any event, as we've explained, neither of these so-called "background principles" are such limitations on the Federal property interest here.

First of all, the Sacred Sites Act simply cannot apply to Federal land. We've been over that. It was interesting to hear that in response to our argument that there has been no authoritative source cited for the proposition that it could, Respondent argued that they got to define what the law was. Yet, in August, at the transcript at 1079-80, Respondent stated to the Tribunal--and we agree with this--"You

09:08:32 are to take the law as a fact, so to speak. The domestic law is a fact for you to look at." But when it's an affirmative defense, they want to jump over that evidentiary hurdle.

In any event, a further textual analysis of the statute shows that when California wanted to affect Federal lands, which they did in subsection (j) of the Act, they knew how to say it, and they said Federal lands, and the only authority given to them to Federal lands was to negotiate on behalf of the State with the Federal authorities to encourage them to take actions.

Now, with respect to SMARA, they are

conflating the analysis you do if you get past a categorical taking and you go into balancing with the "background principle" concept. So, they are looking to say, because backfilling is mentioned in SMARA, then it is reasonable to project that at some point they might do more than site-specific backfilling. But that is not a "background principle" argument. "Background principles" have to be a preexisting obligation, and there was nothing in SMARA which by

09:09:55 itself has to be implemented by regulation, so it wasn't even self-executing. It had to--it did not mandate backfilling, which is the issue here.

And, in any event, as former Solicitor Olson stated, the grandfathering provisions sink the "background principle" argument. American Pelagic does not revive it. They've cited to that case repeatedly, even though the property interest at issue there was boat ownership.

So, the argument being made was whether someone who owns a boat within their bundle of rights is a right to fish in a particular part of the North Atlantic, and not surprisingly, the Court said no. To make that case applicable here, you would have to say that they had a right to the fish in the sea, like we, Claimant, had a right to the gold in the ground.

And it's not that it was applied to one owner and not to others. Every owner was subject to the same discretionary regime that meant they had no right

to fish--to the fish. All they had was the right to their boat, which they continued to have.

Now, looking, then, at the Federal measures

09:11:21 in terms of expropriation, let me just say that their reference to Tabb Lakes is misplaced. They cite that for the proposition that you cannot convert a measure that's not itself expropriatory into one that's expropriatory by subsequent actions.

In fact, that was a case of unreasonable delay, and the first cease and desist order was found not to be expropriatory, but here the January 17, 2001, Record of Decision is a taking. It is expropriatory, and the delay is concurrent with that and extends after that, so it has nothing--they really have nothing to do with each other.

Now, with respect to abandonment, again, Respondent here has misspoken, and we'll show this on the slide. They stated that BLM had suspended, but, in fact, they hadn't; and they told us they wouldn't until we gave them assurance that we would not hold them liable.

So, in the January 7th letter--not December, as they said yesterday--they made clear, "Once that letter is received, I would be glad to suspend officially any further processing of your Plan of

09:12:38 1 Operation." And when we responded just two months
2 later, accordingly, we directed them to continue.
3 Accordingly, we expect the BLM will continue to
4 process the Glamis Plan of Operations.
5 Now, let's turn briefly to valuation. And I
6 had hoped to avoid ever using the words "swell
7 factor," but I will use it ever so briefly.
8 This, again, Respondent took us to task by
9 claiming that we are disregarding documents on which
10 they rely that are contemporaneous, and they do this
11 because they want to pretend that a rule is applicable
12 where there are contemporaneous documents that
13 contradict a position that a party takes later that
14 you look to those contemporaneous documents. But the
15 predicate to that rule is they have got to be talking
16 about the same issue, and they have got to be
17 probative of that issue, and that's not the case here.
18 So, when you look, they trot out a series of
19 memoranda, each of which has the same 1994 assumed
20 swell factors, but they never show that document that
21 those numbers that are on that document, the swell
22 factor numbers, were used in any calculation anywhere

09:14:00 1 in this record. That's never been shown.
2 And similarly, they cite to a number in the
3 BLM report, again a swell factor that on its face, is
4 not an average swell factor for the site, but is some
5 sort of swell factor associated with the leach

pads--with, sorry, the waste piles contrasted with a 4 percent for the leach pads. So, it's clearly not the swell factor of taking it out. It has something to do with the settlement or what is happening on those pads before it's redisturbed again, which is the key issue, and you take the material back to backfilling, which is where the expense comes.

Finally, Respondent misstates the impact, and again we could not find--and I would be happy to be corrected on this point--that Navigant, their expert, never made this calculation, but they suggested yesterday a calculation of the impact of this as being modest, but they have understated that in two ways. First, they claim the difference in tonnage was 15 million tons. Well, the very chart that they use says that Navigant comes up through Norwest with 187 million tons. Glamis, in its projections, had

09:15:21 been doing 206 million, and Behre Dolbear calculates 226. Well, the difference between 226 and 187 million is, in my calculation, about 39 million.

And then, to further understate the impact, they multiply it by their arbitrary 25-cent per cost--per ton cost, not our 35.3 cents. So, they have mixed now two issues to try to show the impact of one. If you multiply the 39 million by 35.3 cents, that's closer to 14 million before you go into discounting.

Now, the same problem of extracting only that which they find useful from a document and then

elevating that document to something that it isn't is demonstrated by their use of the January 2003 analysis that Mr. Voorhees did to see if the project remained viable after the backfilling. So, you only need to look at this document to see it's not a valuation of the Project like the extensive expert reports that have been submitted to you, so if we can pull that up, please.

So, you have got two of them, January, the pre--the April 20, 2002, which is Navigant Exhibit 11, and then you have the January 9, 2003, Navigant

09:17:01 Exhibit 13.

And then each of them does have a spreadsheet behind it, and they cite to this spreadsheet as suggesting that this is some very extensive analysis. But now let's look at what actually is going on in this document.

If you look at where they are putting the reclamation costs, if you see this line, which is the direct operating cost line, all they have done is take a number of $52 million, divide it by four, and add it to the existing numbers that were there. So, it's clearly a set number. It's no analysis of where the costs are actually going to be incurred, but it's just a straight let's put these numbers in at the end of the Project to see how it goes.

Now, when you go and say, well, okay, where did they get that number for, there is no calculation

or analysis in these spreadsheets or in the computer model that's nowhere referenced except for by Respondent. Let's go to the front page of the January analysis. What they have done is simply estimated a cost of 25 cents per ton. There is no basis given

anywhere for that estimate or whether that was simply a number taken to get an order of magnitude decision as to viability of the Project.

They clearly think it's low because if you multiply 25 cents by 206 million tons, that's less than 52 million. They round it up.

So again, there is nothing on this document that gives you confidence that it was a valuation, intended to be a valuation, of the property. In fact, as the Glamis witnesses testified, its intention was quite different. It was a business decision-making document. It was a decision, do you go forward now that complete backfilling is there? And, under their decision criteria, the answer was no.

So, there's no need to go back and see are reclamation or binding costs in here. They weren't. Do we have the right per-ton estimate? They didn't. But they knew enough already to know that this project was dead if full backfilling--if the emergency regulation stayed in effect or S.B. 22 was passed.

Now, they also attack us on the notion that we did not address any number of other criticisms.

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09:19:43 1 The fact is we have addressed the criticisms. Behre
2 Dolbear systematically goes through them. In our
3 arguments and pleadings, we have taken the position of
4 focusing on those that are most important and have the
5 most significant impact, and the bonding costs are one
6 of those.
7 Their position is that they cite to a number
8 of companies, none of which are similarly situated to
9 the type of gold company that Glamis was that could
10 not get backing that was not cash-backed financing,
11 either Letters of Credit or bonds.
12 They cite even today Goldcorp, which is a
13 significantly larger company than Glamis, which can
14 from banks obtain noncash-backed securities, although
15 nothing like the size they would have needed for this
16 project.
17 And another issue that they criticize us on
18 is the so-called "Singer Pit mineralization," which is
19 the third pit. Now, Behre Dolbear has answered this
20 question. It again involves the failure to appreciate
21 the difference between resources and reserves. The
22 east and West Pits were proven reserves. The Singer

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09:21:00 1 Pit was an exploration potential. And when you have
2 an exploration potential, as Behre Dolbear explains,
3 when you're valuing, it has some level of value if

you're going to be at that site mining because then it makes sense to continue exploring and see what else is there.

But if there are not, if the backfilling regulations make it uneconomical, you don't add more value for this unexplored potential.

Finally, with respect to valuation, we were a little surprised to hear Respondent retract their statement from August that the current price is a red herring. But then, when you heard the reasons, it's simply Behre Dolbear bashing. And the fact that because this month we are on an upswing in the gold price, it allows them to say it's raised to another $60 million. But the fact is that no one uses current spot to price.

And this is proven out by the fact that we've gotten--Glamis has gotten no offers for this. That is really the only relevance of the current value of the property is to show that it is still valueless, and

09:22:25 the market shows this. This is not--this market for Gold Properties is not 200 million homes in America where if you don't put up a for sale sign out, no one knows you're interested. There is a handful of gold mines out there. If they are not core assets, if they're not being developed, there is inevitably interest in pursuing those, and yet Glamis, since the January 17, 2001, denial and the--subsequent to the California measures has received nothing except for

one inquiry months ago which hasn't borne any fruition, and certainly we would be happy to accept the requirement that the Respondent wishes to put on us of informing the Tribunal if there is any change.

You might remember or recall that Mr. McCrum tried to sell the property to Mr. Houser during his testimony unsuccessfully.

Now, with respect to reasonable expectations, we've never said the regulations are frozen. We agree with the approach that--apparently Respondent does too--that you come in expecting a natural evolution. But a natural evolution is just that. This was anything but. On the Federal side you had an

09:23:56 arbitrary, unlawful changing of the regime; and, on the State side, while they went through legal process, it was an arbitrary change without any scientific or technical study from the long existing practice on which we had relied and the studies on which we relied, which it always said and which SMARA itself contemplated, was that reclamation should be site-specific, and backfilling is site-specific.

Now, when you go to the character of the measures, there's a few points I want to make. First of all, Respondent started off with citing the 1994--excuse me, the 2004 U.S. BIT in a note which the United States has inserted and now argues for in negotiating BITs which seeks to restrict expropriation. Well, that's obviously a long time

after NAFTA which has no Chapter Eleven--Article 1110 has no such note, nor did the 1994 BIT itself. So, we would submit that has nothing to do with this case.

Secondly, we believe Respondent's reliance on the Fireman's Fund is completely misplaced. That case does not stand for the proposition that discrimination is not a factor to consider in the character of the

09:25:20 measure. What that case said was, at paragraph 207, "A discriminatory lack of effort by the host State to rescue an investment that has become virtually worthless is not a taking of that investment." So, that discrimination didn't result in a taking, but that's because there was no property value left for these worthless debentures.

And in paragraph 99 of that decision, they say that discriminatory and arbitrary treatment are part of the character of the measure analysis.

So, as Solicitor--former Solicitor General Olson has pointed out, targeted measures are a sign that the regulation is not bona fide.

Similarly, this is a case where Glamis has been asked to bear the total costs of preserving this land for the Native Americans, for the Quechan Tribe. That is a public interest, and the public could certainly decide that it is worthwhile, given the nature of the cultural resources to preserve that land, but they shouldn't do it when the expense is borne completely by Claimant.

22 And so, in answer to the Tribunal's question

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09:26:42 1 yesterday afternoon in looking at their general
2 question five, we are in complete agreement that it is
3 part of the test for the Tribunal to evaluate the
4 character of the questioned governmental acts applying
5 a balancing test by assessing whether the measures are
6 reasonable with respect to their goals, the
7 deprivation, and paying attention to the rights of
8 Governments to regulate in the public interest, but
9 with the general prohibition of Governments to
10 discriminate or act arbitrarily.
11 So, turning, then, to their 1105 arguments
12 for a moment, they really made two points. They said
13 we hadn't shown that it was arbitrary as to how the
14 Imperial Project was treated vis-a-vis other projects
15 in assessing cultural resources, and they tried to
16 defend the Solicitor Leshy's opinion.
17 Now, I want to start your--start this by
18 turning your attention--and this is not an exhibit,
19 but I want the record to reflect Exhibit 96. I showed
20 you a part of this during the opening statement. It
21 is a summary of a meeting in December 1997 between the
22 Quechan and Ed Hastey, the State Regional Director

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09:28:09 1 after the studies had been done and before the Project

was put on ice until it was denied in 1991.

Now, the interesting thing about this document is it records any number of the Quechan statements about their concern for the area, not one of which said it's unique. Rather, the emphasis was that we'd already, as on page two of this document, Mr. Cachora, the historian for the Quechan, noted that the Tribe had given up significant areas already for several other mining operations. On this particular project, he said the Tribe met and finally said no.

And then on the last page, he said they let other mining operations go by, but there is not much left. This is our last stand, he noted. We are at the point of extinction.

So, the point is that this was not unique, yet it was felt to have a tremendous impact on those resources left. And when we look at their chart, which they went through yesterday, this chart is highly misleading, and the whole bean counting approach to what resources and what their impact is should be rejected, and let's just go through a few of

09:29:41 these.

So, if we look first at the Imperial Project, they have a check mark under no previous mining, but, in fact, there had been activities at that site. So, if you look at the Schaefer and Schultz study, mining and some military maneuvers left a mark on the cultural landscape of the Project area. Cultural

resource surveyors noted that cultural sites such as trail segments in the Project area had been obliterated by things like a modern drill pad and off-road vehicles. So, that's really an X.

Now, if we look at Briggs, again Respondent says no mining there. Let's see what they said. Respondent cites a cultural resource survey to suggest that the site is materially different from the Imperial site in its level of previous disturbance. Cited source notes only the presence of a handful of underground mine features, such as a cement platform, six underground mine portals, and some prospects.

So, not very extensive mining.

The Mesquite Landfill. What the Respondent has said here, and it's also another distinguishing

09:30:59 factor between the Quechan's concerns as reflected there between the Imperial Project area and the Mesquite Landfill, at least as reflected in the protest letter, is that in the Imperial Project area, the Tribe just wasn't expressing concern about preserving archeological resources or just about the historic value of the resources there.

But, in fact, if you go to the Tribe's letter, this proposed project will erase for all time the remains of a significant ancient Indian settlement or religious center or the combination of the two.

And if you look at the convergence notion, our representatives found materials that were either

missed or not cataloged during the resource surveys. And thus, it's for Respondent to suggest there was no convergence between Native American concerns and archeological evidence ignores the Tribe's own belief on this.

So, that one is a check. Or at least a question mark.

Let's go to one that's not even on here, North Baja Pipeline. Well, they didn't put it on here

09:32:09 because it's got more NRHP sites than any of the others.

Now, what about Native American concerns? Respondent claims that the Baja Pipeline is distinguishable because no Tribe stated that the final approved pipeline route would destroy key cultural resources such that it would impact their ability to use an area for sacred and/or religious ceremonial purposes.

But, in fact, elders of the Mohave Tribe expressed "major concern" for "physical and spiritual aspects of the trail network." Considering this concern, they would like the Project to bore underneath trail segments. They feel that severing trails with mechanical equipment would have an adverse effect on the spiritual and geographical continuity of those important resources.

So, with respect to convergence, as Dr. Cleland's testimony reveals, not all the trail

segments were, in fact, avoided. Some were served and destroyed by the pipeline route.

Now, let's go to Castle Mountain. Now,

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09:33:25 Respondent is quite right, this letter is not in the record. It is, however, in the EIS portions of which--of the Castle Mountain EIS, portions of which are in the record, and as we understand the decision and the agreement between us, that those documents can be supplemented. We are happy to furnish as an electronic copy the complete because we think that the Tribunal should not be given a misleading impression of these. We appreciate the Tribunal didn't want the full copies in hard copy, just the pages, so that's all we have given so far, but after this, at whatever time is convenient, we intend to give them the full electronic copy.

So, what did the Tribe say? They raised a concern about adverse visual effects of the Project on the landscape and the ability to practice our religion. Now, although the Respondent shows the BLM offered some responses to the Tribe, it ignores the fact that BLM's responses did not address possible adverse impacts to the view of Avikwaame, which we all know from the map is the one at the north, the Spirit Mountain, the Creation Mountain, or to the Tribe's

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09:34:41 1 religious expression.
2 The Quechan expressed similar concerns about
3 the alleged adverse effects on the Imperial Project on
4 Picacho Peak, which is seven miles east. So, again,
5 this is apples to apples. It's visual impact to their
6 significant mountains. And if you go back to that
7 December 16 memo I spoke about, Exhibit 96, you will
8 see again in that memo they express it's the mountains
9 which are significant to them.
10 So, if we go back to Castle Mountain, again,
11 Fort Mohave Tribe's letter, the Respondent concludes
12 based on BLM's response comments in the Final EIS that
13 the Fort Mohave Tribe's concerns about the Project
14 were based on mistaken information about the location
15 of the project. But the Tribe's letter reveals its
16 concern that objects found in the Project area may
17 have originated from sacred locales.
18 Now, the Tribe also expressed a view that we
19 have not been given an opportunity to express our
20 concerns with projects like Castle Mountain Mine.
21 Thus, to suggest that there was no convergence ignores
22 the archeological evidence and the Tribe's complaints

09:35:55 1 about not having adequate consultation, which is what
2 they did get in the Imperial Project.
3 So now, let's look at the Mesquite Mine
4 expansion, and again, this was--the Quechan letter is
5 not in the record until Monday, but is subject to the

same issue.

After issuance of the Draft EIS, the Quechan expressed to BLM in a letter that it continues to be concerned about the mine expansion's impact on cultural resources.

The Quechan asked BLM to seek a more positive statement, again, do more consultations as had been done at Imperial for the potential existence of religious or cultural sites within the Project area. So, that's at least a question mark as well.

And finally, going back to the Imperial Project for a moment, we heard yesterday, again in closing, that Dr. Cleland had testified that the concerns raised by the Imperial Project were the greatest he had heard in his 30 years' experience, and he did say that. But what they forget to tell you at that point is they don't mention that he admitted the

09:37:10 Imperial Project was the only Federal mining project he had ever worked on; and as far as we know, the only other project in the CDCA of this magnitude he worked on was the North Baja Pipeline.

So, in conclusion, what you see is a chart that is very much different than what has been depicted to you, and the Imperial Project isn't abnormal or unique, and yet it was subjected to significantly different standards. And the effect of being subjected to different standards at the Federal level was to stop the mine and then ultimately the

motivation for the State of California in its actions.

So, turning, then, to the M-Opinion, Solicitor Leshy's opinion in which he converted the undue impairment standard into a discretionary authority to block mines, contrary to nearly 20 years of established practice, now, they say that was an issue that was left open, and we have cited to no legal authority that undue impairment had been had been tied to the undue and unnecessary degradation standard in FLPMA 6(b). In fact, we have shown you all the documents in which--that we've got--in which

09:38:46 Interior had done exactly that, and there were plenty of others which they withheld under various privilege.

But again, going back to the opening, there is a simple answer. The very BLM official, Bob Anderson, who they did not bring to the hearing, but who drafted the original 3809 regulations, he has said they intended them to be the same, and we can show you that memo from Bob Anderson to Karen Hawbecker just after the rescission in 2001. We purposely did not define undue impairment in 1980 because we all concluded it meant the same as undue degradation.

And then they ignore the fact--now, I would point out as well that if you looked at our submission in February of 2006--2007 for--no, 2006--it's been so long we have been having this fun--on the submission of privileged documents, Attachment D-1, at 18, one of the documents we sought, document 36 on that chart is

an Anderson document commenting on the Leshy Opinion in March of 1999.

Now, the Respondent also ignores the fact that the FLPMA section that imposes undue impairment specifically says it has to be imposed through

09:40:35 regulation. So, if, as they say, it wasn't done in the 1980 regulations, if it wasn't, in essence, the same as undue and unnecessary degradation, then they certainly couldn't by memo all of a sudden make an interpretation that they had discretionary authority. And that is, in fact, what Myers criticized and why he revoked it.

Now, I will make one other point here simply because the question was raised yesterday on the delay, the arbitrariness of the delay. I would just point you to this December 1998 schedule in which--internal BLM schedule--in which interestingly they say there is no schedule. And when you look at this document, you see that the valid existing rights, the mineral exam, the validity exam were to be done within a few short days. And if you look at the document itself, every other uncompleted item on here is directly attributed to Leshy.

So, now let's turn, then, to the California measures and some of the ways that Respondent has distorted our position there.

We are not saying that this was merely an

09:42:00 imperfectly implemented regulation, that it didn't cover other kinds of mines and other kinds of dangers is not reason to criticize it. We are criticizing it because it was intended to prohibit mining at the Imperial Project site. That is the only way to interpret the words used by Governor Davis to make it cost-prohibitive. And there is no dispute that Governor Davis directed his Secretary of Resources to have regulations promulgated by the Board to destroy the mine, to make it cost-prohibitive, which they did.

Nor can these be considered objectively reasonable to any of the stated rationales, and the rationales vary each time they talk about it as to whether it is preservation of the cultural resources, and we have pointed out that that's not really a protected by here, repeatedly. If you look at Respondent's Exhibit 82, the Baksh Report, he says, "If the Trail of Dreams was to be physically damaged, it would affect our ability to dream in the future." This is, in essence, the convergence that they themselves cite, the convergence between those artifacts which are on the ground and the spirituality

09:43:26 of the site. And in destroying the artifacts on the ground, which is what mining does, and the backfilling can't cure that, you've necessarily affected

significantly that site, which is also why, as they admit, the Quechan didn't want the mine there, period. They didn't care about backfilling. It wasn't a compromise to accept backfilling. That was the way to kill the mine.

So, the other thing about the arbitrariness of the Board regulations that I would just like to put out that they raised yesterday, as they insist again that aggregate mining was considered as part of that record; but again, they fail to point out that the only discussion of aggregate mine is by those saying don't include us. You want to kill Imperial, that's fine, don't get the aggregate mining industry at the same time. And an example of that is this document, the Respondent's Exhibit 129. We understand the Board had concerns regarding potential environmental impacts of the proposed Imperial Project. However, we believe that the proposed emergency regulation is overly broad and would negatively impact those engaged in aggregate

09:44:52 mining operations.

And that was because in order to define what was a metallic mine, they had to decide how much of--if you got some metallics while you were mining the aggregate, did you automatically, even though the aggregate business was your predominant business, did you ultimately become a metallic mine.

But they didn't ever do any scientific or technical studies to rebut the preexisting studies

that had all concluded that mandatory backfilling was not either environmentally sensible or feasible, that this was not an appropriate thing to do. Nor did they distinguish between the boron nonmetallic mines leaving open pits, if it's a safety reason, or if it's the gaping hole we heard about yesterday. We already determined the boron beginning hole is the largest one out there in the State of California from these perspectives.

So, now, let's turn, then, to, finally, to the 1105 standards and the answers to some of the Tribunal's questions posed yesterday.

Now, fair and equitable treatment, as we have

09:46:17 said repeatedly, is a recognized standard under customary international law. That is what the United States has repeatedly said. We believe that to be true. That's what the Free Trade Commission Note says. And to the extent that it's read to say that, we don't challenge it in any way. If it's read to amend 1105 to add on a proof burden that didn't exist, to say that in looking at what does fair and equitable treatment require, you can only look at domestic State practice, we reject that and other tribunals have rejected that, including Mondev, on which Justice Schwebel served. That is because you can also look at the normal sources of international law, including BITs that are incorporating the same fair and equitable treatment standard.

So, what does that mean with respect to this academic exercise, largely academic exercise of is it autonomous or as we often hear broadly autonomous versus customary international law? There could be a fair and equitable treatment standard that is autonomous, meaning that the Treaty, by its terms, provides for more than customary international law.

09:47:59 But when you look at the cases on which we have relied, they aren't doing that. They are applying, and most of them expressly state they are applying that, at the end, they don't see any difference in this and the facts and the standards that they are applying to those facts between the customary international law standard and whatever might be accorded to under the Treaty itself.

Now, finally, the last question was on the contracts and whether--and the notion, as I understand the Government's argument, is that, well, because a breach of contract cannot be actionable under international law, then surely legitimate expectations, something less than a contract, and it could not be actionable. Well, that misunderstands contract law. It misunderstands international law.

The international law does permit in areas where the host Government is acting in its sovereign capacity, and primarily in investment-type contracts, concession-type contracts as opposed to commercial buying of goods, that those can be actionable under

international law.

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But, in any event, a contract breach is a very different thing than what we are required to show to prevail under the good-faith principle under fair and equitable treatment, which is the genesis of the legitimate expectations because there it is a balancing of what our expectations coming into the investment were versus the Government's right to regulate.

In a breach, it doesn't matter what the motive is. You look solely to the assurance. And if you breach the terms of that contract, then it is a breach. If you don't, it doesn't matter whether--except for in some egregious cases of complete bad faith. It is a much less onerous standard than what we have set for ourselves under the good-faith principle.

And the other principle that is well acknowledged is the due process, lack of arbitrariness prong, which is--again goes back to the notion of being treated in accordance with the rule of law when you come into a country and make your investment, and you're entitled to rely, not that the regulations

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won't change, but they will not be arbitrarily and

discriminatorily applied to you or modified simply to target your investment.

And so, for these reasons, we believe that Claimant is entitled to the full value of the mineral property, which is the $49.1 million, or at a minimum under 1105 for the restitution interest in having made its investment of over now 15.2 million, and not been able to extract the gold it was promised.

And with that, we complete our rebuttal, and we thank you very much.

PRESIDENT YOUNG: Mr. Gourley, thank you.

We will adjourn until 12:30, at which time we will have our next lesson on swell factor. Thank you.

(Off the record from 9:50 a.m. until 12:30 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT YOUNG: Good afternoon. We welcome you back.

The time is now Respondent's.

REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

MS. MENAKER: Thank you, Mr. President and Members of the Tribunal. I will be giving now the

closing remarks for Respondent today, and then hopefully if I have time, I will turn it over to Mr. Bettauer to close out our presentation.

And I'd like to begin by making a few remarks regarding our expropriation defense as it relates to the California measures.

And yesterday, the Tribunal asked several questions relating to the expropriation claim, and I want to briefly return to the issue of the property right that's at issue here and the framework in which we have placed our legal analysis in order to hopefully eliminate any confusion that may have--still remaining about our position in this regard.

The Tribunal is correct that the parties agree that the property interest at issue here, which

12:37:39 are unpatented mining claims, that that property interest is a Federal property interest. And the parties also agree that the Federal property interest is subject to reasonable State environmental regulations.

The Tribunal has inquired about the extent of the State's ability to regulate those Federal unpatented mining claims, and the answer, in our view, is straightforward, and that is that the State may only regulate to the extent that its regulations are not preempted by Federal law.

So, to use President Young's terminology from yesterday, it is a one-fold analysis, and that is that

preemption is the limit of the State's authority on Federal lands. In the case of unpatented mining claims, U.S. Courts have interpreted this to mean that a State may impose reasonable environmental regulations.

Now, there is a separate legal question when engaging in an expropriation analysis. And in that analysis, the threshold inquiry always is, what is the extent of the Claimant's property rights? So in other

12:38:39 words, what is included in the Claimant's bundle of rights? And this is where the background principles analysis is relevance.

The extent of the Claimant's interest in its property is defined by the Federal Mining Law, and because the Mining Law provides that unpatented mining claims are subject to state environmental regulation, a mining Claimant's property interest is further limited by any preexisting State laws that apply to those mining claims.

So, the Claimant's bundle of rights includes the rights to mine the unpatented mining claims, but only in a manner that is not precluded by "background principles" of law. And the key here is that the preemption and the "background principles" analysis are separate inquiries because preemption involves a question of the limits of a State's authority to regulate, while the "background principles" are limitations on a particular Claimant's property

interest.

So, a mining Claimant's property interest and its unpatented mining claims may be circumscribed by

any number of "background principles" of State law, but each of those "background principles" may only limit the Federal property interest to the extent that they are not preempted by Federal law.

And on this point, I just want to make one remark in response to what Claimant argued this morning and it stated that there was, "simply no authority for a State statute to be a "background principle" that can confine and constrain the Federal property interest that's been granted." And this is simply incorrect. And I would direct the Tribunal's attention to the Kinross Copper Case that we have cited in our written submissions and discussed at last month's hearing. There the property interest at issue was the same as it is here. It was unpatented mining claims. And the Court found that a background principle in that case was an Oregon State environmental statute, and so there that is an example of a State statute that is found to be a "background principle" that restricts the nature of the Federal right, to use Claimant's words.

Now, here, as far as our "background

12:40:57 principles" defense is concerned, Claimant raised a few issues this morning. It argued with respect to the argument regarding the Senate Bill 22 that that could not be found to be an application of a "background principle" because the Sacred Sites Act doesn't apply on Federal lands, and I believe that all of the issues they raised this morning we have briefed and we discussed yesterday, so I don't intend to elaborate on that any further.

And the same is true with respect to their argument that the SMGB is not a reasonably--an objectively reasonable application of SMARA because SMARA sets site-specific standards, and you will recall that Mr. Feldman addressed those issues yesterday.

And finally, on that one issue, today Glamis noted or argued, excuse me, that there was no obligation to backfill in SMARA, and therefore SMARA couldn't be a "background principle," and that is just a wrong approach. The issue here is that there is an obligation. The obligation at issue in SMARA is the obligation to return the lands to a usable condition,

12:42:12 and that is the obligation which was later specified in the SMGB regulation as it pertains to open-pit hardrock mining.

So, only if the Tribunal finds that Glamis did, in fact, have a property right that was affected

by the California measures at issue here, and if it rejects our "ripeness" defense, would it then go on to evaluate the three factors that the parties have discussed? But before moving on to make a few remarks about those three factors, I want to briefly respond to Claimant's argument on our "ripeness" defense.

This morning, Claimant argued that this case was exactly like Whitney Benefits, but it is not. In Whitney Benefits, as Claimant explained this morning, that concerned a ban on surface mining, albeit on not underground mining, but nevertheless it was a ban on mining, so it is just like the Eighth Circuit case which they have repeatedly cited, the St. Lawrence County case, which also concerned a ban.

Here, there is no ban on mining. Neither of the California measures bans any type of mining. What Glamis has done is, they are bringing a facial

12:43:30 challenge to those statutes, and they are asking you to find that those statutes or the regulation and the legislation that they do, in fact, constitute a ban, but precisely because it hasn't been applied and on their face it's not a ban, there is no evidence upon which this Tribunal could find that those measures do constitute a ban. They simply have not met their burden of showing that either of those statutes have been applied to them in a manner that prevents them from mining their unpatented mining claims, or that either of them have been applied to them in a manner

that bans mining.

And, in fact, we have shown that another mining company, Golden Queen, is going forward with its mining operations, notwithstanding the California reclamation requirements; and, this morning, Glamis argued that that was just speculative.

But in light of this evidence, they--clearly Glamis has not met its burden of showing that the California measures would operate as a ban on mining in every circumstance. They simply have fallen far, far short of that, especially in light of the showing,

12:44:43 in light of the evidence of Golden Queen.

So, their claim challenging the California measures is simply not ripe. It has never been applied to them.

Now, I would just like to make a few points on each of the three factors which, again, the Tribunal need only consider if it rejects both our "background principles" defense for both of the measures and the "ripeness" defense.

On the issue of valuation, I would just note that this morning Glamis acknowledged that the January 9, 2003, document, the valuation memorandum, was a, "business decision-making document." And the Tribunal should reject Glamis's request that it ignore this contemporaneous document that was prepared in the ordinary course of business by and for Glamis's top executives concerning matters falling within their own

stated competence.

There are just three points that I will make on the specifics because we have dealt--we have spent an awful lot of time dealing with the minutiae that specifics or details, excuse me, of the valuation

12:45:50 expert reports and I won't go into detail here, but just to note that, one, Glamis this morning said that we had misstated the impact of the swell factor. That is simply incorrect. Only a portion of the difference in tonnage between the two parties was attributable to the swell factor, the Tribunal will recall. The rest of the difference in the tonnage was attributable to the fact that Behre Dolbear had envisioned moving all of the material off of the leach pad rather than leaving it at 25 feet, as the regulation permits.

Second, on the issue of financial assurance, today for the first time Glamis conceded that Goldcorp has used a noncash-backed financial assurance, and we have shown that Glamis could have done so as well, and there is ample authority in the record in Navigant's first reports at pages 71 and 72, identifying which companies have used this, and this evidence remains unrebutted.

And finally, just one short point about the Singer mineralization. Glamis this morning argued that, once it was determined, once Glamis made the determination that the project would have been

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12:47:05 1 economical, it didn't go on to consider the Singer
2 mineralization, but that's just illogical because once
3 you consider the Singer mineralization, that adds
4 value, and we've explained how it adds value in two
5 respects, not only to the value of the gold, but the
6 strategic value of putting off the cost of backfilling
7 for an extra two years.
8 So, what Glamis is arguing is, in essence,
9 saying it's like if you're adding up a row of numbers
10 and at one point you reach a negative number that you
11 just stop counting. That doesn't make sense if the
12 numbers that follow are positive numbers. It may
13 change the result. You simply can't stop counting at
14 that point.
15 To move on to the second factor, an
16 investor's reasonable investment-backed expectations,
17 there are just two points that I would like to make in
18 this regard, and one is concerning a question that the
19 Tribunal had which was how does the investment-backed
20 expectations, what kind of relevance does it have to a
21 "background principles" analysis? And we submit that
22 an investor's reasonable expectations are only

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12:48:14 1 relevant to the three-factor balancing test in the
2 indirect expropriation analysis and not to the
3 "background principles" analysis.

Now, as it turns out, in the present case the very laws that we are arguing are "background principles," which are the Sacred Sites Act and SMARA, would also be relevant to the reasonable expectations factor if the Tribunal were to conduct this separate indirect expropriation analysis. And this is because both because SMARA and the Sacred Sites Act form part of the regulatory framework in which Glamis was operating, and so those laws necessarily would have affected its reasonable expectations.

But notwithstanding that fact, an investor's reasonable expectations are not relevant to the inquiry of whether a Claimant's property interest is circumscribed by "background principles" of State law.

And the second point, on the issue of reasonable expectations, we just want to confirm for the Tribunal that the standard that is set forth in question 1(4) where it stated that once it was going to inquire into the reasonable investment-backed

12:49:28 expectations, whether it's correct to determine whether the investor acquired the property in reliance on the nonexistence of the challenged regulation, and we agree that that is correct, that the Tribunal should, when analyzing this factor, conduct a fact-specific inquiry to determine whether the investor acquired its property in reliance on the nonexistence of the regulation.

Here, in this case, in the case like

Glamis's, where the investor is operating in a highly regulated industry, it could have only acquired its property in reliance on the nonexistence of the challenged regulation if it received a specific assurance from the Government that the challenged regulation would not be imposed on it.

And finally, on the character of the action--and here also I would just like to make a few points--the first is with respect to Glamis's contention this morning that the language in the U.S. Model BIT is somehow not relevant for this Tribunal's inquiry, and with that we strongly disagree. The provision, the obligation that is contained in our

12:50:43 Model BIT is the same expropriation obligation that is contained in the NAFTA, and there is no dispute that the expropriation obligation is an obligation that arises under customary international law, so it is the same obligation in both treaties, in our latest Model BIT. The United States has provided guidance for tribunals by further elaborating on the content of that customary international law requirement, but there is no reason to draw a distinction between the two obligations.

And, if one looks at the Methanex decision, the analysis that the Tribunal engaged in there is entirely consistent with the guidance that was provided in our 2004 Model BIT. And, in our view, it is somewhat telling that Glamis is seeking to run away

from that language or to have this Tribunal disregard it because that is the proper governing law; and if its claim would fail in connection with an application of those guiding factors, then we submit they have certainly not shown that there has been any customary international law violation here.

Now, I won't repeat the arguments that I made

yesterday with respect to the Fireman's Fund case, but again we just reiterate that in our view, that Tribunal engaged in a correct analysis on the proper role of discrimination and arbitration--excuse me--and arbitrariness in an expropriation analysis.

The final point that I would like to make on this character factor is Glamis's statement which it made this morning that it was being asked to bear an undue or disproportionate burden. And again, that is simply not the case. Here, they said that they were being asked to bear a burden that should be borne by the public as a whole, that this land was sought to be preserved for cultural resources purposes, and they shouldn't have to bear the burden of that expense.

But this is simply not a case like, for instance, the Santa Elena case, where the Government of Costa Rica decided to preserve some land, to set it aside as a cacti reserve, and there there was no dispute because the liability was not contested, but the investor did not have to bear that cost alone. That is not what's happening here because again, this

is not a ban on mining. The Government did not tell

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Glamis that it could not engage in any activity here and that it was preserving the land for any other reason or turning it into a park, for instance. It withdrew that land, but pursuant to all valid rights including Glamis's, and Glamis has every opportunity to mine that land.

And so, here, again as we mentioned yesterday, this is not a burden that we are asking that should be borne by the public that we are shifting to Glamis. We are merely asking Glamis to reclaim the land, to clean up the damage that it would cause by its own activities.

Now, I would like to now move on to the expropriation claim as it pertains to the Federal measures.

As we noted in argument last month, as the Fireman's Fund's Tribunal has stated, a failure to act or an omission by a host State may constitute a State measure that is tantamount to expropriation under particular circumstances, but these cases will be rare and seldom concern the omission alone. And here there has been no omission, no failure to act. Glamis has

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argued that its Plan of Operations, the processing of

that plan has been unduly delayed or somehow that that delay constitutes an expropriation. But in the case where a delay has been found to be expropriatory--and we have briefed this in our written submissions-- that is where it has been demonstrated that the Government has simply failed to act, and here the record is clear that the Government did not fail to act. The Federal Government had consistently and persistently processed Glamis's application at every step of the way.

Glamis again repeated today that the--it was--on average, it should have taken two to three years to process a Plan of Operations, and that's simply untrue. We pointed in the record to testimony by its expert and the Mining Association which stated that it is not at all unusual for the processing of a Plan of Operations to take a decade or more. And in this case, where Plan of Operations raise difficult legal and factual issues, it is to be expected that the processing will take a long time.

Now, to the extent that the Tribunal is to consider a claim that the mining claims have been

12:56:14 expropriated because there was a failure to approve Glamis's Plan of Operations, the time frame for any such claim must stop in 2003, when Glamis submitted this claim to arbitration. And the Tribunal will recognize, of course, that at the time Glamis submitted its claim, it was at that time that it stated that the breach had already occurred, that

there had been an expropriation at that time. It can't now point to a failure of the Government to approve its plan after 2003 as being the breach. We have shown that up to the time when it decided to pursue arbitration, at every point during that time frame--and we produced time lines last month--that the DOI was actively engaged in processing Glamis's claim. And then it decided to turn to arbitration and argued that at that point, no later than that point, there had been a breach of Article 1110 by the Federal Government.

So, if there has been a failure to approve, it had to have occurred by that time, and the Tribunal will recall that that is the reason why in the discovery disputes between the parties it said the end

12:57:34 date for discovery as of the date that Glamis submitted its claim to arbitration because the breach would have had to have ripened into a breach into an expropriation no later than that date.

Now, in response to the Tribunal's questions yesterday, let me say that we have shown that after Glamis submitted its claim for arbitration, that it clearly abandoned the process of pursuing approval for its Plan of Operations.

Now, yesterday, in response to the Tribunal's questions, the Tribunal asked us if it found that Glamis had not abandoned the claim, how would Glamis's failure to have taken any action, whether that be to

file a suit under the APA or even to pick up the phone and call DOI or to send a letter to DOI, how would that have affected Glamis's expropriation claim. And again, our first response is the Tribunal ought not to consider that because these are events--the breach cannot have occurred after the time that the claim was submitted, but assuming for the sake of argument that we're considering this, we noted yesterday that Glamis's failure to take any action in this regard

12:58:53 would weaken its expropriation claim, and we cited to the Tribunal the Generation Ukraine case, and you will recall that we also cited in our written submission the Feldman versus Mexico case and the EnCana case.

But I would like to elaborate on that for one more moment. And, in fact, Glamis's failure to take any action in this regard would not only weaken its expropriation claim but, in fact, would be fatal to its expropriation claim. And the reason for that is Glamis can't contend that the basis for its expropriation claim was the failure of the Federal Government to approve its Plan of Operations when it has received no final decision from the Department denying its Plan of Operations. And it certainly has received no such decision.

Now, Glamis also cannot claim futility in this respect because Glamis has made no effort to contact DOI or BLM concerning its Plan of Operations, so it's simply not credible for Glamis, after having

informed the DOI that its claims have been
expropriated, after thanking them for its efforts,
after telling them that it's going to pursue other

avenues of relief and after never having followed up
with DOI, despite its historical persistence in
keeping in constant contact with them, for it now to
claim that any effort for it to have contacted DOI
would have been futile and that DOI would have not
acted on its Plan of Operation. There is simply no
evidence in the record to support such a conclusion.
And, in fact, the testimony that we heard at
last month's hearing simply confirms the evidence
that's already in the record, and that evidence shows
that Glamis had no intention of pursuing approval of
its Plan of Operations after going to arbitration and
had decided to abandon it.
But, again, if the basis for its
expropriation claim is the Federal Government's
failure to approve it, that claim is not ripe because
it has never received a denial of that Plan of
Operations, and it can't contend that it would have
been futile for it to continue to engage with DOI on
this point because it has made absolutely no effort to
engage with DOI. In fact, it has done the opposite.
It has sent every message to DOI that it was

13:01:15 1 abandoning the process, and in that case, its failure
2 to take any action defeats its expropriation claim
3 with respect to the Federal measures.
4 I will turn now to Glamis's minimum standard
5 of treatment claim. Glamis has the burden of proof to
6 show that a rule of customary international law has
7 been violated.
8 Now, the first thing that a Claimant must do
9 and that a tribunal must assess is, if Claimant has
10 identified a customary international law rule that
11 disciplines the type of action at issue, and then if
12 it has, then it can see what standard applies to that
13 rule. But the Tribunal can't simply choose an
14 adjective and then attach that adjective to every type
15 of State conduct and measure every type of State
16 conduct against that adjective, whether that adjective
17 be unfair, inequitable, egregious, arbitrary. That's
18 just not how customary international law works. And I
19 would ask the Tribunal to take a close look at the ADF
20 decision in this regard because I think that it
21 illustrates this point well.
22 So, let me turn to the California measures

13:02:32 1 and show how this works in that context.
2 Now, here Glamis has argued that the
3 California measures violate customary international
4 law because they are arbitrary; but, again, we have
5 shown that they have not identified any rule of

customary international law that prohibits so-called "arbitrary legislation" or "arbitrary regulations."

Now, the ADF Tribunal was faced with a very similar claim. There the Claimant was challenging a buy America provision, basically a requirement in a statute that materials used be bought and fabricated in the United States. And there, the Claimant argued that the regulations--that the statutes were per se unfair and inequitable, and the Tribunal rejected that so-called per se argument.

What it did was it went to see whether Claimant had proven that there was any rule governing that type of State conduct, any kind of general and consistent State practice adopted out of them by States out of a sense of legal obligation, and we showed in that case that State practice in this regard varied considerably. That many States had procurement

13:03:57 legislation, and many States discriminated in their procurement choices in favor of nationals.

Just like we have shown here, that State laws in the area of mining vary considerably. They range a broad spectrum from banning certain types of mining to imposing almost no reclamation on mining at all.

And the ADF Tribunal found looking at that, that the Claimant hadn't shown that customary international law governs the substance of that type of activity by the State, and so there it said that it rejected this per se argument. And we have done the

same here.

Now, Glamis has argued that that is not the issue, that you don't look to see--look at the content of the law, and that simply pointing out differences among states is irrelevant, but it's not at all irrelevant. And again the UPS Tribunal did the same thing. There the challenge was to an anti-monopoly law, competition law, and both United States in its Article 1128 submission and Canada in the case introduced ample evidence that although the burden was not on the Respondent, but did introduce evidence

13:05:12 showing that competition law varied widely among States, and there that Tribunal also found that there was no general and consistent State practice in that regard.

So, here the Tribunal--the Claimant in ADF argued these regulations are arbitrary, they're unfair, and certainly you will have many economists that would opine that these are arbitrary, that they don't act in a fair manner, that they're not good for the economy, that they do all sorts of bad things, just like the competition law, but that was not the place for the Tribunal to look at the content or the substance of those measures and to determine whether, in its view, they were arbitrary or whether they were rationally related to their goals.

Rather, what they had to see was whether there was any restriction on the State from regulating

or, excuse me, from applying--whether there was--customary international law prescribed any discipline on that type of State conduct, and it found that it had not.

So, then, in any event, we have shown that

13:06:24 neither of the California State measures were arbitrary, and nothing that Glamis has said this morning contests that. We have shown that despite the fact that some cultural resources would be destroyed, that does not render the S.B. 22 arbitrary in any sense of the manner because it was a compromised legislation. It still was rationally related to its goals. And similarly, we have shown that the SMGB was perfectly rational in deciding to have--adopt a regulation that governs metallic and nonmetallic mines. But again, this is not the correct mode of analysis, we submit, but we have shown that, in any event.

And again, I would say that, to the extent that Claimants point to any or argue that customary international law did discipline this type of conduct at all, they have conceded that this was lawful conduct, that these rules were promulgated in a lawful manner. So, there is nothing that they have even raised that could possibly intersect with the customary international law violation in that respect.

Now, when one looks at the Federal

13:07:44 Government's actions in connection with Glamis's Article 1105 claim and the administrative processing of that claim in particular, Glamis again hasn't shown what customary international law rules apply in that circumstance. The closest analogy might be perhaps, you know, a denial of justice, the denial of justice, excuse me, rule that applies in a judicial context, but here Glamis hasn't even shown the content of any purported due process principle to the facts of this case.

And even in the denial-of-justice context, the Tribunal will recall that it's very clear that a wrong decision by a court or an agency that's acting in an adjudicatory context doesn't give rise to a denial of justice, nor does a procedural error give rise. It must be something of a much higher order of magnitude. As the Loewen Tribunal stated, it must offend judicial propriety. As the Thunderbird Tribunal stated--and here, they were talking about in the context of an administrative procedure, it noted that administrative irregularities must be grave enough to shock a sense of judicial propriety. And we

13:09:14 talked about the ELSI case yesterday which talks about conduct that is contrary to the very rule of law.

And Glamis has shown nothing that would

approach this magnitude.

Now, its claims in this regard are basically based again on its argument that it received different treatment with respect to the processing of its--that the other--that DOI had approved other projects that were similar to its project, and, therefore, its treatment was arbitrary. And again, its attack on the Leshy Opinion.

With respect to the treatment of other mines, we have shown that the Imperial Project raised unique concerns, and that information is in the record, and we would urge the Tribunal to review that carefully.

We, of course, don't have time to remark on every factual allegation that Glamis made this morning, but we again urge the Tribunal to look at the record because the record simply does not bear out any other conclusion other than the unique status of the Imperial Project.

Now, this morning Glamis referred to a

13:10:24 statement made by Lorey Cachora of the Quechan Tribe, where he said that they had let other projects go, but they were taking a last stand with respect to the Imperial Project.

Now, we have noted that the Federal Government has an obligation to consult with Native Americans, and we have also noted that as of the mid to late 1990s, typically speaking, Native American tribes were much more vocal in letting their concerns

be known to the Federal Government.

Now, whether this was because Native Americans became more familiar with their legal rights, whether it was because they saw the destruction that was occurring all around them and decided to take a last stand, or whether it was because they had finally had the economic means to hire attorneys who could inform them of their legal rights, we don't know, but it doesn't matter. The fact is that the Government can only act on information which it is told. And regardless of what the Tribe's motivations were, the fact is that here they did express these concerns, and that these

13:11:26 concerns were unlike concerns raised with respect to any of the other projects.

And even looking at the chart that Glamis put up this morning, it's curious to note that even when they changed the checks and the Xes, the only projects that had even two checks were the Imperial Project and the Baja Pipeline project. But here there is ample evidence in the record to show again the impacts of the Baja Pipeline project would have been or are and would have been nothing like the impacts from the Imperial Project. Some of this is just self-evident. The impacts of an underground buried pipeline are not going to be the same as the impacts of a huge, massive open-pit mine.

But we also have Dr. Cleland's testimony that

the impacts were not the same, nor were the concerns raised the same, and Glamis acknowledged that Dr. Cleland had worked on both of these projects.

And I just remind the Tribunal that Dr. Cleland is not a paid expert in these proceedings. He is a witness. He is an archaeologist that worked on both of these projects and is describing for the

13:12:40 Tribunal his findings.

But most importantly, of course,the reason why that Baja Pipeline project is not on that chart is Mr. Benes very carefully explained yesterday, that you can't compare apples to oranges. He was comparing the treatment received by the Imperial project with the treatment received by other projects during that same time frame. And the Baja Pipeline project was approved after the Record of Decision denying the Imperial Project was rescinded. At that time, the DOI was not applying the undue impairment standard to deny any projects, and there is no indication that, in fact, we can say as a matter of fact, that that standard would not have been applied to Glamis's project to deny it after that time, as well.

Now, on the Leshy Opinion, again, Glamis said today that it--we have shown that Glamis can't even show that the Leshy Opinion was wrong, much less that somehow the issuance of the Leshy Opinion constituted a violation of the minimum standard of treatment under customary international law. Today, they responded by

saying that they had put forth legal authorities, and

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they intimated that they would have put in more, but that some of these documents were withheld from them on the grounds of privilege.

But the law is public. What's important here is what the law says and how the law has been interpreted and not what individuals say informally in private E-mails when they're opining on the law. They can't show that the Interior Department issued this decision at odds with legal precedent by pointing to documents because legal precedence is public. It's out there, and we have shown what the law was. We have pointed to the statutes, we have pointed to other cases, and we have shown that their interpretation of undue impairment didn't contradict anything that was there. And in this respect, the E-mail that--which was really the only source that Glamis has pointed to, Mr. Anderson's E-mail is completely irrelevant. That is a personal opinion of a nonattorney on the interpretation of a legal standard. And while he may have been involved in drafting the statute, that has no legal import. I mean, it's akin to interviewing one member of Congress that voted or even drafted a

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piece of legislation that's not part of the official

legislative history, and his opinions are certainly not the law. They can't show that there was anything in the law that contravened what DOI showed or determined.

And in this respect, I think, again, the ADF Tribunal's decision is particularly instructive. There, like here, the Claimant argued that the United States had refused to apply preexisting case law, and this ignored its so-called legitimate expectations. But just like we have shown here, that the legal authority that Glamis has put forward is all legal authority that is interpreting the unnecessary and undue degradation standard and not the undue impairment standard, in that case, just coincidentally perhaps, the Claimant was doing the same thing. It was introducing evidence of the Department of Transportation's interpretation of the Buy American Act and not the Buy America Act. Now, in that case it truly was the case that the statutes do sound the same, but nevertheless they could not show or they couldn't show that the interpretation given by the

13:17:01 agency contravened any law, but more importantly, even though it looked at that on the merits to see whether the determination contradicted law just like the Tribunal can here, more importantly, what it found was, and I quote, and this is from paragraph 190 of the decision, it says: "Even had the investor made out a prima facie basis for its claim, the Tribunal

has no authority to review the legal validity and standing of the U.S. measures here in question under U.S. internal administrative law. We do not sit as a Court with appellate jurisdiction in respect of the U.S. measures. Our jurisdiction is confined by NAFTA Article 1131 to assaying the consistency of the U.S. measures with relevant provisions of NAFTA Chapter Eleven and applicable rules of international law. The Tribunal would emphasize, too, that even if the U.S. measures were somehow shown or admitted to be ultra vires under the internal law of the United States, that, by itself, does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment embodied in Article 1105(1)."

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13:18:13 It then went on to say, "Something more than simple illegality or lack of authority under the domestic law of the State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1)." And Glamis has shown nothing more here.

And again, we remind the Tribunal that, in this case, the facts are even stronger because, even if there had been some illegality, which they have not proven, that was all corrected by the rescission of the very decision that they complain about.

So, there is certainly no facts on which the Tribunal could find a breach of the customary

international law minimum standard of treatment.

And finally, the last point that I just want to make is Glamis's reference this morning to a so-called duty of good faith when interpreting the customary international law minimum standard of treatment. Now, good faith, of course, is a principle that must be used in interpreting treaties, but it is not a stand-alone obligation. And again, the ADF Tribunal referenced this because the Claimant there

13:19:32 made a similar argument and said, "An assertion of a breach of a customary law duty of good faith adds only negligible assistance in the task of determining or giving content to a standard of fair or equitable treatment."

But even more on point is the ICJ's case in the border actions between Nicaragua and Honduras, where it also cites the Nuclear Tests case, where it says the principle of good faith is one of the basic principles governing the creation and performance of legal obligations, and I don't think anyone disagrees with that.

And it says, but it is not in itself a source of an obligation where none would otherwise exist, and/nor is it here. As we have made clear, the Tribunal's task in this case is to interpret the provisions of the Treaty, namely the expropriation and the minimum standard of treatment provision, but is not to engage in an ex aequo et bono determination or

to just determine on the basis of equity.

In any event, as we have shown, the equity certainly in this case do not weigh in Glamis's favor.

13:20:53 And with that, I would turn the floor over to Mr. Bettauer to make our closing remarks.

Thank you.

PRESIDENT YOUNG: Mr. Bettauer.

MR. RONALD BETTAUER: Thank you very much, Mr. President, Members of the Tribunal.

Ms. Menaker has summed up our technical arguments, and we again urge you to look at the record, our previous statements, the previous filings, the remarks made in the August hearing. I think, by now, all these points will have been amply disposed of.

What I would like to do is just take a few minutes now to conclude our rebuttal presentation by stepping back for a second and give you my assessment of this matter.

This morning, Glamis's counsel accused the United States of distortions and misrepresentations, this from a Claimant that discounts documents when it finds it convenient, that discounts evidence when it finds it convenient to do so.

Now, the United States, of course, doesn't

13:22:14 1 accept that kind of allegation. Rather, as I point
2 out, it is Claimant who is now--by now practiced at
3 slinging aspersions and at name calling. They have
4 attempted to discredit witnesses, evidence, and,
5 indeed, us.
6 I said yesterday that we recognize we have
7 different views than Glamis as to what happened and
8 what the legal consequences are of those events. But
9 we trust that the Tribunal now, having the evidence
10 before it and all the filings before it, can
11 distinguish what actually happened and can credit the
12 evidence that is there, including the contemporary
13 evidence, and will see through Glamis's smokescreen
14 and come to see clearly what is going on.
15 Was there an expropriation? We find it
16 difficult to understand how Claimant can maintain its
17 property rights were taken in full or virtually in
18 full and still maintain its mining claims. It pays
19 the annual fees to maintain its property rights, so it
20 must think it has them. It had a discussion of
21 selling those mining rights recently, so it thinks it
22 has them, and yet it's saying it doesn't have them.

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13:23:52 1 Something doesn't compute here. It doesn't
2 make sense.
3 In this situation, taking all the facts in
4 evidence, it will be hard to justify finding that an
5 expropriation had occurred, it seems to me. Was there

treatment that violated the customary international law minimum standard of treatment of foreign investors? Well, first, as Ms. Menaker has just explained, it's hard to understand what treatment the Claimant alleges was in violation of what specific rule. It's not that we assert that there must be a particular rule concerning unpatented mining claims, but there must be some rule in some way stated, more than a catch phrase that is stated, is shown to be observed by States out of a sense of legal obligation, and that is shown to have been breached by the United States in some concrete manner. Claimant just hasn't shown that. They relied on catch phrases drawn from other cases without really explaining how those catch phrases apply and why it is appropriate to apply them in this case.

So, although the facts don't suggest unfair

13:25:22 and unequitable treatment in a way cognizable under the NAFTA, we have gone on to show that they don't constitute unfair or inequitable treatment in any commonsense way, either. In the Federal process, Glamis managed to convince DOI to reverse an unfavorable ruling and convinced them to continue processing their plan until the California measures were enacted, and Glamis itself decided to pursue this course of action, this arbitration.

How can that be unfair or inequitable? Glamis turned around the Federal Government and was

able to have its Plan of Operations processed, but then decided on a different course of action.

In California they participated in the Board and State legislative process, and they participated fully themselves and through the Mining Association.

There is no suggestion that the proceedings were not lawful, that they suffered from some level of illegality; everybody seems to have admitted that. So, how can that be unfair or inequitable even in a commonsense way?

Well, Glamis did not fully get what it wants.

13:26:58 It did not get a right to mine without complying with reasonable requirements put out by the State related to the environment. They wanted to take the gold and not be subject to appropriate State measures requiring that they clean up and remediate the environment. And this was environmental degradation that they created or that they would create if they were to go forward with the Plan of Operation as they proposed.

In effect, they wanted a free ride from appropriate State regulation.

As I said yesterday, this was not a question of asking them to shoulder a public benefit, and Ms. Menaker just mentioned that, too, but of asking them to pay for reclaiming the damage to the environment that they themselves caused. Surely, this is within the realm of expectation of any reasonable investor. It is a business risk that a State will ask

you to clean up the environmental mess you create. And businesses take such a risk, and NAFTA doesn't ensure against such a risk.

How could requiring such a cleanup be considered an expropriation? How could requiring such

13:28:38 a cleanup be considered unfair? We don't see how it would be possible to explain to our public and legislature that a State could not take reasonable action consistent with the Federal and State legislative scheme without compensation--excuse me, how it could not take such action and not have to--and be lawfully allowed to take such action, and we don't understand how such an action would be considered by anyone to be a violation of a NAFTA obligation, when the steps were reasonable, when the State is required, when the State has required cleanup by a company or person of environmental degradation it creates.

This surely isn't a burden that should fall on the taxpayer. It is a burden that should fall on the company seeking to conduct the activity. If it were a burden that would fall on the taxpayer, it would raise all sorts of questions.

So, our submission, Mr. President, Members of the Tribunal, is that both from a technical perspective, as has just been explained by Ms. Menaker and has been explained by our team throughout this argument and in our briefs, and from a commonsense

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13:30:13 1 perspective, these claims have no merit. We request
2 that the Tribunal dismiss the claims made by Glamis,
3 both for expropriation and for violation of Article
4 1105. We think they are meritless. We think we have
5 shown that over the course of this hearing and in the
6 course of our pleadings, and we think it would be
7 fully justified for you to do so.
8 So, with that, I will conclude our
9 presentation. We still have a few minutes left, but I
10 think you will value having that time. I will
11 conclude our presentation and thank the Tribunal for
12 its attention. Thank you.
13 PRESIDENT YOUNG: Thank you very much,
14 Mr. Bettauer. Thank you, Respondents, for doing that
15 entire presentation without mentioning swell factor
16 once.
17 We will stand adjourned for 15 minutes at
18 which point we invite you to come back and we have
19 some more questions we'd like to ask the parties.
20 Thank you very much.
21 (Brief recess.)
22 PRESIDENT YOUNG: I want to start by thanking

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13:48:31 1 the parties for their very extensive and diligent work
2 in helping illuminate this for us. We appreciate it
3 very much. We do have some additional questions we

would like to ask and put to the parties.

Before we start, however, we did give the option yesterday of addressing some of the questions today. I know some of those have been actually answered in the closing arguments, but if there are additional questions that we asked yesterday that weren't addressed that you would like to take a few minutes and address now, we would be happy to start with those.

Mr. Gourley?

MR. GOURLEY: I won't promise that I have kept complete accurate count, but I do know two questions that were outstanding to us that I'm prepared to answer at this time.

PRESIDENT YOUNG: Perhaps you could start with those, and then we will ask Respondent with respect to any questions they feel left over from yesterday that they would like to respond to.

MR. GOURLEY: The two questions that I've

13:49:37 got, the first was Professor Caron asked us to address specific assurances.

The specific assurances that we relied on are of the general nature and a specific nature, but they both--one is the no buffer zones language in the California Desert Protection Act, and the other is State Director Hastey. In both those instances that goes to--

(Sound interference.)

PRESIDENT YOUNG: We would ask everyone to turn off their BlackBerries or cell phones. Thank you.

MR. GOURLEY: Both of those assurances go to the Federal measure, not to the State measure.

And the second question that was one of the original questions which I'm not sure we ever got out was the question of the State--of the rights to the mine and whether--to the mineral rights and whether those would be extinguished. The answer is this, and it also goes to a point that they have made.

We have from our very first Memorial said that if we were compensated for the loss, we would

13:51:24 relinquish those rights, and the only reason that Glamis continues to pay Respondent to maintain them is so that we do not lose jurisdiction in this case.

So, it has nothing to do with value. And, again, were we compensated, those rights would pass.

ARBITRATOR CARON: If I can just follow on the answer to your first question. So, you mentioned as the specific assurances the buffer zone; is that correct?

MR. GOURLEY: No. That's the general assurance.

ARBITRATOR CARON: The specific assurance is State Director Hastey's statement.

And in the testimony by Mr. McArthur, that was the portion of the transcript that refers to, "I

looked him in the eye," that portion of the transcript; is that correct?

MR. GOURLEY: Yes.

ARBITRATOR CARON: So, I guess if you could just expand on it for a moment. When I read that statement, there's a couple of questions that come to mind. First, it is a statement as to--not as to

13:52:48 timing, as to delay. It's a statement as to eventually his belief that permits--you will get permits and not necessarily the content or the requirements of those permits, but you will get permits. That's one part.

And the second part is the authority, why one would rely on that oral statement of a State Director or view that as an assurance.

Thank you.

MR. GOURLEY: The State Director Hastey was the decision maker for approving the mine until it was removed from him by Solicitor Leshy.

So, the assurance that he was telling Mr. McArthur that he understood and he knew Glamis understood that under the Mining Law, as amended, we were entitled to permit for the mine. We had a reasonable plan, and we had proposed the appropriate mitigation. We were willing to propose more mitigation for the discovery of the cultural values. So, that's the reliance that McArthur had on that was to continue to proceed to process the Plan of

Operation.

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PRESIDENT YOUNG: Thank you.

Does Respondent feel there are any questions left over from yesterday that you didn't have an opportunity to answer in the closing statement and would like to address now?

MS. MENAKER: Yes, there are. Before I do that, may I offer a response in response to--that's okay?

PRESIDENT YOUNG: Yes.

MS. MENAKER: So, on the two questions I would like to respond. The first is Glamis just said that the fact that they are maintaining their mining claims, paying royalties on those doesn't have anything to do with their expropriation, whether there has been an expropriation, but they did that in order to retain jurisdiction in this case, and that's simply wrong. In our view, the only reason to pay for those claims is because those claims are still worth something.

Had they not paid for them or had not continued to maintain them, yes, their rights in those claims would have been extinguished pursuant in

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accordance with law, but that would not divest this

Tribunal of jurisdiction. That happens in expropriation cases all the time. If there was a direct expropriation and the Government took title to your property, of course you could still bring an expropriation claim. You wouldn't own or control the investment at that point in time, but that's the whole point of bringing the claim. It's for a claim for expropriation. You don't have to show that you--that's what you're complaining about.

So, it's simply wrong to say that they're maintaining those claims in order to retain jurisdiction in this case. One thing has nothing to do with the other, and we submit the very fact that they continue to pay to the Department funds to maintain these claims is evidence that they think that the claims have some value.

The second point is on this alleged specific assurance, and this fails for several reasons. First of all, all we have in the record is one stray remark made by one of Glamis's witnesses. Obviously, self-interested, on this ground. But just as

13:56:40 importantly, again, even if we were to credit that remark, all he said is it will take time, but you will get your permit.

Again, that helps them with nothing as far as their claim that there has been an expropriation because there has been--it's taken a long time for the processing. He didn't say anything with respect to

the processing time.

At most, it goes to an issue of his views that the Leshy Opinion might be wrong for them to say that they were entitled to some sort of approval, but again, this is not sort of any official assurance. But even so, it amounts to nothing because as we have shown the Leshy Opinion is not expropriatory.

But again, this is not the type of specific assurance that Tribunals look to when they're talking about specific assurances. The specific assurances Tribunals look to are assurances that were given to the Tribunal in order to make its investment and upon which it relied when making its investment. When you look at the Argentina cases, that's what happened. Argentina decided to privatize its public utilities,

13:57:53 so it put out first offering memoranda, but it entered into contracts to induce those investments, making specific assurances, you will be able to charge in dollars. You don't have to worry about inflation issues. We are going to adjust the tariffs in accordance with the U.S. Producer Price Index because those were the things that investors were worried about is the economic situation in Argentina and whether they could still make a profit there.

So, the State made specific assurances in order to induce these investments. It took those contractual arrangements and actually elevated them into laws which were later codified, and then it

reneged on those.

Here, regardless of what Mr. Hastey said or didn't do, that wasn't a specific assurance that was given to Glamis in order to induce them to make their investment. This is something that is purportedly happening years later and has nothing to do with a specific assurance to make an investment.

As far as the questions that were left unanswered from yesterday, I believe the Tribunal did

13:58:59 ask a question about the Argentina cases, and how the Tribunals in those cases interpreted the fair and equitable treatment provision. And those cases, the Tribunals, for the most part, are not interpreting it or do not interpret--

PRESIDENT YOUNG: I'm happy to read the opinions myself. I wanted to know the U.S. Government's decision on their interpretation of those rules. In other words, do you agree with the standard for the application of fair and equitable articulated in those opinions? Or is that the range of opinions you're rejecting? That's what I'm trying to get clear on. Does the question make sense? I'm happy to rephrase it if I'm not clear.

In other words, what I'm interested in is you indicated that some Tribunals perhaps--and the Pope decision is certainly one of those, and I understood that--is one where the Tribunal had introduced an autonomous standard beyond customary international

law. What I am interested to know is whether you think the Tribunals in the Argentinean cases or other cases did that as well, or whether you are comfortable

14:00:30 with the standard articulated in those other cases.

MS. MENAKER: We do not believe that the standard that's articulated in those cases is reflective or has been shown to be reflective of the minimum standard of treatment under customary international law. Many of those Tribunals explicitly state that they are not tying the standard to that. And when they have gleaned the standard, as far as we can tell, many of them have looked at language from the preamble and have basically elevated that into a standard without examining State practice.

Now, this is much like what the Metalclad Tribunal did with respect to the transparency language that's in the preamble.

Now, I would also just mention that that's not to say that in none of those cases do we think there might not have been established a breach of the minimum standard of treatment. We haven't undertaken that analysis, but as I mentioned the repudiation of contract issue, for one, is a standard that we recognized, but it just hasn't been interpreted like that, and none of the Tribunals undertook an analysis

that we can see where it examined whether there was general and inconsistent State practice and opinio juris in formulating the so-called standard of fair and equitable treatment, so we do reject it on those grounds.

PRESIDENT YOUNG: Thank you very much.

Continue if you have other questions you would like to address, please.

MS. MENAKER: Does the Tribunal want us to address Glamis's very late minute request for these--for documents that are outstanding? I just--

PRESIDENT YOUNG: Yes. As we indicated in our earlier decision regarding discovery is that we have these issues under advisement. We will decide as we narrow down the issues that we think are dispositive to make decisions about the disputed documents. But if you would like to say a few words about that, we would be happy to hear that now.

MS. MENAKER: Thank you.

We do believe to the extent that the Tribunal is going to revisit this request that the request should be denied.

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As an initial matter, we would note that the Claimant is correct that we did assert deliberative-process privilege over the documents at issue, but we just remind the Tribunal that at the time we also asserted the Governor's privilege over

this issue, and we would ask to the extent that the Tribunal is going back to look at this, that it again revisit--that it again take a look at the statements, the arguments that we made with respect to the Governor's privilege, which is an absolute privilege.

But to the extent it analyzes this under the deliberative-process privilege, it should--the Tribunal should reject the request. The request really is based on sheer speculation on Glamis's part, and Glamis has not proven any need for the documents. In fact, at this stage, it's quite surprising that its still seeking the documents.

It argued that it had a so-called theory that the six documents might suggest and provide additional evidence as to why or what the Government's rationale for S.B. 22 and the backfilling regulations were, and that they--it might provide additional information

14:04:13 that those measures were focused on the Glamis Imperial Project.

There is ample evidence in the record as to what the Government's rationale for the two measures were, and we have addressed this at length. It is clear on the face of both of the measures what their stated purposes were. And the fact that they were focused on the Glamis Imperial Project is not at issue. We have never contested the fact that the Glamis Imperial Project provided the impetus or the reason why that brought to the fore the problem which

the Legislature and the SMGB Board sought to address. There is no need for more evidence on that point.

It is quite different from what Glamis has been arguing, that they are somehow solely targeted by this or that it was discriminatory. We've argued at length and explained why one proposition does not follow from the other.

Now, also, I think Glamis said something about perhaps it would shed light on what the Governor was thinking about during this time period, or it casts some kind of doubt. They said that if the

14:05:27 Governor had no ability over the backfilling regulations, what was the Governor deliberating about during this time period?

Well, the documents in question were created between April 4th and 7th, 2003. The Governor signed Senate Bill 22 on April 7th, so it's really--it's not surprising at all that there were executive agency deliberations with the Governor's Office regarding the bill and the hours that were leading up to its signing.

It's also not surprising that given the fact that the SMGB Board was slated to vote on regulations just a few days later that the documents might address the substance of the regulations as well as the Bill's text.

Also, the--I think that's all. I mean, Glamis has not offered any basis for the Tribunal to

rule that the State of California's need to protect the deliberative process of its policymakers is outweighed by Glamis's need for the documents on the theory that the documents might suggest or provide additional information about the California measures.

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14:06:36 PRESIDENT YOUNG: Thank you.

Claimant, do you have any response to that?

MR. GOURLEY: Just two points, Mr. President.

First of all, when you do revisit the pleadings that are now a year-and-a-half ago, you will see that the California Governor's privilege is a records privilege for records request under FOIA type. It expressly by the Court of Appeals of California does not apply to litigation.

Secondly, the point and the importance of those documents, and this is, to us it seems, a contested issue, although if Respondent is now admitting that, we would accept that, the two measures, the S.B. 22 and the regs are inextricably intertwined, and they were both caused by the same motivation to make the mine costs prohibitive, so that you could not mine at that location, which is the ban that they deny.

So, these documents go directly to that time when the two measures were again joining because S.B. 22 was being passed and the emergency regulations were coming up to become final, and that's the importance

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14:08:06 1 of them that outweighs the--any need six years later,
2 five years later, for the State of California to keep
3 those confidential.
4 PRESIDENT YOUNG: Thank you.
5 MS. MENAKER: If I may just very briefly
6 respond to that.
7 PRESIDENT YOUNG: Yes.
8 MS. MENAKER: Thank you.
9 We have not conceded in any fashion or at
10 least not in the manner Glamis has suggested that the
11 measures were inextricably intertwined. All we have
12 said it that it would not be surprising at all for the
13 Governor to be informed of information as to what's
14 happening in one of the executive agencies.
15 We also certainly did not say that--when we
16 said that Glamis's project may have been the impetus
17 for the Legislature and the Board to take up this
18 issue, we did not ever say that the motivation of both
19 measures was to make the mine costs prohibitive. I
20 think we have made that clear throughout.
21 And the one thing that I failed to mention
22 before that I would just mention again, and this is on

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14:09:10 1 the privilege log for the documents, is that these
2 documents, which are E-mails, they address public
3 outreach strategies in light of the bill and the SMGB

regulations which, in light of the administrative record, you know, it shows that those were going to be acted upon.

And so, there is nothing suspect about the fact that both measures are being discussed in these E-mails with the Governor's Office.

PRESIDENT YOUNG: Claimant?

MR. GOURLEY: The only point to respond to that is the--if you go back to the Governor's press release itself, the outreach there was to assure the other mining--elements of the mining industry in the State of California that this measure had been targeted as narrowly as possible to a portion that is of new mines of the 3 percent which were metallic mines of the entire mining industry. And that, again, is what these documents are addressing.

MS. MENAKER: You can note our disagreement with that statement, but I don't want to belabor that point.

14:10:46 PRESIDENT YOUNG: I think we are assuming--we will assume a can opener here, as economists tell us.

Ms. Menaker, are there other questions that we had left standing as of yesterday that the Respondent would like to address?

MS. MENAKER: I don't think so, but by all means, let us know.

PRESIDENT YOUNG: Thank you. With that, we will add some additional questions to the mix.

We'll start with Professor Caron.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR CARON: I have a series of questions. This first group of questions relates to ripeness. They are to both parties. I will try to phrase them in a way that we can have short answers and proceed through them. Both of my colleagues on the Tribunal also have questions concerning ripeness. They may add questions at various points, but we will try to work through this a little bit.

In part, I just want to start with a very basic question. We've heard about two different things. One, need the Claimant have done anything

14:11:56 after the adoption of the regulations? Was that sufficient at that point? So, that is more or less the Whitney Benefits case and that line of discussion.

The second discussion we have heard quite a bit about is continued pursuit of the process. What significance should we take from the July 2003 letter where the NAFTA arbitration is initiated and Glamis Gold informs the Department of Interior of that.

Now, what I just want to make--to get the views of both parties quickly, is this a two-step analysis or are those two separate prongs? So, for example, first we ask the question, need the Claimant have done anything once the regulations were adopted? Step one.

Second, if they needed to do something more,

then we look at the continuation of the process and through the series of letters up to the July 2003 letter.

MR. GOURLEY: Claimant's position is that once the regulations were adopted, there was nothing more that could be done or that Respondent has shown that we could do. There was no plan that could make

14:13:26 an economically viable project go forward.

With respect to the second, we don't see the correspondence in July as really part of the ripeness discussion. I think I understand how you have connected the two. We have always understood the Respondent's argument there to go to the delay issue. But again, all we did at that stage--and Metalclad is a good example of this--the actual expropriation that was at issue in Metalclad occurs months after the claim is filed, when they pass a Decree that removes the site forever. There is nothing about filing the claim that stops action on the permit, if there is something that could be done.

Our position is there is nothing that could be done, and people did recognize that, both Interior and Glamis. We would have been happy to have them continue, we asked them to continue, but...

ARBITRATOR CARON: If I could switch to the Respondent, then, and just to say--so, what I take the significance of the later correspondence is I have understood Respondent to argue it is Glamis Gold that

22 suspended the process, ended an ongoing process that

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14:14:55 1 they should have pursued, and therefore it's not ripe.
2 But what I take from what you said is you
3 first start with the regulation, you believe that
4 that's the end of the matter. If it's not the end of
5 the matter, you didn't really see the relevance of the
6 second question. Is that correct?
7 MR. GOURLEY: I guess what I would say is, if
8 the regulation isn't enough, then it is Respondent's
9 burden, since it is an affirmative defense, to show us
10 what should we have done. It's not call up Interior.
11 I mean, is there some plan? If they're trying to say
12 it's not ripe because we stopped them, then, as we
13 have heard a lot, we reject that out of hand.
14 ARBITRATOR CARON: So, to the Respondent, is
15 it a two-step analysis in that way?
16 MS. MENAKER: I don't know if I would call it
17 a two-step analysis, but the answer to your first
18 question, need Claimant have done anything after the
19 adoption of the regulations? It's yes. Right now,
20 what they have done is they are making a facial
21 challenge to the regulations which--it's not ripe.
22 Those regulations have never been applied to it. What

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14:16:13 1 it needed to do was put itself in a place where those

regulations could be applied to it so that the Tribunal could see the impact that those regulations had on the plan. What they have said is the impact is a ban. It prevented them from going forward. That's not proven, and they never put them in the place to show that.

We are saying that had those regulations had been applied, they would not have operated as a ban. They would not have demanded a--necessitated a denial of their Reclamation Plan. That would be--or to prevent them from mining, and the economic impact would have been different from what they say.

Now, as far as the continued pursuit of the process, the reason why that is relevant is because what they needed to do in order to put themselves in a position to have those regulations applied is to continue with the process of having a Plan of Operations processed. But they clearly put an end to that when they told the Department of Interior that they were abandoning.

For them to say now that they would have been

14:17:18 happy to have them continue is just a gross distortion of the record, and I won't go into that, but I just want to note that Glamis said it is somehow our burden to show what should have been done, and that's just wrong because their claim is not ripe. We have the burden. We have shown that it's not ripe. They want to now come back with the defense and say it would

have been futile. If they want to raise a futility defense, that is their burden to show that. They have not shown that it would be futile, as I discussed earlier today.

ARBITRATOR CARON: Thank you.

If I could proceed to a next question, I think which goes in this way towards the effect of the regulation full stop, what I understand--I was a little--I saw a slight difference between what Mr. Feldman was saying yesterday and what Ms. Menaker said just an hour ago, and there seemed to be two different things. One, if the Claimant had proceeded further--and we could have a discussion about what that means to proceed further--there seems a couple of options. One, they could have proceeded with some

14:18:48 plan as is at that time without incorporating the new regulations, and have seen that denied as not meeting the new regulations.

They could have reconstructed the whole plan of operations to meet the new regulations, and eventually seen either--and this is where I think Mr. Feldman's remarks were you could not know the economic impact until you had done that.

And then Ms. Menaker's remarks seemed to be, you could not know whether it would be banned, which to me seems to say that you would have been denied even though you had incorporated the new regulations. Then those seem to be two different things in that

way.

So, could you just comment on, A, you're not talking about submitting the old plan and being denied because it doesn't meet the new regulations; B, which of the two things are you talking about? Learning more about the costs of actually doing it, of complete backfilling, or seeing that this is actually an attempt--they're unhappy with the fact that you're actually trying to do it even with complete

14:20:09 backfilling and are, therefore, banning you.

MS. MENAKER: And I can understand the confusion, but let me just back up to say that when we are talking about they could have proceeded, that is they could have proceeded, you know, in accordance with the regulations, and only then could you see the economic impact because then you would see what the plan was like with it. As we discussed gold being a commodity, things change, prices change, and it's only at a certain point in time you can assess the economic impact.

When I was saying earlier that you could not have known whether it would be banned, that's only because I'm responding to an argument that Glamis has made that what these--these regulations don't do what they say they do. They have been making an argument that they really are designed to prevent the Imperial Project from ever going forward. They were designed with pure motivation to kill the Project, and that is

how they would have been implemented, and there is just no evidence in the record of that. They tried to compare it to--to analogize it to the ban in Whitney

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14:21:22 Benefits and St. Lawrence County, and we've shown that this isn't a ban.

Then they're saying, well, you know, they've almost made the argument that, yes, that was their intent, and somehow that that perceived intent is going to override the actual language of the regulations. And what we are just saying is that is clearly not what the regulations do. If that's their argument, they have no evidence to support that. And if they really want to make that argument, they would have had to have gone, and then sure, then if the Government actually denied their plan, even though it complied with the regulations, then obviously they could come back and say, you see, the regs don't do what they say they do, but that's not just the case here.

So, I didn't mean to introduce any confusion on that point. It's just merely in response to their argument.

ARBITRATOR CARON: So, before Claimant responds, let me just ask another question on that.

And that is, the question goes to why are the

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14:22:24 1 costs becoming more certain to see it implemented?
2 This was Mr. Feldman's point yesterday. I agree that
3 as time passes, the estimate would become more
4 precise, but you know what the requirements are going
5 to be. This ties to a separate question of I don't
6 understand what variance was possible. It seems that
7 the regulations state pretty clearly what it has to
8 be, what steps have to be taken.
9 So, the agencies would be pretty much
10 implementing those steps. You could project forward
11 seeing the regulation that these are roughly the costs
12 involved.
13 Yes, as time goes--I'm not even sure the
14 implementing agency itself would make an estimate of
15 costs rather than just simply require the acts, the
16 certain mitigation measures.
17 So, and it's the gold price, at least for
18 that period of time is not shifting that much perhaps,
19 so whether it's six months later or a year later, it
20 might make a difference. It might not, solely on the
21 price question, but--or the rise in costs of
22 transporting the material back. But I'm not sure why

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14:23:47 1 it's radically different to wait and actually try to
2 figure out what the costs are.
3 MS. MENAKER: If I could just consult on that
4 for one moment.
5 (Pause.)

MS. MENAKER: On that question, we think that the law is clear that facial challenges are strongly disfavored, and that the showing that a Claimant needs to make when challenging a statute, regulation on its face without having it be applied is much higher. It must show that that statute acts in a manner that's inconsistent with the law here, that it acts in an expropriatory manner in every conceivable situation, and that Glamis simply cannot show. It hasn't met its burden of showing that; and, in fact, although it's not our burden, we have introduced evidence that other mining operators are seeking to go forward, Golden Queen in particular, with its plan, despite these regulations.

So, we have shown that it is not economically infeasible for all operators.

So in that respect, with its facial

14:26:46 challenge, it's just failed, and if it wanted to make a challenge as applied, it hasn't done that, and it's important to because, for some of the reasons you stated, you do need to see what the economic impact is at a particular time when it's actually been applied. And here it--gold--I mean, it does fluctuate, costs do fluctuate, and in the processing it would have still been a matter of time before the whole processing went through, and so, even if you are talking about, you know, six months or however many months, that could make a significance difference.

Also, you will recall that at this point in time, if the DOI were to be approving the Plan of Operations, one of the other issues that would have had to have been resolved is a determination of what mitigation measures should be imposed on Glamis specifically with respect to the cultural resource issues. In the denial, they have denied the plan because of that, but now that denial is rescinded, so now they go back to just the process where they have to impose mitigation measures. Without knowing what those mitigation measures would have been, we don't

14:27:56 know what the entire plan would be, and you can't impose--you can't calculate the impact of the costs of the backfilling regulations on that plan without having all of this information available.

ARBITRATOR CARON: Thank you.

So, I would like to ask for the Claimant's comments, and then I have related question to Claimant, but why don't you go ahead.

MR. GOURLEY: Whitney Benefits was faced with two choices after the statute at issue in that case. They could submit a request for a permit for surface mining, facially unlawful, denied, hopefully, or not, it would be solely within the power of the United States in that case to wait, which is what they have done here, or they could submit for a permit to mine underground, which was lawful, but couldn't feasibly be done.

So, this distinction between that Respondent is trying to make here doesn't hold up. Respondent would have you believe that Glamis had some other choice here, which it doesn't. Its choice was the same. It could stick with its plan, which called for

14:29:27 partial backfill, could have been denied on April 14th or December 13th under the emergency reg. Never was. Or they could have structured an uneconomic one that they never could perform to try to provoke an acceptance that they would try to then challenge. I'm not even sure how you challenge an acceptance.

So, that's the reason that it's futile. There is nothing really for the mineral right holder to do at that stage.

ARBITRATOR CARON: If I could ask Claimant a question just on that point.

So, in the original plan for the Imperial Valley project, you have an exhibit, it's an internal memo in February of 1998, I think it's Exhibit 107. In that memo, it appears they are planning for the development of the Imperial Mine Project. There is a statement that given what gold prices are at that time, this may not be the best time to really take off on that project, and so they say we could implement, quote, the small mine concept. And then later, turned it into I think the phrase was world-class mine project.

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14:31:09 1 And the image there is that you go through,
2 you get approval, you have some--I'm not quite sure
3 you have a term of years that you have approval for
4 under that Plan of Operation--it's at the top of page
5 2--you have a term of years under which you can do
6 that operation.
7 So, if you were to get a permit under the new
8 regulations that you decided didn't make sense under
9 the current price, I wonder how the small mine concept
10 fits into that. Is it possible to simply say, well,
11 we are not going to start anything for two years?
12 Let's wait and see what the price is. We have an
13 approved project, it's not feasible now, it may be
14 feasible in two years.
15 MR. GOURLEY: The short answer is, no, that
16 companies, mining companies, wouldn't invest--I
17 mean,this goes back to the option theory--mining
18 companies are there to mine. It's not for them, you
19 know, outside a certain caliber of companies that are
20 willing to speculate, to hold assets for the future.
21 The small mine option is a notion that you open up a
22 mine and only mine that which is the easiest goal to

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14:32:47 1 get access to.
2 But the complete backfilling still hurts if
3 not destroys that because the problem with complete

mandatory backfilling is that--which differentiates it from partial backfilling. In partial backfilling, as you mine, you can take the material, you take the ore rock to the leach pad, and the waste rock can go directly to the first open pit. So, it's a one-step operation. It doesn't require the two steps. It's the second step which is the entire cost.

So, a single small pit, you are still going to have the two steps. You have to pull out all of the material and put it back.

So, there is nothing in the record that would suggest that it would be any more economical than a three-pit mine or a one-pit mine or a two-pit mine. It's the mandatory complete backfilling, the two steps, having to take all the material out and put all the material back in two separate operations that drives the costs to make it prohibitive.

ARBITRATOR CARON: So, a related question. So, that conversation we just had proceeded on the

14:34:08 assumption that you went through the process, and the regulations were applied as they're written, and there was a complete--permit was granted, complete backfilling required.

To the extent that your claim is that really this project would be killed no matter what, are you contending that the permit, if you had really tried to do everything, the permit would be denied, that that is the basis of your claim?

MR. GOURLEY: I'm not sure I followed that. If your question is that even if we had put a complete backfill operation and even though we know that it is uneconomic, would the Federal and the State have denied it, the evidence certainly suggests that. I mean, despite what you just heard from Respondent, we have got eight years of targeted action to preserve this--

ARBITRATOR CARON: That's not so much my question about does it suggest it as whether that is the basis of your claim.

MR. GOURLEY: That is a part of--that is an element of the claim. We don't think you have to get

14:35:38 that far, but, yes, as we've said repeatedly, the Project area is now stigmatized. That is one reason why we don't think it has value even today. We wouldn't get anyone to make an offer because you have got everyone in the State of California and the past Federal practice--Federal actions of denying the Project at every turn.

ARBITRATOR CARON: But to go from stigma as the measure of that for a moment, there is a separate ripeness issue to the extent that is the basis of the claim.

So, when the regulation is passed, on its face, it is not a ban, an actual ban. It is a statement that ultimately you would get your permit on the basis of those regulations. To state that

actually the regulations are a ban, that can--well, how is that ripe at the point of the adoption of the regulations, other than the cost feasibility point you made?

MR. GOURLEY: Well, an outright ban even Respondent concedes is ripe. That's how they distinguish Whitney Benefits, which we say there's

14:37:04 only one ban. There is only a partial ban in Whitney Benefits, not a complete ban, and yet it was still futile.

So, if it's a ban, then it's ripe immediately because there clearly is nothing to do. The only question here is because it's not a literal ban, but a ban that's effective because of the cost issue, is there something else that we could have done that would have stimulated some sort of final action to make this a challengeable measure.

ARBITRATOR CARON: Does the Respondent have any comments?

MS. MENAKER: Just brief comments.

I don't think that Glamis really--I won't say they didn't answer the question, but I think that nothing evidences the unripeness of the claim as clearly as was just evidenced. If part of the basis of their claim is that the measure acts as a ban because it would be--the measure--that the Government would have denied its application notwithstanding compliance with the regulations, and they have just

said, yes, that is a part of their claim, there

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really, I think, can be no argument that that claim is not ripe because that is not what the regulations say. The regulations have never been applied in such a manner. They have no reason to--they may think what they want to think, but there is no evidence upon which this Tribunal could find that that is how the regulations would be applied.

So, I think in that case that claim is clearly not ripe.

The only other things that I would just note is when you were saying about putting in a Plan of Operations that complied with the regulations, of course, I would just remind the Tribunal that even though Claimant is now saying that, you know, they had made all these determinations that it was uneconomic, the only determination they had made is in--that's in the record is in that January 9th, 2003, memorandum that shows that it would have been profitable, now that they made it a business decision that it did not turn what they have called a strategic profit and that, therefore, they wouldn't go forward, that's simply not the same as showing that it would have

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prevented the Project from going forward. And

certainly, as we have said before, it doesn't prevent all projects from going forward.

And I do think that the real option's value of mines does play a role here, but I won't repeat all of those things unless the Tribunal has a specific question on that.

ARBITRATOR CARON: Not at this point. I think the President has a question to you.

PRESIDENT YOUNG: One very small point for Respondent, but I just want to be clear about this.

Should the Tribunal have any doubt in its mind that even if Claimant had continued the series of phone calls to DOI, asking them to process their claim, that that would have been denied, under the--under the way it was actually drafted at that point in time? Is there any doubt that that would have been denied? I mean, should we have any doubt about that?

MS. MENAKER: Unless I'm misunderstanding your question, it's the converse. I think that there is no reason to suspect that it would have been

14:40:57 denied.

PRESIDENT YOUNG: So, the Department of Interior would have said to hell with the regulations, we are going to approve it anyway?

MS. MENAKER: You're talking about whether they would have approved it had it not complied with the regs?

PRESIDENT YOUNG: Exactly.

MS. MENAKER: I just want to check one technical thing.

(Pause.)

MS. MENAKER: Because the 3809 regulations had been amended during this time period, there is an open question as to whether in processing the Plan of Operations on the Federal side whether they would have had to have taken into account compliance with California measures or not, of course that comes into play when you're talking about the Reclamation Plan.

Since the date of the amendments to the 3809 regulations, the Federal Government does look to see if the State regulations are complied with.

Glamis's plan at this time was falling into

14:42:24 this window where it's not clear whether the Federal Government at that point in time, whether that would have been part of its own approval process. And as far as we know, there were no other pending plans that kind of crossed this window. That means that were filed before the amendments but that remained pending after it.

MR. GOURLEY: May I comment on that?

PRESIDENT YOUNG: Please.

MR. GOURLEY: First of all, there is absolutely no evidence in the record of anything that was just said. I mean, we did not hear from anyone from Interior. We don't have any documents that even

suggest that there was anything that the Department of Interior was doing to process this application or that there was some question about whether the current plan that was still pending and subject back to the 1980 rules, not to either of the two versions that had been promulgated during its pendency, could be approved, given the State measures.

ARBITRATOR CARON: Well, my last question would go to the process which followed the adoption of

14:43:52 the regulations in S.B. 22, and we were referred this morning to a series of correspondence, the December correspondence, the January 2003 correspondence, and then the March 31st, 2003, letter.

And in reviewing that correspondence, and then there is an internal note in Glamis--no, in BLM in June of 2003 that's in Claimant's Memorial, and then the July letter.

When you review that, it's clear that the Tribunal--not all the facts of what's happening in that period are fully argued at least orally to the Tribunal. There are discussions about acquiring the interests that are going on. There seem to be discussions about--it seems to be that the old plan is not really the issue. It's a question of whether we are going to go to a new plan. And there is a question of Glamis's asking--making statements concerning preemption, and BLM is asking questions about well, should you get the California denial first

of the old plan. So, it's a complicated period.

The--part of that leads me to trying to understand the last letter in July of 2003.

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14:45:24 So, first, on its face, it is not a request for suspension, so we are trying to interpret the letter and ask what does it mean. There are a couple of phrases that are pointed to, and I would just ask again succinctly for the comments from both sides. One is we appreciate your efforts, and there is a sense in which those efforts are now over. Those efforts were more than just processing. They probably were about acquiring the interests, your efforts in helping think about acquiring an interests. Your efforts in thinking about the preemption issue, so there are a number of efforts, probably including processing, that are all there.

Secondly, there is the initiation, the initiation of the arbitration, and Respondent argument, I believe, is that when one initiates an arbitration where one of the allegations is that it is now expropriated, then inherent in that is an end to a plan to mine the site and, therefore, an end to the processing request.

So, if I could have the comments of both Claimant and Respondent would be helpful.

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14:46:58 1 MR. GOURLEY: If you go to the March letter
2 and read that, it references some communications by
3 Senator Reid to the Department suggesting that some
4 sort of compensation could resolve this. That was
5 referenced as well in the December letter and the
6 January letter. Those were the efforts that were
7 going on as to whether, instead of the--in light of
8 the California measures, was there something that
9 could be done, and, indeed, the continued Native
10 American interests in the site, was there some other
11 alternative method.
12 So, the efforts that are referred to in the
13 letter are those efforts to try to see if there was
14 some other means to resolve the issue outside of
15 pursuing the permit or them just denying the permit
16 because the plan couldn't meet the standards. The
17 letter nonetheless continued to express the hope that
18 given the 90-day consultation period that's required
19 under Chapter Eleven, that those efforts could
20 continue. And, indeed, there were further efforts,
21 albeit not under Chapter 11, but under a different
22 Federal process called the CEQ process.

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14:48:32 1 ARBITRATOR CARON: Does the Respondent have
2 any comments?
3 MS. MENAKER: Yes. On the letter in
4 particular, I think it's clear that when Glamis tells
5 the DOI that it appreciates its efforts but it's now

going to pursue new avenues, the efforts that it's referring to is its efforts to have processed the Imperial Plan of Operations during this time period, and it is now abandoning that effort. You referred to other--you referred to other efforts, and one of the efforts was the effort for them to try to get compensation. It's clear they were lobbying at this time, talking to a host of people, and trying to see if they could not convince the Federal Government that there was a wrong done here and that they should be compensated. They were unsuccessful in that regard.

But even as Glamis has now knowledged, those efforts continued, and in their notice of arbitration--I mean, in this letter they say that they hope to consult and continue negotiating, and it did continue, albeit through a different method, through their lobbying, they got people interested, and those

14:49:48 continued.

So, clearly they weren't thanking them for those efforts and saying now, those are over. They were thanking their efforts with respect to the processing of the Plan of Operations.

And just as important as this letter is, equally important is their subsequent silence. If there was any misunderstanding on their part, if they had at all expected that the Department would have continued to process, they clearly would have indicated that to some extent. I mean, the record is

just replete with evidence showing how involved they were in the processing of its Plan of Operations, for then after this letter for there to be complete silence, there is really no other conclusion that one can draw other than they were talking about an end to the efforts to process their Plan of Operations.

And as Professor Caron noticed--acknowledged, it is fundamentally inconsistent, the notion of bringing an expropriation claim and then expecting that the Government is going to continue processing a Plan of Operations for mining claims that it is now

14:51:03 claiming have been expropriated by the Government, there is just a fundamental inconsistency there, and the Department would not spend public funds to continue to do this when faced with that situation.

They're saying that they have basically--that these claims now belong to the Federal Government. We have taken them. Why would we then continue to process a plan?

ARBITRATOR CARON: I have one last question.

In January of 2003, Department of Interior writes to this--this is to the Respondent--writes to Glamis Gold concerning the request to suspend the process, asking for a certain guarantee or release from liability. But there is then the statement in that letter that once this is done, we will issue you a formal letter of suspension. I believe that's the phrase in the January letter.

So, what significance is to be taken from the fact that there is not at least in the record we have been pointed to a letter of suspension to the proceeding?

MS. MENAKER: None because the circumstances

were fundamentally different when that letter was sent and then after they filed their arbitration claim.

It's much different if you are in the situation where you have an applicant and you're moving along processing the Plan of Operations, and then they ask you to suspend, but for whatever reason. I mean, it could be because they--maybe someone decides they don't want to go forward with the mining project, or there are some questions as to whether they go forward. And as you know, the applicant often pays for a large part of the processing. In this case, Glamis hired EMA, which was helping out with many of the issues that needed to be dealt with in the processing.

So, it's an expensive procedure not only for the Government, but for the applicant. So, if the applicant has questions about whether it wants to proceed, it would not be strange for it to say, well, you know, hold off. And in that case, the Government might want, you know, the assurance that that is not going to come back and provide a basis for a complaint against it.

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14:53:39 But that is quite different. Once the complaint against it is actually filed, there is no need then to ask them to ask for any formal suspension because it's quite clear that at that point in time, the processing has stopped, that now you are in the realm of litigating that claim, and you are no longer in the circumstance where you're looking for any sort of guard against liability for your failure to act.

ARBITRATOR CARON: Does Claimant have any comment?

MR. GOURLEY: Just briefly. We think it has all the relevance in the world. There is a very formal process for suspending. If the Department of Interior had ever thought that the Plan of Operation would had been withdrawn, they would have told us that.

In fact, they've admitted here--Respondent admits here even today that it's pending and still subject to the 3809 regulations. So, I think the claim that it is somehow in abeyance is just wrong.

PRESIDENT YOUNG: Mr. Hubbard.

ARBITRATOR HUBBARD: Well, lest we become

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14:55:05 exhausted by ripeness as we were with swell factors, I only have one question and I think relates to ripeness.

And that is to Claimant: If you can explain the reasoning behind Mr. McArthur's statement that it would have been reckless for Glamis to proceed with its Plan of Operations after the California measures were enacted.

MR. GOURLEY: That is just Mr. McArthur's expression of futility equivalent to what you just heard from Respondent, equivalent to what you just heard Respondent saying, the futility of DOI pursuing the Plan of Operations. There was nothing left for Glamis to do once the California measures made permanent the expropriation that had started with the Babbitt denial in January of 2001.

ARBITRATOR HUBBARD: I guess I'm violating my own rule, but I would like to ask one additional question.

Could you expand further on the statements you made that Glamis continues to hold its unpatented mining claims and to pay the annual fees for purposes

14:56:23 of jurisdiction? I think we heard from the Respondent that that can't be the case, but I would like to hear a little bit further from Claimant.

MR. McCRUM: I'll respond to that. The annual fees are required by Federal law to maintain the unpatented mining claims. We do assert that the claims have been expropriated by the actions we referred to, but it's acknowledged that we continue to hold nominal title to those claims, but to continue to

hold the nominal title, these fees must be paid or the claims expire by operation of law.

And we see in this case, we have a variety of procedural defenses raised, ripeness as well as time barring as to certain actions, so to avoid any possible issue about standing or jurisdiction to maintain these claims, we have continued to pay the fees to the Respondent, and we also seek recovery of those fees as part of the relief here.

ARBITRATOR HUBBARD: But you are clearly on record that you would surrender those claims if you were to be awarded?

MR. McCRUM: Yes, we made that clear in the

close of our Memorial--we made that close in the close of the Memorial as well as in our Reply that we would fully recognize that as a consequence of the conclusion of this protracted controversy.

ARBITRATOR HUBBARD: Respondent?

MS. MENAKER: Sure. I can just very briefly respond to those points.

The first is with respect to Mr. McArthur's statement that it would be reckless to proceed, we don't care why they determined or on what basis they determined that it would be reckless to proceed, what his motivation was in thinking it was reckless to proceed.

What's important is the fact that it shows that they didn't continue to seek processing of the

Plan of Operations. It's evidence that they were not seeking continued processing.

And, in fact, it's evidence they did nothing to indicate to the Department that they expected the Department to continue processing. It's evidence that they abandoned pursuit of the processing of their Plan of Operations.

14:58:38 On the second point, for the reasons I noted, not paying those fees would have nothing to do with--would raise no jurisdictional problem here, but the fact that Claimant has so-called volunteered to surrender the claims also is--it's not something that is within Claimant's--let me state it another way. I mean, that's just a--would be mandatory. I mean, the whole essence of an expropriation claim is who owns the property. I mean, it's inherent in a finding of expropriation they no longer hold it. They would be required to. And I think this was with respect to the last of the Tribunal's questions that we may not have directly answered.

But if there were, which, of course, we say there was no basis for finding of expropriation, but were there to be such a finding, automatically the title to those claims would have to be transferred to the United States--we would have purchased those claims, in fact.

ARBITRATOR HUBBARD: And that would be true even in the context of an indirect taking rather than

a direct expropriation?

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MS. MENAKER: Yes, because they could not continue to use that property in any way after having been compensated for essentially--for an expropriation.

I mean, inherent, it goes back to what we've been arguing that an expropriation isn't just showing a diminution in value of the investment. That is woefully inadequate to prove an expropriation. You have to prove it's been taken away from you.

And, you know, if one were to prove that it's been taken away from you, you can't continue to later use that property. You have no rights to that property any longer.

ARBITRATOR HUBBARD: Any response?

MR. McCRUM: The only thing I would add is by making those statements in our filings, we are acknowledging that, that that would be the logical and natural end to this proceeding; that the nominal titles that Glamis has continued to hold would become transferred to the United States, and we have simply acknowledged that very briefly in each of our filings here.

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PRESIDENT YOUNG: I want to ask a question to

Claimant and to Respondent, but obviously the answer I want is a different one from each of you.

Here is the essence of the question. There is a possible mode of analysis in this case that would require the Tribunal in terms of thinking about whether you come at it from the perspective of what is the bundle of rights, and it may come from a preemption perspective or whether you come at it from what the set of "background principles" are, that there be a certain line drawing exercise here that State regulation is permitted. Reasonable State regulation is permitted. Everybody seems to concede that.

What I need some guidance on is what the respective parties think is reasonable, what a party either could have anticipated or, phrased differently, what the Federal Government would permit under some version of preemption.

Now, I have--I take it Claimant says whatever it is, it's not this far, but I would appreciate some help on how far it is in your judgment, from a

15:02:19 reasonable miner's perspective. Respondent, on the other hand, has told me that a ban on mining would not be appropriate, a State ban on mining wouldn't be appropriate. But I'm wondering if anything short of an outright ban is acceptable, in the Government's view.

So, if you could help me figure out where you

think that line is drawn, I would appreciate that. We will start with Claimant.

MR. GOURLEY: All I can say really to help guide the Tribunal in this is that is, in essence, the question of the second two elements, if it's not a categorical taking, and you're looking at something less than categorical, and so you look, then, you weigh the diminution in value and the last two which are the legitimate expectations versus the character of the measure.

So, a wholly nondiscriminatory, had there been a series of studies that wholly independent of focus on the Glamis Imperial Project had evaluated what needs to be done with respect to open pits and what would preserve the ability--what would be the

15:03:44 appropriate balance of addressing pits versus other reclamation versus continued mining, and that had progressed in its natural evolution to a rule that impinged on the value of the Imperial Project as it did every other, then we wouldn't be here. But that isn't what happened in this case because now you're looking at a character of measure against our expectation of a history and a legal regime that did not elevate cultural values over the right of the mineral holder and which had expressly and repeatedly excluded mandatory backfilling in favor of site-specific to focus on what was the intended use of that site in the future, that you would then jump from

that and apply that to a Plan of Operation that had already been pending and the investment to prove the reserves had already been made, that's the surprise element, and this one was specifically targeted at this particular mine. That's the discriminatory bad-faith element of it.

So, looking at those factors draws the line, but you can only draw the line in any individual case that you apply because a measure can be

15:05:19 expropriated--expropriatory in one context but not in another.

PRESIDENT YOUNG: Thank you.

Respondent?

MS. MENAKER: In this respect, we think also it's very helpful to keep clear the distinction between a "background principles" defense and the factor of reasonable investment-backed expectations.

And so, let me start by saying when you're talking about the line drawing exercise, when we are in the "background principles" construction, we are looking at, you know, what are the bundle of rights that they have, and it's subject to reasonable State environmental regulations. The line drawing on that would be if the regulation constitutes a land use regulation as opposed to an environmental regulation, and that comes from Granite Rock, where the Court, I would say, also didn't even specifically hold this, but that's what it suggests that the line is between,

you know, land use and environmental regulations.
And land use is in the respect of, like you said, as a ban. If a State can't say we are not going

15:06:56 to permit mining--this is land that is open to Federal mining under Federal Mining Law, but we are not going to allow mining, that's not okay. But what is okay is environmental regulations.
And so, here, if there is a background principle in place that limits the nature of the right and then later there's an objectively reasonable application of that background principle, that ends the inquiry, so to speak, because Claimant never had the right to mine in a manner that is inconsistent with the background principle.
Now, when you go into a--it's only if we're out of the realm of background principles and we are looking at just an indirect expropriation analysis. When we are evaluating the investor's reasonable expectations, and at that point in time it will depend--there is no bright-line rule on what would be a reasonable expectation. In some cases, a regulation that falls far short of a ban, you know, might frustrate an investor's reasonable expectations. In some cases a ban would not. What you need to look at there is in the particular context; here in the mining

15:08:18 1 context, you need to look at the legal regime that
2 governs mining, and then you need to look at whether
3 this--whether the investor had received any assurance
4 that the particular limitation would not be placed on
5 it and whether this was, in essence, a natural
6 evolution of the law.
7 Here, we suggest that it, indeed, was, that
8 given SMARA, given the Sacred Sites Act, this was,
9 indeed, a natural evolution of the law, and,
10 therefore, Claimant's reasonable investment-backed
11 expectations would not have been frustrated especially
12 because they had received no specific assurance that
13 the State would not act in this manner.
14 But--does that answer your question as to why
15 the line? You know, there is no kind of bright-line
16 rule in Rebes. You basically look at the legal regime
17 as a whole where the background principles there is a
18 bright-line rule, but that line is the preemption
19 point, and here the guidance that we have from the
20 Supreme Court is the line where preemption is drawn is
21 when the State action constitutes a land use
22 requirement rather than an environmental regulation.

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15:09:40 1 PRESIDENT YOUNG: Does that answer the
2 question? It gives me guidance as to your theoretical
3 overlay, but it does not give me any guidance to see
4 where the Government the case of mining, which is
5 what's before us, would answer that question. But let

me shift because that may be an unfair set of questions.

Land use versus environment in this context, where do Indian artifacts fall in that? Are they environmental or are they land use?

MS. MENAKER: They are absolutely environmental. Let me just get the precise citation for you.

PRESIDENT YOUNG: While they're looking at that up, let me add sort of then to be clear about this. So if, in the end, the Government--California passed a regulation that said because there are Indian artifacts on the surface of this land, the surface cannot be disturbed, nor can the contours be disturbed, would be acceptable because that's environmental regulation, not land use?

MS. MENAKER: No, because that governs the

15:10:55 manner in which the land--it basically is not allowing mining to occur.

Now, it's different if you're saying because there are cultural artifacts, we are not going to open this land to any sort of mining. That is different than the case like the La Fevre case that we mentioned in Wyoming where there they said because of the archeological evidence of the site, the Reclamation Plan that had been proposed by the Claimant didn't adequately account for those, so the permit to mine there--and it was a pumice mine there, but the permit

to mine there was denied, and that was found to be perfectly acceptable, that's okay. And that's what California has done here, is the regulation is an environmental regulation--I will give you that citation in a moment--but it doesn't dictate or the manner in which you can use the land. It doesn't say you can't mine here. It only imposes a requirement for reclamation as to how you have to--if you are going to mine what you need to do to reclaim the land. And in that respect, you know, it's very--I think the Le Fevre case is helpful in that regard as an

15:12:11 illustration of this.

I'm trying to find the citation for you, the proposition that both NEPA and CEQA contain provisions that require the protection of the human environment. It's in CEQA Section 21060.5.

PRESIDENT YOUNG: Say that number again.

MS. MENAKER: CEQA Section 21060.5 defines the term environment to include, "objects of historic or aesthetic significance," and also NEPA requires the Government to use all practical means of coordination--and this is a quote--"to end that the nation may preserve important historic, cultural, and natural aspects of our national heritage," and then requires the Federal agencies to provide an Environmental Impact Statement if the proposed undertaking significantly affects the quality of the human environment. So they are including in the

context of human environment the historic and cultural aspects.

And also--and I would just note for the Tribunal's convenience, this footnote is in our Rejoinder. It's footnote 481, and also the Le Fevre

15:13:53 case that I mentioned before, there it--the Wyoming court said that denying the permit in order to preserve the Indian artifacts, it didn't conflict with the 3809 regulations, and the 3809 regulations, you will recall, allow States to impose more stringent environmental requirements, so clearly that Court there thought that an action to preserve the cultural resources was--could be considered an environmental requirement.

PRESIDENT YOUNG: Thank you.

MS. MENAKER: And, if I could also just make--if I could just also make one more comment, another additional evidence that these measures are not what we would call land use measures is that the very fact they applied post-mining shows that they are not land use measures. They're not measures that inhibit the use of the land for mining. They actually envision that the land is going to be used for mining but then just impose certain requirements, reclamation requirements. So they are, in that respect, environmental regulations and not land use requirements.

15:15:13 PRESIDENT YOUNG: Let me then ask the question.

So if it is a legitimate environmental regulation that there is no limit to what the State can do?

MS. MENAKER: The limit again, as just interpreted by all of the authority that we have seen, is the limit is that it's as long as it's not a land use requirement.

MR. McCRUM: Mr. President, I wonder if I could briefly respond.

PRESIDENT YOUNG: Please.

MR. McCRUM: We certainly acknowledge that cultural resources are within the general scope of the environment within the scope of statutes such as the National Environmental Policy Act and have always been addressed through the EIS/EIR processes. Here at the Imperial site, when we look at these California measures, there are some question about the legitimacy of the motives of California as reflected by Governor Gray Davis's press release of April 7, 2003, where he states that these actions, S.B. 22 in particular, but

15:16:26 he also references the SMGB regulations are being taken to send a message that sacred sites are more precious than gold, which comes very close to a

land-use determination by the State of California.

So, that motivation that is stated raises some question about the bona fide nature of the measures that were being adopted.

One other point I wanted to respond to is there has been some reference to the Wyoming Supreme Court case, Le Fevre v. Environmental Quality Counsel. We believe we've just heard of that case referenced here in arguments here in last day or two. We don't find the case in the briefs submitted by Respondent. It is a reported case we have discovered. It's 1987, and the case involved a pro se party seeking to carry out some activities on Federal land in an area that was identified as an area of environmental, of Critical Environmental Concern, unlike the Glamis Imperial situation, and there are some statements about preemption in the view of the Wyoming Supreme Court. I would suggest that a much more appropriate case setting forth preemption principles in the mining

15:17:41 context would be the Granite Rock decision of the Supreme Court, or the South Dakota Mining Association v. Lawrence, which I believe Respondent has acknowledged is a correct statement of the law of preemption in 1998 by the Eighth Circuit Court of Appeals and would have much more weight than the state court case that has just been referred to, although it's a 1987 case, 20 years old.

MS. MENAKER: May I just very briefly

respond?

PRESIDENT YOUNG: Yes.

MS. MENAKER: The Governor's statement really has no relevance to this issue, a statement that sacred sites are more precious than gold.

First of all, obviously, it's not the measure itself. It says nothing about what the measure does. It's a political statement, but he could have just as easily have said environmental awareness is more precious than gold. That doesn't transform anything. If you are imposing something that an environmental regulation, and he had said the environment is more important to us than doing anything you need to do to

15:18:48 get gold out of the ground, that would not cast doubt on the nature of the measure as an environmental measure. So, we think that's completely immaterial.

As far as the Le Fevre case, I would just say there that we think that that case is entirely consistent with both the Granite Rock case and the Lawrence County case. The Tribunal need not choose between them, but this case is--it's equally as relevant as those cases are.

PRESIDENT YOUNG: Professor Caron?

ARBITRATOR CARON: I have few questions on the standard of taking and date of taking to put forward, and the standard question is actually rather short, and it's primarily to Respondent.

Claimant, in its discussion of standard,

added a first question of is it a categorical taking, meaning, I gather, a full taking or full value taken rather than less than full value taken, and Respondent did not refer to that statement, and I'm just wondering whether you had any view to express on that standard.

MS. MENAKER: Is your question whether

15:20:15 there--could you rephrase the question?

ARBITRATOR CARON: In the Tribunal's questions to the parties, we did not include a first standard as to categorical takings. That was an additional statement added by the Claimant. Respondent has not commented on that addition by the Claimant. I'm asking whether the Respondent has any views.

MS. MENAKER: If I understand, I think that we don't disagree with Claimant's statement that if there is a complete deprivation of value that that constitutes a categorical taking, and, therefore, is compensable. But that is not the case, as they acknowledge, if what--if notwithstanding the fact you have been fully deprived of your value, if you never had a property right to engage in the activity that is depriving you of all value, and that is where the "background principles" defense comes into play.

And so we don't disagree with that analysis. it's just, you know, you can either look at the "background principles" defense as a threshold

22 analysis to first get the nature of the property

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15:21:36 1 right, but it is--we agree that in the case of a full
2 deprivation. But I would note that then, when one
3 moves on to this balancing test, where we partways is
4 where in the extent of the deprivation that is
5 required in order for there to be found any taking at
6 all, and it has to--the measure has to destroy all or
7 virtually all of the value of the property in
8 question.
9 And I note that in Claimant's presentation it
10 actually presented a slide, I think it was the title
11 of the slides that said something like less than a
12 complete expropriation. I mean, perhaps that was just
13 an error and they meant less than a complete
14 deprivation, but there is no such thing as less than a
15 complete expropriation. I mean, if it is, then it's
16 not an expropriation, and your expro claim falls. But
17 for an expro claim, you need essentially a complete
18 deprivation of your rights in the property.
19 PRESIDENT YOUNG: Does Claimant have any
20 comments on that?
21 MR. GOURLEY: No.
22 ARBITRATOR CARON: If I could turn to the

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15:22:46 1 question as to the date of taking and specific acts

once more, I totally understand the Claimant's response that you, as in many cases, you view this as a spectrum of events, that the Tribunal should look along the spectrum for this possible moment of expropriation. Inexorably we will be led to particular events, particular days.

So my question is: Is this basic understanding correct as to the range of days, or is there something being missed other than that there is a whole spectrum? So, one date mentioned yesterday is the 2001 Record of Decision at the Federal level. The next date would be the December 2002 emergency regulations. A third date would be the April 2003 adoption of the permanent regulations and the passage of S.B. 22.

Is there another period, in your view?

MR. GOURLEY: Those are the April dates, sadly, there are two dates, but those are the principal events that you would choose among.

ARBITRATOR CARON: Then if I can just follow in that question. So, one response by Respondent to

15:24:31 the Record of Decision event is that that event was rescinded sometime thereafter.

Let me ask that. I will just phrase it that way. That may not be accurate.

Secondly, as far as the December 2002 emergency regulations, what is Claimant's position on the fact that those regulations are emergency

regulations and of a limited duration, necessarily of a limited duration? Does that affect--how does that affect the question of taking?

MR. GOURLEY: With respect to the first point, the rescission in--the formal rescission of the Record of Decision, I believe, is early November 2001, but that is not a rescission of the taking. The taking evidenced by the denial is the failure to approve. We had a valid Plan of Operation. We had valid mitigation. It was not approved. Instead it was denied. We never got approval, so the taking continued.

When you get to the temporary--the emergency regulations, it could have been a temporary taking. If those emergency regulations had gone on for

15:26:10 whatever the valid period was, 120 days, then--and then had been lifted, there would have been a question of whether that constituted a temporary taking at all. Should it have--would there have been damage to Claimant. But we don't have to worry. We don't have to consider those issues in this case simply because they did become permanent, and S.B. 22 was passed as intended during that 120-day period.

So, whatever temporary effect was removed from the early emergency regulation.

ARBITRATOR CARON: Would Respondent have any comments?

MS. MENAKER: Yes, thank you.

The first thing that I want to note is that it was yesterday, I believe, or the day before, was the very, very first time that we ever heard a date other than December 2002 being proposed as the date of expropriation. I mean, it's far late in the day for Claimant to now be suggesting that the property was expropriated in December '01 or in April '03.

If you look through the briefs, repeatedly they refer to the date of expropriation as

15:27:28 December '02. That's the date that both--all the valuation experts used in the valuation reports throughout the hearing last month. That's the date that was repeatedly referred to.

So, I think on that ground alone the Tribunal ought not to even consider a claim that their property was somehow expropriated at a different date.

But with respect to their argument, if the Tribunal does consider it, with respect to their argument as to the December '01 date, first we note and we've made this argument that that ROD was rescinded, so it could not have constituted an expropriation.

Now, here Glamis is saying, well, no, the expropriation was the failure to approve. That cannot have taken place on that December '01 date. That just doesn't make sense. The Tribunal will recall that the Department issued the validity examination, the Mineral Report, in Glamis's favor, which it touts well

after that time, so how could you have a failure to approve when the decision denying it was rescinded and then later actions were taken in Glamis's favor?

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And I would note that Glamis has made no effort to put in a valuation for its mining claims as of December '01. There is just simply nothing in the record that even values its investment as of that date.

And then we don't take issue with--well, obviously we take issue with their expropriation claim, but the date that we have been using all along is December '02, and the fact that those were emergency measures, we have not argued nor are we arguing that somehow that date can't be used because of that. We think--I mean, it's not ripe, and there are a host of problems with the expropriation claim. But because those emergency measures were later made permanent and there was really no gap in time, it isn't the case where a measure was only in place for a short amount of time.

And then with respect to the April date, again, the first time we heard this was yesterday or the day before, and I don't think the Tribunal should consider a claim that their property was expropriated as of that date.

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15:29:51 1 PRESIDENT YOUNG: We are coming up on 3:30.
2 We do have more questions, but we will take at this
3 point a 15-minute break and reconvene at 3:45.
4 (Brief recess.)
5 PRESIDENT YOUNG: Thank you. We are ready to
6 reconvene.
7 Ms. Menaker, I understand you want to make a
8 very brief intervention.
9 MS. MENAKER: Yes. I just wanted to very
10 briefly supplement the answer that I gave to--I
11 believe it was the last question--Professor Caron's
12 question on the various dates of expropriation, and
13 the fact that, when we are talking--I already dealt
14 with the ROD date and the April date, but when we are
15 talking about the date of the emergency regs, there is
16 one area in which it's significant that they were
17 emergency regs, and this is in that if for any reason
18 the Tribunal would find that the emergency regulations
19 constituted an expropriation, because they were
20 emergency and, therefore, it was--they were only in
21 place for a short time, that would have been a merely
22 femoral action, a temporary action.

2200

15:48:57 1 And then when the permanent regulations were
2 adopted, if the Tribunal were to find that those
3 permanent regulations did not exact an expropriation,
4 in that case the emergency nature of the regulations
5 would be important because it would show that the

claim for expropriation with respect to the SMGB regulations still fails because if the troubling aspect of the regulations was in the emergency nature, that was only temporary. Glamis didn't sustain any damage during that temporary time. And to the extent that it was cured to any effect by the permanent regulations, the Tribunal could look to that in determining the expropriation claim.

PRESIDENT YOUNG: Thank you.

Claimant, any response to that?

MR. GOURLEY: No, thank you.

PRESIDENT YOUNG: Mr. Hubbard?

ARBITRATOR HUBBARD: I think I'm down to one question, and this is for Claimant.

When we were hearing from Respondent about the undue impairment versus the unnecessary undue degradation standard and how Mr. Anderson, in his

15:50:13 E-mail, had been--he said, "We purposely did not define undue impairment in 1980 because we all concluded it meant the same as undue degradation," and they suggested that this was just the one opinion of one person who was a nonlawyer. But, in his E-mail, he says "we," and I wanted to ask Claimant who "we" refers to.

MR. GOURLEY: Because we don't have--Mr. Anderson wasn't, despite our invitation, wasn't brought before you. We don't know the answer to that. If you do look at the Federal Register

Notice which is in the record--I won't know the site off the top of my head of the 3809 regulation in 1980--there are two contact persons listed. Bob Anderson is one of those, and the other person, unless Tim recalls, I don't.

ARBITRATOR HUBBARD: It was my recollection that there was a group of people that were involved in writing those regulations, and that's the reason I asked the question.

He was sort of the lead person, as I understand it, of that group of people.

15:51:39 MR. GOURLEY: That's correct. He was a lead person, and then our expert, Tom Leshendok, was a lead person in doing the amended regs in 2000. But what the entire group is we do not have; that evidence isn't in the record.

MS. MENAKER: Mr. Hubbard, if I could note on the record.

ARBITRATOR HUBBARD: Surely.

MS. MENAKER: Significantly, that E-mail does acknowledge that the Department did not define the standard, and that is consistent with what we have shown, that it wasn't ever defined. And so, here, the Department was making an interpretation of an undefined standard.

But again, there is no way to know who he was referring to in that E-mail, and any suggestion that he offered in that respect would be purely hearsay.

Not only did he not testify, but we certainly haven't heard from any of those other people, so it's double hearsay, really, that statement.

MR. GOURLEY: I could respond just briefly to that. I mean, the fact remains it is evidence of the

15:52:54 long-standing BLM interpretation, which itself is reflected in the CDC Plan which equated the two standards, subject to the same economic feasibility issue. And Respondent has produced nothing to suggest that, prior to the Leshy Opinion, that anyone within BLM or the entire Department had taken a different position. And, furthermore, FLPMA itself required implementation of the undue impairment standard by regulation, not by fiat or interpretation.

MS. MENAKER: I won't repeat all of our arguments in this regard, you will be happy, but just on that point, first of all, this E-mail cannot be interpreted as evidence of a long-standing BLM interpretation. I mean, that's clearly not what it says, but we have produced evidence to show that people had taken a different view, and that is all contained in the Leshy Opinion. Solicitor Leshy cited to the "Andrews" decision, for example, which didn't deal with this precise issue, but acknowledged that the term "impairment" was certainly different from unnecessary or undue degradation in a slightly different context.

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15:54:25 1 But we have also introduced and briefed the
2 Price and Thomas decision where you will recall a Plan
3 of Operations was denied under the undue impairment
4 standard.
5 As far as FLPMA's requirement, the Tribunal
6 will recall that even Solicitor--the Solicitor that
7 rescinded the decision acknowledged that the 1980
8 regulations clearly anticipated that the Department
9 would interpret the standard on a case-by-case basis
10 and not through regulations.
11 MR. McCRUM: Mr. President, if I could just
12 very briefly respond.
13 Ms. Menaker just referred to a Price decision
14 of the, I believe, the Interior Board of Land Appeals,
15 although she didn't specify which did involve one
16 attempt to apply an undue impairment standard at some
17 point the 15 plus years ago. That case, as we have
18 addressed in our briefs, involved very unique facts
19 not involved in the Glamis case. The land in question
20 was recommended by BLM for wilderness designation
21 under the Class C, which was land to be set aside for
22 permanent preservation.

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15:55:43 1 And, in that particular circumstance, there
2 was an invocation of an undue impairment standard in
3 that case upheld by the IBLA, but that the Myers

opinion states the view of the Department that that standard is not to be implemented without regulations.

That's all.

PRESIDENT YOUNG: Professor Caron?

ARBITRATOR CARON: I have another cluster of questions--these are a little longer--considering the calculation of value that has been done by both parties, and you will be happy to hear that the first is concerning swell factor.

So, I just want to confirm with Respondent at the end--Claimant, I'm sorry--at the end of the August session, we had a conversation--series of exchanges about the series of yearly numbers by Doug Purvance and whether the swell factor that was in those memos was calculated or not. And at that time I thought the response was yes, it's calculated, but I understand clearly--I think I understand from you in this closing week that it is not calculated. It is an assumed number.

15:57:06 Is that correct?

MR. GOURLEY: I had hoped we made it clear in August that it was assumed.

The swell factors are assumed. The only thing that could be called a swell factor that's calculated--and it's calculated from assumed numbers--is the weighted average. So, you took assumed numbers and weighted them to come up with what would be an assumed weighted average, is what it

really is, not a calculated weighted average.

ARBITRATOR CARON: Does Respondent have any comment to that?

MS. MENAKER: Just to note that whatever his calculations were--I mean, they were stated on this document, and there are no other documents that show any other different types of calculations.

ARBITRATOR CARON: Thank you.

If I could follow on that, in Mr. Sharpe's presentation, he had a projection, so it's under the valuation section by Mr. Sharpe. I think it's the tab in Respondent's binder called "Economic Impact," and it's the BLM--it's a page from Appendix A to the BLM

15:58:47 2002 Mineral Report, and it's a Navigant exhibit, Exhibit 28; and, in today's closing statement, you made a comment concerning the probity of this document. I just wondered if you could repeat that statement.

It's the third sheet after Tab 5.

MR. GOURLEY: What you have on this sheet are some rock densities, and then you have what is labeled "swell factor or on leach pad" at 22.3 percent.

Now, there is no way to calculate that number from any of the other numbers on this sheet or, indeed, in our experience, from the book. So, there is nothing that shows how that number or, indeed, what it means because there is no discussion here of why there would be a 22.3 percent for the leach pad and a

4.--and this is--4.8 for the waste dump.

So, normally, if you're taking the rock out of the mine and you're delivering the ore rock to the leach pad and the waste over to the waste piles where you are then piling on and there is a compaction that goes on, but there is nothing here that tells you what these numbers are, much less an average swell factor

for doing the entire project, which both parties have--both experts essentially agreed what you would use in trying to value it.

ARBITRATOR CARON: Thank you.

If you look--let me just ask a related question for a moment to make sure I understand this.

Under "rock density," the first two lines, it says "mineral"--maybe I should choose the next two lines--"mineralized rock in place," "mineralized rock loose." Then it shows so many pounds per cubic foot, so it's becoming less dense as it's coming out.

Is that reflecting this notion of swell factor?

MR. GOURLEY: Yes.

ARBITRATOR CARON: So, the difference between 115 and 148 is 33 pounds.

So, once it's loose, you have 33 pounds left over that has to continue to go somewhere else. That's the swell.

MR. GOURLEY: Yes.

ARBITRATOR CARON: If we look at how much

space 33 pounds would take, it would take, dividing it

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16:02:32 out, another 2.8 cubic feet or--in other words, is that a 28 percent swell factor? If you trust me for a moment that 33 divided by 115 is .28.

MR. GOURLEY: I believe that's correct.

ARBITRATOR CARON: So, the question I would have from this document is, if you go a little further down, it says "tertiary conglomerates," "tertiary in place," "tertiary conglomerates loose," and they don't seem to distinguish between compacted or gravel, the long discussion we had about the different types of conglomerates. Rather, above, when it looks at the source of this, it says "in-place rock density determined by weighed average from block model assignments."

If we look at that, that would be a swell factor of 25 percent for all conglomerates.

MR. McCRUM: Professor Caron, what we were referring to here is an appendix document in a lengthy BLM report that contains various information on rock density. There is no statement of an average swell factor, and we have an 80-page text of the BLM Report that makes no finding about the swell factor. It

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16:04:06 simply wasn't a finding that BLM made.

And this data, we don't believe, states an average swell factor for the site as a whole, and we have presented other information from this report that shows clearly that the dominant overburden at the site was known to be tertiary conglomerate that would have a swell factor of 33 percent. That's the best answer I could give you.

We have got data in this BLM Report. We don't have any BLM expert who has been put forth by the Respondent to provide detailed explanations about these raw data points in a single appendix document in a very lengthy report.

MR. GOURLEY: The bottom line, Professor Caron, is we tried to make sense of these numbers and couldn't.

ARBITRATOR CARON: Thank you.

Does the Respondent have any comment?

MS. MENAKER: My only comment here is that Glamis has repeatedly referred to very general statements made some by BLM saying that, typically speaking, a swell factor can be in the range of 30 to

16:05:11 40 percent, and we showed this that when BLM looked at the Imperial Project specifically and actually looked at the data, that it reached a swell factor in line with the swell factor that Glamis did, which was 23 percent.

And here, when they say they don't know where this data came from, it says very clearly here that

the data was compiled from Glamis's metallurgical work, and then it was verified by BLM.

ARBITRATOR CARON: Thank you.

If--this is a more educational question just for a second. So, what we have seen is--what I have experienced is it's somewhat difficult to calculate the costs, projected costs, of complete backfilling and that there are differences between the parties on this point. But, at the same time, during the passage of the emergency regulations, there are a number of statements the Tribunal has been pointed to, where the State of California apparently has concluded that it would render the Project or is stating it will be cost-prohibitive. Someone is stating it. An official or an employee--someone has made that statement.

16:06:33 Is there a sense from either party of how they reached that decision or that conclusion or opinion?

MR. GOURLEY: The only--we don't have documents that show they did a calculation, although the State of California also believed that 35 percent, the Church factors for this kind of an area which, as some of the things that Mr. McCrum went through showed that at other mines in the--this part of the area, you still have predominantly tertiary cemented conglomerate, that you're looking at an average somewhere between 30 and 40 percent.

Looking at the total amount of rock that's

going to get removed and knowing you're going to add the expense of having to put it all back in, that's what leads people to believe that it is cost-prohibitive, but we can't tell you that they concluded that as a factual matter or it was more just that everyone understood, given the economics of mining, that that was the effect. And certainly that was what people were telling the Board.

ARBITRATOR CARON: Does Respondent have

16:07:55 anything?

MS. MENAKER: Yes. The only statement with which I will agree is that's what people were telling the Board. The legislators are not geologists. They are not necessarily--they don't have the expertise in this. We have seen no documents showing that anyone in the legislature or on the SMGB Board undertook an analysis, certainly not of swell factors and other things, to determine the costs of complying with the regulations.

Instead, what we do see and what is throughout the record is that Glamis and the Mining Association were lobbying very heavily against these measures. It was in their interest for these measures to be promulgated; it would increase the costs. And they went around telling everybody this will render this uneconomic. This will put us out of business. Don't do this. Those were the statements that they were making, and those statements became reflected in

some of the documents you have seen, but there is no analysis behind those statements.

And so, to the extent that everyone so-called

16:08:58 "understood it," I don't think that's--that certainly hasn't been shown; but, to the extent that anyone in the political process was saying these things, it's because they have been told these things by Glamis and other opponents of the measures.

MR. GOURLEY: If I may respond.

ARBITRATOR CARON: Yes, please.

MR. GOURLEY: Ever so briefly.

First of all, the sequence is wrong. The cost-prohibitive was before, even before the regulations went into effect, and you go back to the statements of the internal State of California documents.

In any event, the National Science Foundation study they concluded back in '77-79 that in most cases it would be economically infeasible. That was one of the grounds. They have said mandatory backfilling shouldn't be employed.

And we also pointed to any number of Plans of Operation, Records of Decision on Plans of Operation in the California Desert where again complete backfilling was considered and found to be

16:10:13 uneconomical, just as it was in the Mineral Report in September 2002 at the Imperial Project which, again, is before any of these California measures.

So, it was not a lobbying effort. It was facts available to these decision makers that would lead them to conclude this was an effective way to stop the mine.

ARBITRATOR CARON: I have two more valuation questions. The next one relates to the requirement of financial assurances, and here I'm just uncertain of the Claimant's response to a certain argument raised by the Respondent, namely that the Behre Dolbear Report is incorrect in allocating the costs of the financial assurance to the first year rather than spreading it out over the Project, and I just wanted to be clear on your response to that argument.

MR. McCRUM: What Behre Dolbear states is that, from their experience, they understood that cash backing would be required for financial assurances. And what they then project is not that the full amount of the financial assurance would be in place in year one, but their way of modeling the economic impact of

16:11:43 a cash-based financial assurance was to put in a sufficient amount of money in year one that would actually grow with a rate of return that could be expected on that cash--in the bank to grow to an amount that would be needed to provide the full amount

of the financial assurance when it was--when it was needed for the full reclamation. So, they do not assume that the entire full amount of the estimated reclamation cost would be due in year one.

In fact, that is a conservative way of looking at it that might actually underestimate the cost because the agencies may well say that the financial assurance--the full amount would have to be posted in year one. And while Navigant has gone through an engineering analysis, an attempted engineering analysis, to show how that might be phased in over time, Navigant's expert has said that he had no experience in financial assurances prior to this case.

And interestingly, in making that phased assessment, Navigant does not rely on engineering determinations of Norwest.

16:12:55 ARBITRATOR CARON: Does Respondent have a comment?

MS. MENAKER: Putting in--and I think the model shows $61.1 million in year one and allowing that to grow in interest so it reaches the 90 or so million is not an economically wise way to account for these costs because, as we've--when you do the modeling--and Navigant has this in their report--for a few years the costs are so small that you would never put up that much, even assuming it had to be cash, which we have shown it hasn't, you would never put

that large amount of cash at year one. It would take several years before you needed to reach anything amounting to that.

And, in fact, you would certainly use another type of instrument or for several years if you had to put cash to account for it, because it's not a straight trajectory because, as you are mining in certain circumstances, you are also reclaiming. So, it's not as if your costs go all the way up and in the final year you have this big cost. I mean, you are incurring it during time it could be plateauing, it

16:14:14 can be moving along the way.

And this is in--if you take a look at Exhibit J to Navigant's first report, they provide the details on this issue.

ARBITRATOR CARON: Thank you.

So, the last question has to do with Real Option Value, and what I took the slide you put up, and the quote--I think the quote was along the line of this is not like a light switch where you switch it on and off, and what I took from that was that the mining industry requires a fact-specific investigation partly about the costs you expect, the price of gold, the stability of the price of gold, and how long it will take to get to production. So, there is a time limit involved here related to the volatility of the price, which makes Real Option Value difficult.

Earlier, I referred to that earlier statement

concerning the small mine concept, in part--let me just say the question I'm having is: Are there, in practice, ways to mitigate concerns about volatility in the price? It seems like the small-mine concept might do that a little. It's all fact-specific to

figure out; that I would accept.

But the second, what this real question is about is, I had not focused before on the slide put up by Mr. Sharpe about I think it's called "forward sale contracts," which would seem to be, A, I'm not sure I understand what those contracts are, so I'm asking both parties to explain the practice; but, if it's some sort of forward sale assurance of price, then that's a way to protect yourself against this volatility element.

So, does that somehow--how does that work with this Real Value Option, and how does it relate to the light-switch analogy?

MR. McCRUM: Professor Caron, the importance of the light-switch analogy is simply that, with a valuable commodity like gold, which fluctuates in price, as we can see clearly from the historical record, and given the fact that it will typically take two to three years or, in some cases, four years to permit a mine, one cannot reasonably plan a mine to commence production with a hoped-for production or hoped-for peak in the price. So, therefore, that is

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16:17:01 why there is a need to look at long-term price averages in terms of making investment decisions.

With regard to the issue of--I'm sorry, the second aspect of your question? The option value.

ARBITRATOR CARON: The question is whether--

MR. McCRUM: That is a concept that companies in the gold industry were looking at when prices were particularly low. There are some documents in the record that Respondent has pointed to where Glamis was considering it. In some cases, the fact is Glamis never did pursue that option, and it was prudent not to do that. And, as Behre Dolbear has stated, companies that have engaged in forward selling have found that it was not--it was not a prudent thing to do, and those companies had been punished in the marketplace that had engaged in that. Glamis has not engaged in it traditionally in the past several years.

In the case of a project like Imperial, were you to engage into a forward-sale contract, you would obligate yourself to sell gold from that property in the future, despite significant question about whether this project could actually be successfully permitted,

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16:18:22 so it really would be an imprudent option to consider.

And Behre Dolbear has spoken to that in its reports.

ARBITRATOR CARON: Thank you.

Does Respondent have a comment?

MS. MENAKER: Yes, just briefly, that forward-sales contracts here, we have shown and Navigant introduced material, and we have shown that they are used in the industry, and they can certainly be used to hedge against volatility in the commodities market for gold like any other commodity. And there--I mean, Claimant talked about sometimes companies using it when the commodities price was low and hedging that the price might increase in time, and they make a business decision to do that, and that may make it economical to go forward.

By the same token, when the prices are going up--and we have evidence in the record to show when gold prices were going up--that without the forwards contracts, companies were able to achieve--Glamis's own company officers said prices that were around, I think, 40 to 50 cents--40 to $50 in excess of the spot

16:19:29 price.

Now, for Claimant to say that companies that have engaged in this type of activity have been punished and it's not prudent, no one can make some sort of across-the-board characterization. I mean, this is something that is done commonly with commodities. And each company will have to decide for itself in the prevailing environment whether it makes sense to proceed as such, and I'm certain there are

lots of companies that are reaping great benefits from having engaged in this type of practice. Others may have made bad business decisions just like investing in the stock market, which could be good or bad.

But the indicators anyway show--all of the indicators show the expectation that gold will increase as Glamis's CEO has said on record numerous times, in which case this is certainly an opportunity to tie in to ensure that you're going to receive a high price for gold that it may be buying in the future and to hedge against any type of possibility that their price might decrease.

So, certainly, we have talked about the real

options value at length, but we think it's well supported.

PRESIDENT YOUNG: I want to ask just a couple of questions again related to valuation, and I think these are largely directed towards Claimant, but Mr. Sharpe talked yesterday about--I believe it was--I'm pretty sure it was Mr. Sharpe, but the difference between pre- and post-tax rate of returns, saying analysis should certainly be on post-tax as opposed to pre-tax. Do you have any comments on that?

MR. GOURLEY: The parties agree that the discounted cash rate of return should be applied to after-tax earnings. What they disagree on is whether the two rates--and we have a slide that we could put up to help demonstrate this--it was in the materials

we passed out this morning--we just skipped over it in a hurry.

Oh, we don't. But, if you have the books from this morning, it was, I believe, the fourth--it was the sixth slide. But what it does is put the two different discount rates that the experts have done next to each other.

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16:22:21 Now, what Behre Dolbear did was--and this is what they do in all the valuations, the mineral property valuations, that they do; and, if you look at Navigant Exhibit 106, at page 35, you would see that they did it in that Greek mine situation. They take a series--they identify a series of risks; some of those are geologic, some is development, market risk, country risk none of those are specific--they're all pre-tax. There is no tax element in any of those factors.

So, once they have calculated what the risk associated with the Project is they then apply to get an after-tax rate of return, they discount that--they divide it by using this lurch formula to convert the pre-tax to the after-tax.

Now, if you look at what Navigant did, they sort of combined two methods. They say it's a CAPM method, but the CAPM method is really the piece which is the equity risk premium applied to the beta. Now, that is an after-tax rate. It's considered an after-tax rate as the literature that Navigant has

22 included because you are looking at what the market

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16:24:02 1 would pay for a stock in a company.
2 Now, that's also its flaw for whether you can
3 use it to value a mineral property. But then to fix
4 that, they then just assign a 3 percent project risk
5 premium, which they don't identify exactly where that
6 comes from, but that's not a market-based risk
7 premium, so it's not an after tax--it's not looking at
8 it from a corporate after-tax purpose. So, you would
9 need to factor that one, just as you would the real
10 risk-free rate, which is normally treasuries, which
11 are not tax-free.
12 So, if you actually took their numbers, which
13 is the 4.2 percent, which is really after-tax, but
14 then may convert--converted the 2 percent, 3 percent,
15 added that 5 percent, and two took two-thirds of that,
16 which is the one-third tax rate, effective tax rate,
17 that Behre Dolbear did, you would break that down to
18 3.3. When you add that to 4.2, that's 7.5 percent.
19 Not far off the 6.5. And, even there, there is some
20 double counting.
21 Because while the equity risk premium doesn't
22 actually--it's got a problem, as the literature points

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16:25:23 1 out, in that it moderates the risk. When you have a

company, the company has a whole series, unless it were a single mine company, they have one mine in one area and another mine in another area, and they're all going to have different risk profiles. And when you have got a bunch of them, it moderates it out. But you are still counting, as Mr. Sharpe pointed out yesterday, it includes both systemic and unsystemic. The unsystemic are those that would be specific. So, there is actually still some double counting in adding the 3 percent.

And we don't know what those numbers would be, and so we don't know what kind of adjustment to make, but what you have got is, in essence, an overstated rate because what Navigant ended up doing was treating the whole thing as if it were after-tax and it was all CAPM, which it is not.

PRESIDENT YOUNG: Do you have any response to that?

MS. MENAKER: Yes.

We don't dispute that Behre Dolbear has done this--that is, that they have further discounted their

16:26:40 discount rate to account for corporate taxes--but we maintain that it's just completely wrong. There has been no other evidence introduced that this method had been used by anyone other--anybody else, but we introduced ample evidence that Navigant has that this is incorrect.

We, yesterday, showed you again this industry

paper that says it's crucial that the discount rate derived from the build-up model--that's Behre Dolbear's model--be applied to the appropriate income stream that is after tax flow, and that simply wasn't done. If you look at the valuation reports, Navigant made this criticism in the report, in its first report; and, if you look at Behre Dolbear's report with its reply, it did not say anything--anything--about this whatsoever in its reply. It had no response. And certainly it didn't testify on this point.

And we have just introduced abundant evidence that it simply makes no sense to further discount a discount rate to account for corporate taxes, whether you are using the buildup model or the CAPM model.

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16:27:57 PRESIDENT YOUNG: The one area where I see the biggest disagreement really relates to equity risk premium. Can you address that.

MS. MENAKER: If you just give me one moment.

(Pause.)

MS. MENAKER: On that point, if you look at the two expert reports, the risks used are the same. And when you look through the risks, whether they're used in the buildup model or the CAPM model and you look through them and then you add that up, you arrive at the same rate.

So, adding up whether you do it from, you know, either method, they're arriving at the same rate

taking into account the risks inherent in a venture such as this one.

And then the only different accounts--the only difference is whether you then adjust that rate to account for taxes, which that is just, as we have been saying, just doesn't make sense, and we have shown that that is just not an accepted method.

PRESIDENT YOUNG: Thank you.

If I can ask another question, again, I think

16:29:50 this may go to the Claimant, but obviously I would be happy to hear Respondent's response as well, which is one of the questions, of course, is this profitable, and there are two ways of thinking about this. One is it's a 9 million-dollar negative number, but it's possible that sort of as gold prices rise, it may, if appropriately hedged, be a positive number of some sort. Is there anything in the record that indicates what rate of return, either on equity or investment, that Glamis generally seeks or that gold companies generally seek? Is there anything in the record that points us to what rate of return gold companies really consider a minimum?

MR. GOURLEY: There is only theoretical discussion of that. There was--there was no Glamis document.

If you looked at the April 2 or April 2002 document, which is Navigant Exhibit 11 or 13--I get them confused--they, for determining whether they're

going to go forward, their general approach is for projects in the United States is to use a 5 percent discount rate. But what internal rate of return that

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calculates to, I don't know, and I don't know that that was ever brought out.

MS. MENAKER: Mr. President, if I may just comment very briefly on that, in our view, that issue, it would be completely irrelevant because here, if it's shown that the Imperial Project retained value, as we think we have shown, whether or not any particular company thought as a business decision that it was worthwhile for it to go forward with that project or if it could have decided it had a better use of its capital--I mean, all companies have a limited amount of capital and have to make business decisions as to where they can get the best return, the fact that they or any company makes a business decision that it could get a better return elsewhere does not mean that the investment was rendered worthless.

And again, for an expropriation, they have to show that the measures deprived the investment of all or virtually all of its economic value. And so, it's simply irrelevant as to whether that investment would have produced a rate of return that would have

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16:32:43 1 motivated it to go forward with that project as
2 opposed to a different project. In our view, it's
3 really two separate inquiries. But we agree we
4 haven't seen evidence--we agree that we haven't seen
5 evidence in the record showing what their rate of
6 return was, other than, I guess, the one document
7 where we did see a certain document where it was
8 a--they concluded that the value would be $1.1
9 million. That was going--this was on October 17th,
10 2000, and that was using 5.--that would have resulted
11 in a 5.9 percent internal rate of return, and you will
12 recall that on that document, the Glamis suggested
13 that the Project was economic. And, in that sense to
14 say it was economic that it was worth their while to
15 go forward, that it would produce $1.1 million in
16 profit, and that was a 5.9 percent rate of return, and
17 that's in Exhibit 39 to the Navigant Report.
18 PRESIDENT YOUNG: But you did use the word
19 virtually without value. Where do you withdraw the
20 line? A hundred dollars? A thousand dollars? I
21 don't mean to be facetious about that. I mean to say
22 at some point or another, even by use of that word

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16:34:09 1 there is something in there that requires some return.
2 I mean, it's not a dollar, I take it. If you just
3 give me a sense--I certainly understand the notion
4 that they may choose that 5.9 percent isn't enough,
5 but others may say that's just fine, but at some point

even the Government would agree for a company in Argentina that the Government, having made it so the company could only make a dollar profit would perhaps be a virtual taking, what guidelines would I have for thinking about that?

MS. MENAKER: Unfortunately, it's very difficult for us to offer any more than that because if you look at even the U.S. Supreme Court jurisprudence, you know, that's an issue that constantly arises. And when there are tons of Law Review articles written about this, and that there is simply not a line drawn between when it's all or virtually all, like is it okay if it takes away 99.99 percent of the value, is it okay 95 percent of the value, and the Court has repeatedly refused to draw any kind of bright line.

We accept that if there was property and the

16:35:34 Government did something that really left it worth--if it was worth millions before and it literally had $1 of value, no one would suggest that you could succeed in defeating an expropriation claim by saying it didn't take away all value. But I think what you do is you look at the cases that show that where expropriation claims have failed because the property at issue retained value, that--and the diminishment of that value was deemed insufficient to result in a taking, and there are some NAFTA cases in that regard, certainly the GAMI case, the Pope & Talbot case, the

Argentina case that we cited yesterday, the LG&E case.

And again, it's a hard to put a number on those, but some of the things in the Argentina cases in particular, what's notable is that in those cases, the Tribunals have almost universally, and I think universally have rejected the expropriation claims in those cases, and they have looked at the indicia of ownership, and they found that the claimants in those cases retained control of their investment. They retained management control, they were in possession of their investment. And then they said just that the

16:36:58 economic impact on it was insufficient to constitute an expropriation, and there we would contend that the impact of those measures in some of the cases seem to be greater than what we are talking about here. But that's the guidance that we could give you.

PRESIDENT YOUNG: Thank you.

Claimant?

MR. GOURLEY: If I can just make a few observations, the first is that the internal rate of return of the gold mining industry would help define whether a willing buyer, what a willing buyer would pay. There is--a willing buyer will not go into a project of marginal profitability, so there is some value where it shows positive, and yet no one would still buy the property because of the risk associated with it are insufficient. It doesn't give you a bright line or tell you is it a million dollars or $2

million, but when you start at 49.1 and you reduce the Project to below five, you have clearly got a significant deprivation, if not a confiscatory, a categorical taking, which you clearly have when it's negative 8.9.

16:38:21 MS. MENAKER: If I may just respond just with one sentence, is that in a fair market valuation, that does consider the risks, and again, I just remind the Tribunal that Glamis's own internal documents show that the Imperial Project at $1.1 million was economic. Here, the valuations we have shown is just what the two-pit mine, not even the third pit, it would have been $9.1 million. That's certainly more.

So, if it's economic at $1.1 million, it hasn't been all of the value or virtually all of the value hasn't been taken away from it if it's valued at $9.1 million.

MR. GOURLEY: Since that was more than one sentence, I'll just--it was a run on, but still I'm not sure it was one. I will only point out that you also have to look at the date of the expropriation, and so, to look at what the market would be willing to invest when you're at a 250 or 220-dollar or 270, a market low, which is what was happening in the nineties, the late nineties, is different from what you look at at 325, 326 an ounce in terms of whether you are willing to go forward.

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16:39:46 1 MS. MENAKER: That just again, that confuses
2 the issue of the rate of the return with the value of
3 the property and whether an individual company decides
4 for business reasons whether it wants to go forward
5 with something with gold prices skyrocketing, and it
6 has many different options available to it. That's a
7 completely different inquiry as to whether the
8 property retains value.
9 PRESIDENT YOUNG: Well, all this brings us
10 back to the date of expropriation, so I will ask
11 Professor Caron if he has more inquiries.
12 ARBITRATOR CARON: I'm down to my last one,
13 and it's short. It's in two parts to the Claimant,
14 and then I will ask the Respondent if they have any
15 comment.
16 This morning you raised a certain argument
17 concerning, I guess, the relationship between the
18 requirement of complete backfilling and its purpose,
19 and the example--what you stated was, I believe, that
20 if the goal was to preserve artifacts on the land,
21 then the mining and then putting it back would not do
22 that. Is that correct?

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16:41:13 1 MR. GOURLEY: Actually, our point was a
2 little more than that.
3 If the goal is to preserve the cultural

significance of the site, and again much has been written, and we have seen in these various reports, EISs and EIRs, that it's the connection between the archeological resources and the spiritual use of that property; that if you sever that, in effect destroys the cultural significance. So that by removing a--if the goal is to preserve, then a complete backfill requirement doesn't do anything to help that because you're still going to have disturbed the entire area, and, in fact, as we have also shown in our Memorials, if you require site regrading, then you're expanding. As the January 2003 showed, your area of disturbance is going to increase.

So, you're, in effect, disturbing more of the area.

ARBITRATOR CARON: My first question is, could you spend a moment telling me--advising the Tribunal what specifically that argument relates to as an issue. I seem to recall your saying, for example,

16:42:42 therefore, it's not a compromise. The enactment is not a compromise between competing views.

So, are you trying to point us to the intent? Or what is the relevance of the point?

MR. GOURLEY: It's relevant to both the 1110 and the 1105 analysis in evaluating whether the measure is objectively reasonable; it's a rational implementation of the goal that the State of California espouses.

And it also goes to evidence of the discriminatory or targeted nature. In fact, is this measure merely a guise under which they are achieving a different end, which is also what we contend.

ARBITRATOR CARON: So, the second question is whether you can--my recollection of the August hearing was another goal, and so I want you to just extend what you're saying or apply it to that.

The other goal as I recall from your presentations of the site--and I will be careful here not to describe too much--but that the primary archeological concerns were at some distance from the site or closely adjacent to a part of the site, but

16:44:14 not on the site. There are things on the site--I'm not saying that, but some primary ones--that would, therefore, be protected or would not be disturbed either way, but that, and then I don't think this was your presentation, but toward the end there was a different argument that what is preserved is the view from, in time, the view angles from those locations that would be undisturbed.

MR. GOURLEY: Certainly in the Federal review of the project in the nineties, there was some dispute, I think, still, as to whether--there is no question that there are archeological and circles and trail segments that would be destroyed by the pit. There was some question as to whether and to what extent any of those extant trails were, in fact, the

Trail of Dreams, if that is, in fact, a physical embodiment or simply a spiritual one.

But Dr. Cleland's view was that it would destroy the physical dream, and what we have seen--physical Trail of Dreams or some segment of it. It would certainly break the trail, which has been another concern expressed, and we saw that a lot in

16:46:00 the Baja Pipeline, that you have got these significant trail segments, some of which aren't connected right now, but yet you stick something through it, and it destroys it.

So, I don't know if that answers your question, but that's the state of the record.

ARBITRATOR CARON: Not quite, but I will go the Respondent for any comment.

MS. MENAKER: On those points, first the archeological resources that are at the site, the ones Professor Caron and I think you're correct that there are important archeological resources that are outside of the disturbance of the site such as the Running Man geoglyph, and that has--that's in the record, but the archeological resources that are on the site, some of which would be destroyed, those evidence past ceremonial use, but their destruction doesn't prevent future ceremonial use of the land if the area is reclaimed. And there is evidence in the record, voluminous evidence in the record, showing that the Quechan were concerned about the mining project

because it would destroy these view sheds that are

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considered sacred for them and that would impede their ability to practice their religious in the area.

And there is, like I said, evidence in the record, and specifically the Tribunal may recall the letter from the Quechan Cultural Committee stating that waste pile rocks of 300 to 400 feet would destroy the area's use forever.

They also had indicated a concern, and Dr. Cleland testified about this, about the area's sacredness as a teaching area, and that it was imperative that the area retain a sense of solitude and that their landscape, they would be able to actually go to that land and use it as such.

And so, in that respect, it cannot be said that the--and I would just refer the Tribunal to the Baksh Report that summarizes these issues--that the goal of S.B. 22 was not to preserve specific archeological resources on the site, but rather was to ensure that the destruction that open-pit mining caused on Native American sacred sites and on Native Americans' ability to practice their religion was mitigated by these measures, and these measures are

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certainly rationally related to those goals.

But again, as far as the relevance of this inquiry, I would just refer the Tribunal to my discussions of that this morning, where that's really not the standard that it ought to be looking at. I think the ADF Tribunal shows that.

And also the S.D. Myers Tribunal where it says, you know, when you look at legislation, Governments can act for a host of different reasons. It's not a Tribunal's direction in evaluating a minimum standard of treatment claim to see if the Government proceeded maybe on the basis of misguided policy or something like that.

So...

MR. GOURLEY: If I can just, because I didn't address the view shed point, the Quechan, if you go back even to that Exhibit 96 that I referred you to this morning, they have consistently maintained that any mining activity would destroy the religious significance of the site, that backfilling is not anything that would cure it. The view sheds, our point on the view sheds has always been that that is

16:50:05 exactly what the no buffer zone protection was, that you could not relate an item outside, a project outside to connect it to outside--to withdrawn area, wilderness areas which were Picacho Peak and Indian Pass, and that's what that really does.

MS. MENAKER: Here again, quite apart, I mean, just for the same reasons that Glamis would have

lobbied that it would have liked no reclamation measures to be applied to it, the Quechan legitimately argued that it would have liked no mining to go forward, but as we've repeatedly said, it's the job of the Government to take different interests into account.

And regardless of whether the Quechan--regardless of their objections to the Project, it was--can't be said to be irrational for the Legislature, given the evidence before it, to have determined that the reclamation measures that it was proposing for mines that were located within the vicinity of Native American sacred sites would help meet its objective of ensuring access to those sites.

And I won't go through our buffer zone

16:51:36 arguments again, but you understand that. I can see from your nods, hopefully the Tribunal--we briefed that, and I think argued that at length, but that's certainly not what this legislation or regulation was doing. I think the buffer zone language just has no relevance to these measures here.

PRESIDENT YOUNG: It appears we have exhausted our questions, and I'm sure we have exhausted all of you, so we will conclude the hearing at this point. But if I may just conclude with thanks to counsel on both sides, I think you have been enormously professional and helpful in enlightening us on the myriad details and legal arguments on this

case. You have conducted yourself with decorum and civility, for which we are also deeply grateful. That's a greater accomplishment than you might even know, so we do appreciate the very good work. It's been very helpful.

And the Tribunal will now take this under advisement. We will have an opinion for you by the close of business on Friday.

(Laughter.)

PRESIDENT YOUNG: Thank you.

(Whereupon, at 4:53 p.m., the hearing was adjourned.)

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CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

_____

DAVID A. KASDAN