IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

GLAMIS GOLD, LTD.,

*Claimant/Investor,*

*-and-*

UNITED STATES OF AMERICA,

*Respondent/Party.*

**COUNTER-MEMORIAL OF**
**RESPONDENT UNITED STATES OF AMERICA**

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## TABLE OF CONTENTS

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# COUNTER-MEMORIAL OF RESPONDENT UNITED STATES OF AMERICA

In accordance with the Tribunal's Procedural Order No. 8, dated January 31, 2006, and the Tribunal's Letter dated April 25, 2006, respondent United States of America respectfully submits this Counter-Memorial to the claims of Glamis Gold Ltd., which it submitted on behalf of its enterprises, Glamis Gold, Inc. and Glamis Imperial Corporation (collectively, "Glamis").

## PRELIMINARY STATEMENT

This case is about the efforts of the federal and California governments, through regular and democratic processes, to minimize the damage to the environment and cultural sites of significant religious importance to Native Americans posed by open-pit gold mining. Those efforts, reflecting well-established background legal principles and representing the culmination of a number of trends impacting what is one the world's

most highly regulated industries, were reasonable, restrained and respectful of competing interests. Rather than comply with the requirements that emerged from these efforts, Glamis chose to forgo its pursuit of an acceptable mining plan to exploit the still-valuable mineral rights it enjoyed in the Imperial Project on federal lands. By submitting this claim to arbitration, Glamis opted instead for a strategy of seeking to extract a windfall payment from the U.S. government that, at the time of submission, offered the possibility of a greater and quicker return on its investment.

Glamis proposes to mine such low-grade ore that it plans to excavate approximately 400 million tons of ore and rock to produce an estimated 1.4 million ounces of gold. Glamis's plan envisions leaving a permanent open pit measuring more than 800 feet deep, and more than one-mile wide, with waste piles up to 300 feet high and one-mile long. It proposes, moreover, to mine in a pristine area within the California Desert Conservation Area widely-known to contain sacred and historical sites of great importance to Native Americans. There is no shortage of archaeological data evidencing the area's historic use by the Quechan Indian Tribe for cultural and religious purposes. Numerous archaeologists and several government agencies all concurred with the Quechan's assertion that Glamis's plan, as proposed, would have irreparably damaged cultural resources in its vicinity and would have precluded the sacred site from being used for cultural and religious purposes by the Quechan in the future.

Glamis now accuses the United States of having violated international law, and demands compensation because: (1) rather than rubber-stamping its plan of operations, the federal government struggled with and took the time necessary to address the competing concerns implicated by Glamis's proposed mine; and (2) the State of

California, responding to democratically-expressed concerns, enacted regulations and legislation imposing reclamation requirements on open-pit metallic mines.

Glamis's claims have no basis in law or fact, and should be dismissed in their entirety. The federal government diligently processed Glamis's plan of operations over the course of several years. An initial decision that the Imperial Project could not be reconciled with the prerequisites of federal law, made after exhaustive and fully transparent consideration, was rescinded after being in place for only a few months. Renewed processing of Glamis's proposed plan of operations then recommenced in earnest. Only Glamis's announcement that it considered its mining claims to have been expropriated cut that processing short. Glamis falls far short of meeting its burden of demonstrating that the federal government measures it challenges, some of which occurred too long ago to be considered in this arbitration, either expropriated its investment in its unpatented mining claims or otherwise breached the customary international law minimum standard of treatment.

Likewise, the California measures at issue here, namely: (1) amendments to the California Mining and Geology Board's reclamation regulations (the "SMGB regulations"); and (2) California Senate Bill 22 ("SB 22") in no way violate international law. The amended SMGB regulations and SB 22 are two distinct, if overlapping, measures that require backfilling of all open pits and recontouring of the land after cessation of metallic mining activities.

The SMGB first amended its reclamation regulations on an emergency basis in December 2002 for the immediate preservation of the public welfare. Threatening the public welfare was the potential approval of any additional open-pit metallic mine in

California, including Glamis's proposed mine, that would not be subject to these reclamation requirements. Existing mines not subject to such requirements were found to have left mined lands in an unusable condition and posed threats to the environment, as well as to public health and safety. Glamis had every opportunity, which it took, to participate in the democratic process that led to the adoption of these reclamation requirements. That its position failed to prevail does not grant it any right to seek redress in international arbitration.

The California Legislature in April 2003 enacted SB 22, which contains reclamation requirements similar to those in the SMGB regulations, but is intended to accommodate the Quechan's free exercise of religion and to otherwise protect Native American sacred sites from irreparable harm. SB 22 was enacted nearly five months *after* the date on which Glamis alleges its mining claims were expropriated. SB 22, therefore, cannot have caused Glamis any additional harm.

Glamis has a property interest in its unpatented mining claims, which it retains in full. What Glamis does not have – and never had – is a right to have any particular plan of operations or reclamation plan approved. Glamis remains free to mine upon obtaining federal government approval of its plan of operations as long as it backfills all open pits and re-contours the land after cessation of mining activities. Glamis's unpatented mining claims, however, never included the right to mine in any manner which interfered with the state's ability to accommodate the free exercise of religion, injured Native American sacred sites or endangered the environment or public health and safety.

California – both the SMGB and the Legislature – had good reason to adopt their respective acts. Furthermore, any reasonable operator in the mining industry would have

been on notice that California might regulate or legislate to accommodate free exercise, or to specify standards for protecting Native American sacred sites, the environment and public health and safety. This is especially so considering that long before Glamis acquired its investment in its mining claims, California had enacted statutes protecting Native American sacred sites and requiring mines to be left in a usable and safe condition. Moreover, while Glamis's proposed mining plan prompted the executive and legislative branches of the California government to adopt the reclamation requirements Glamis now challenges, Glamis is not the only mining company potentially affected by those requirements. Two other mining companies have inquired of, and been advised by, responsible California officials or agencies that the regulations would apply to their proposed mines or mine expansions.

And while complying with California's reclamation requirements will make mining in California more expensive – as does complying with any of the multitude of regulations pertaining to open-pit mining – those requirements would not render Glamis's proposed project unprofitable. Glamis's assertions, to the contrary, made before this Tribunal are

The United States' valuation and mining experts have reached a very similar conclusion after conducting an independent valuation of the mining claims, both before and after the reclamation requirements were adopted. With gold prices having more than doubled since the reclamation requirements were enacted, Glamis's unpatented mining claims are worth more than $150 million today. Glamis's assertion that its

mining claims have become even more unprofitable with the passage of time is simply absurd.

Below, we begin by setting forth the relevant facts by describing the multitude of federal and state laws that govern the highly regulated regime of mining on federal lands in the United States, as well as the various federal and state laws that protect Native American cultural and religious sites. We then describe Glamis's proposed mining project, including the process of open-pit cyanide heap leach mining and its attendant environmental consequences. Next, we detail how the proposed plan of operations for the project would have resulted in irreparable damage to sites of cultural and religious importance to the Quechan Tribe, and show how those sites were well-documented long before Glamis located its mining claims. We conclude the fact section by describing the federal government's actions in processing Glamis's plan of operations and the California legislation and regulations that Glamis challenges.

We then begin our argument by demonstrating that Glamis is time-barred from challenging several of the measures identified in its Notice of Arbitration as having violated the NAFTA. We next address Glamis's claim that the California measures expropriated its investment. *First*, we show that Glamis's challenge to the California measures is not ripe, because Glamis was not in a position where either of the measures could have been applied to it.

*Second*, we demonstrate that Glamis's property interest in its mining claims did not – and never has – included the right to have any particular reclamation plan approved or to mine in any particular manner. We then show that both Senate Bill 22 and the amendments to the SMGB's regulations merely articulated background principles under

the U.S. and California Constitutions, as well as California property law and, thus, cannot be deemed expropriatory.

*Third*, we explain that even if the Tribunal were to find that Glamis had a property interest in mining in the prescribed manner, a balancing of the factors traditionally applied in indirect expropriation cases – *i.e.*, the severity of the economic impact, the investor's reasonable investment-backed expectations and the character of the action – all lead to the conclusion that no expropriation has occurred.

*Fourth*, we demonstrate that Glamis's claim that the federal government expropriated its investment is meritless.

*Finally*, we respond to Glamis's minimum standard of treatment claim by first demonstrating that NAFTA Article 1105(1) prescribes the customary international law minimum standard of treatment and that the government actions at issue conformed to that standard. We then show that Glamis has failed to demonstrate that the obligations which it seeks to have the Tribunal impose on the United States are part of the customary international law minimum standard of treatment. We conclude by demonstrating that even accepting the rules that Glamis proposes, the federal and state actions did not violate any such standard.

## FACTS[1]

### I. Mining On Federal Lands Is Heavily Regulated By Both Federal And State Law

Mining on federal lands in the United States is subject to a network of federal and state regulation. The primary federal law governing the establishment of mining rights

[1] Throughout this submission, references to the location of factual evidence submitted by the parties in their respective factual appendices is indicated by "[volume number] FA tab [number]."

on federal lands in the United States is the Mining Law of 1872 ("Mining Law").[2] The Mining Law allows United States citizens to enter federal lands, stake claims, and extract certain valuable minerals.[3] It also granted mining claimants an opportunity to purchase fee title to the lands encompassed by their mining claims.[4] The Mining Law originally applied to a wider array of minerals, but today applies only to hardrock minerals, including metallic minerals, such as gold, silver and copper; and industrial minerals, such as gypsum.[5]

### A. Congress Amended The Mining Law In 1976 To Strengthen Protections Of Environmental, Cultural And Archaeological Values

The Mining Law defined how citizens could establish mining rights on the federal lands, but did not provide for any federal management of the mining operations or their surface impacts. Over time it became clear that it was necessary for Congress to authorize federal oversight of mining operations on the federal lands to curb mining's harmful effects and "reflect the nation's changed view toward land and minerals."[6]

Congress passed the Mining and Minerals Policy Act ("MMPA") in 1970. The MMPA established the policy of the federal government to encourage mining, but in a

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[2] Mining Law of 1872, Rev. Stat. § 2319 (1878); ch. 152, § 10, 17 Stat. 91 (codified in scattered sections of 30 U.S.C.). Congress last enacted the Mining Law as part of the 1878 Revised Statutes; however, for ease of reference, the United States will cite to the Mining Law's codification in the U.S. Code.

[3] 30 U.S.C. §§ 22, 23, 26 (2000).

[4] *Id*. § 29.

[5] 43 C.F.R. § 3809.2(e) (2002). The Mining Law provides that "all valuable mineral deposits … shall be free and open to exploration and purchase." 30 U.S.C. § 22 (2000). This definition has been narrowed by subsequent legislation to exclude various minerals, including oil and gas, coal, phosphate, sodium, potassium, oil shale, geothermal resources, and aggregates such as common varieties of sand and gravel. *See, e.g*., Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287; Surface Resources Act of 1955, 30 U.S.C. §§ 611-615; Geothermal Steam Act of 1970, 30 U.S.C. §§ 1001-1027.

[6] *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 33 (D.D.C. 2003); *see also United States v. Locke*, 471 U.S. 84, 86 (1985) ("By the 1960's, it had become clear that this 19th-century laissez-faire regime had created virtual chaos with respect to the public lands.").

manner "so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities."[7] To do this, Congress encouraged "reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs" and "the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land."[8]

Congress enacted major reforms to the Mining Law when it adopted the Federal Land Policy and Management Act ("FLPMA") in 1976.[9] FLPMA was the first express grant of authority to the U.S. Department of the Interior ("DOI") to regulate mining activities on public lands.[10] FLPMA applies to "public lands," which are defined as lands administered by the Secretary of the Interior through the Bureau of Land Management ("BLM").[11]

FLPMA amended the Mining Law in four ways. It: (1) directed the Secretary of the Interior to "take any action necessary to prevent unnecessary or undue degradation of the lands";[12] (2) provided for recording, annual assessment work and filing requirements;[13] (3) created the California Desert Conservation Area ("CDCA"), and subjected mining claims within that area to "such reasonable regulations as the Secretary may prescribe" to protect the scenic, scientific, and environmental values of the public

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[7] 30 U.S.C. § 21a (1996).

[8] *Id*.

[9] Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784 (2000).

[10] 43 U.S.C. §1732(b) (2000).

[11] *Id*. § 1702(e).

[12] *Id*. § 1732(b); *see also* Use and Occupancy Under the Mining Laws, 43 C.F.R. subpt. 3715 (2005); Surface Management, 43 C.F.R. subpt. 3809 (1999).

[13] 43 U.S.C. § 1744 (2000).

lands of the CDCA against "undue impairment";[14] and (4) subjected mining claims located within wilderness study areas to a non-impairment standard.[15]

In enacting FLPMA, Congress declared that the public lands should be managed "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values[.]"[16] Congress also made it a policy of the United States to implement the MMPA.[17]

In addition, Congress wanted the public lands to be managed on the basis of "multiple use and sustained yield unless otherwise specified by law."[18] By the term "multiple use," Congress meant that BLM should manage the public lands and their various resource values by providing for:

> the most judicious use of the land for some or all of these resources or related services . . . a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values . . . .[19]

FLPMA also provided for the creation of areas of "critical environmental concern," which are defined as areas where "special management attention is required . . . to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems and processes."[20]

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[14] *Id*. § 1781.

[15] *Id*. § 1782.

[16] *Id*. § 1701(a)(8).

[17] *Id*. § 1701(a)(12).

[18] *Id*. § 1701(a)(7).

[19] *Id*. § 1702(c).

[20] *Id*. §§ 1701(a)(11), 1702(a), 1712(c)(3).

Finally, section 204 of FLPMA provided a means by which the Secretary of the Interior could withdraw lands from the operation of the Mining Law.[21]

### B. The California Desert Conservation Area Was Created In Part To Protect Sensitive Cultural Resources In the California Desert

The CDCA is a vast area in Southern California comprising twenty-five million acres – more than three times the size of Belgium. Nearly half of the CDCA is public land administered by the BLM.[22] Glamis's Imperial Project claims are located in the CDCA, on BLM-administered lands.[23] When Congress created the CDCA in FLPMA, it found that "the California desert contains historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources that are uniquely located adjacent to an area of large population,"[24] and that "the California desert environment is a total ecosystem that is extremely fragile, easily scarred, and slowly healed."[25] Congress also found that these resources were "seriously threatened" by "inadequate Federal management authority,"[26] and that to "preserve the unique and irreplaceable resources, including archeological values, and conserve the use of the economic resources of the California desert . . . additional management authority must be provided to the Secretary to facilitate effective implementation of such planning and management."[27]

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[21] *Id*. §§ 1702(j), 1714.

[22] BLM, California Desert Conservation Area Plan (1980) ("CDCA Plan") (amended 1999), at 5 (10 Factual Appendices "FA" tab 96).

[23] Chemgold Inc., Imperial Project Plan of Operations (Nov. 1994), at 3 (10 FA tab 103).

[24] 43 U.S.C. § 1781(a)(1) (2000).

[25] *Id*. § 1781(a)(2).

[26] *Id*. § 1781(a)(3).

[27] *Id*. § 1781(a)(6).

FLPMA thus provided that mining claims located within the CDCA shall be subject to "reasonable regulations" as the Secretary may prescribe to "protect the scenic, scientific, and environmental values of the public lands of the California Desert Conservation Area against undue impairment, and to assure against pollution of the streams and waters within the California Desert Conservation Area."[28] As such, FLPMA provided for special protections over the CDCA not applicable to public lands generally.

### 1. The CDCA Plan Was Based On The Principle Of "Multiple Use" Of Public Lands

In response to the direction given in FLPMA, in 1980 – before Glamis or its predecessors in interest located its Imperial Project mining claims – DOI completed the California Desert Conservation Area Plan (the "CDCA Plan" or "Plan"). The chief purpose of the Plan, as indicated in FLPMA, is to balance the need for "multiple use, sustained yield, and the overall maintenance of environmental quality."[29] As the Plan explains, mining is only one of several competing uses that must be balanced in light of the numerous other interests in the area.[30]

"Multiple use" means:

> the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural *scenic, scientific and historical values*; and harmonious and coordinated management of the various resources *without permanent impairment*

[28] *Id*. § 1781(f).

[29] CDCA Plan (amended 1999), at 5 (10 FA tab 96).

[30] *Id*.

> *of the productivity of the land and the quality of the environment* with consideration being given to the relative values of the resources and *not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output*.[31]

"'Multiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put."[32] In FLPMA, Congress recognized that "not all uses are compatible,"[33] and that "some [public] land" will be used "for less than all of the [available] resources," given the "relative values of the resources" in any particular circumstance.[34] Pursuant to the CDCA Plan, cultural resources are to "be given the same consideration as other resource values."[35] Resolution of conflicts may require several approaches, including:

> [r]esponding to national priority needs for resource use and development . . . without compromising . . . public values such as wildlife, cultural resources, or magnificent desert scenery. This means, in the face of unknowns, erring on the side of conservation in order not to risk today what we cannot replace tomorrow.[36]

The CDCA Plan divided the CDCA into four multiple-use classes: (1) Class C, the most restrictive class, limited to lands potentially suitable for wilderness designation by Congress; (2) Class L (Limited Use); (3) Class M (Moderate Use); and (4) Class I (Intensive Use). Glamis's unpatented mining claims are all located on Class L lands.[37]

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[31] 43 U.S.C. § 1702(c) (2000) (emphasis added).

[32] *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004).

[33] *Id.*

[34] 43 U.S.C. § 1702(c) (2000); *see also Rocky Mountain Oil and Gas Ass'n v. Watt*, 696 F.2d 734, 738 (10th Cir. 1982) ("BLM need not permit all resource uses on a given parcel of land.").

[35] CDCA Plan (as amended 1999), at 25 (10 FA tab 96).

[36] *Id*. at 6.

[37] *See Imperial Project Final Environmental Impact Statement / Environmental Impact Report* (Sept. 2000) (8 FA tab 61) ("2000 FEIS"), at 1-15.

### 2. The Full Extent Of The Cultural Resources Within The CDCA Is Not Known

Due to the vastness of the CDCA, the resources in that region must be continually re-evaluated and the Plan amended based on newly discovered information. The 1999 version of the Plan, for instance, makes it clear that a chief goal with respect to cultural resources is to "[b]roaden the archaeological and historical knowledge of the CDCA through *continuing inventory efforts* and the use of existing data" and to "*[c]ontinue the effort to identify* the full array of the CDCA's cultural resources."[38] In other words, the full extent of the cultural resources within the CDCA is not known. In fact, at the time the CDCA Plan was created, only approximately five percent of the CDCA had been inventoried for cultural resources.[39] As such, although the land use planning in the CDCA was "extensive," it was not comprehensive, as Glamis implies.[40] The CDCA Plan itself is a dynamic document: from 1980 to 1999 the DOI approved 147 amendments to the CDCA Plan.[41] This process is ongoing.[42]

The CDCA Plan identified certain "Areas of Critical Environmental Concern" ("ACECs") within the CDCA. An ACEC is an area "within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to

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[38] CDCA Plan (amended 1999), at 22 (emphasis added) (10 FA tab 96)..

[39] *Id*. at 24.

[40] *Glamis Gold Ltd. v. United States of America*, Memorial of Claimant (May 5, 2006) ("Mem.") ¶¶ 93-117; *id*. ¶¶ 446-47; Declaration of Russell L. Kaldenberg (Sept. 14, 2006) ("Kaldenberg Declaration") ¶¶ 5-6, 9.

[41] CDCA Plan (amended 1999), attached letter from Tim Salt, District Manager, BLM California Desert District Office, to Reader (Aug. 17, 1999) (10 FA tab 96).

[42] *See, e.g., id.* ("I continue to encourage public participation and will ensure that those representing interest groups, public land stakeholders and interested individuals are given an opportunity to participate in the process to update and bring the CDCA Plan into the 21st Century.").

important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes . . . ."[43] The CDCA Plan identified seventy-five special management areas, and noted that "[r]equests for consideration of a new ACEC or special area may be submitted to BLM offices at any time."[44] One of the ACEC's identified in the CDCA was the Indian Pass ACEC, located approximately one mile north of Glamis's proposed Imperial Project.[45]

In order to identify ACECs, and in preparation of the overall CDCA Plan, in the late 1970s the BLM funded an ethnographic study of the region and solicited the involvement of the Native American tribes of the Colorado River valley in that process.[46] While representatives from the Yuman Tribes of the Colorado River Valley, including a few members of the Quechan Tribe, agreed to participate in what would become the first government-sponsored cultural resource inventory of the area, members of the California Desert Planning Staff noted that "[r]elatively few representatives of the Yuman, Penutian and Hokan family languages were interviewed."[47] Based on the limited involvement of these tribes, the California Desert Planning Staff stressed that if the study were to be corrected for "sampling error," additional research involving Native American tribes would be required.[48]

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[43] 43 U.S.C. § 1702(a) (2000).

[44] CDCA Plan (amended 1999), at 10 (10 FA tab 96).

[45] *Id*. at 104; *see also* 2000 FEIS at 1-4 (8 FA tab 61).

[46] Letter from Neil B. Pfulb, Desert Plan Director, to Representatives of the Paiute-Shoshone Indians of the Bishop Community, the Mission Band of Indians of Campo Community, the Fort Independence Reservation, the Paiute-Shoshone Indians of the Lone Pine Community, the San Manuel Band of Mission Indians, the Quechan Indians and the Moapa Business Council (Feb. 27, 1978) (7 FA tab 1).

[47] R. Laidlaw & J. Strand, *Desert Plan Staff Ethnographic Notes Index (Annotated)*, at 8 (May 10, 1979) (9 FA tab 66).

[48] *Id.*

Despite the fact that Desert Planning staff conducted "relatively few" interviews with the Quechan, those interviews consistently focused upon

[49] According to the Desert Planning staff, one Quechan elder specifically

" used by the Quechan, emphasizing "

[50]

[51]

[52]

Thus, while the Desert Planning staff did not interview many members of the Quechan Tribe during the CDCA planning process, the Quechan elders interviewed consistently indicated that the land traversed by the Tribe in the course of the cremation ceremony was sacred. The federal government never conducted the "on-the-ground" survey that the Quechan elders requested to identify sacred cremation sites. Instead, the

[49] *See id.*, Ethnographic Note #2 (Interview with Quechan Elder, age 92, Mohave by birth but Quechan by affiliation); *id.*, Ethnographic Note #3 (Interview with Quechan Elder, age 72, Quechan); *id.*, Ethnographic Note #4 (Interview with Quechan elder, aged 93, Quechan).

[50] Richard A. Brook, California Desert Ethnographic Notes #3 (Mar. 12, 1978) (8 FA tab 65) (emphasis in original).

[51] *See* Eric Ritter, California Desert Ethnographic Notes #1 (Mar. 1, 1978) (8 FA tab 64).

[52] *See id.*

Desert Planning staff created composite maps depicting areas containing concentrations of sacred sites.[53] As such, the Desert Planning Staff did not regard the confidential planning maps prepared in the course of this study to be at all comprehensive.[54]

### C. BLM's 3809 Regulations Implemented FLPMA's Unnecessary Or Undue Degradation Standard

In 1980, following the enactment of FLPMA, DOI promulgated regulations ("3809 regulations") to ensure that public lands are protected from "unnecessary or undue degradation," as required by FLPMA.[55] In furtherance of this goal, the regulations require reclamation of areas disturbed by mineral extraction and coordination with state agencies.[56]

The U.S. Government has imposed significant restrictions on the level and type of mineral exploration that can occur on Class L, M or I lands to protect values other than mining that must be considered under the "multiple use" principle. The 3809 regulations create three categories of mining activity: casual use, notice-level operations, and plan-level operations.[57] Only the last category, plan-level operations, which are operations that either disturb more than five acres or involve work in wilderness or other areas of critical environmental concern, including lands within the CDCA, require BLM approval

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[53] *See* California Desert Conservation Area Map, "Native American Areas of Concern" (6 FA tab 309); Lynne Sebastian, "Cultural Resource Issues, Compliance, and Decisions Relative to the Glamis Imperial Project" (Apr. 4, 2006) ("Sebastian Rpt."), at 22 (discussing CDCA maps, "Native American Areas of Concern" and "Ethnography Element"); *see also* Kaldenberg Declaration ¶¶ 6-7.

[54] *See* Kaldenberg Declaration ¶¶ 6-7.

[55] Surface Management of Public Lands Under U.S. Mining Laws, 45 Fed. Reg. 78,902-78,915 (Nov. 26, 1980) (codified at 43 C.F.R. subpt. 3809). The regulations were effective January 1, 1981. *Id.* at 78,902. BLM amended the surface management regulations in 2000 and 2001. Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69,998, 70,012 (Nov. 21, 2000), as amended at 66 Fed. Reg. 54,834, 54,860 (Oct. 30, 2001) (codified at 43 C.F.R. subpt. 3809).

[56] 43 C.F.R. §§ 3809.1-5(c)(5), 3809.2-2, 3809.3-1(c) (1981); 43 C.F.R. §§ 3809.1, 3809.5 ("Reclamation"), 3809.200, 3809.401(b)(3) (2002).

[57] 43 C.F.R. §§ 3809.1-2, 3809.1-3, 3809.1-4 (1981); 43 C.F.R. § 3809.10 (2002).

before mining activities may proceed.[58] Glamis's proposed Imperial Project, which proposes to disturb more than five acres within the CDCA, would be a plan-level operation.

The 3809 regulations require BLM to "make an environmental assessment … to identify the impacts of the proposed operations on the lands and to determine whether an environmental impact statement is required" under the National Environmental Policy Act ("NEPA").[59] NEPA requires that when a major federal action has the potential to "significantly affect[] the quality of the human environment," an Environmental Impact Statement ("EIS") must be prepared.[60] This process requires identifying alternatives for the mining project and determining the effects on the environment of those alternatives, including any appropriate mitigation measures. Although NEPA mandates that certain procedural steps be taken, as opposed to requiring that particular results be obtained, in evaluating environmental impacts, "these procedures are almost certain to affect the agency's substantive decision[.]"[61]

The 3809 regulations also require that mining operations comply with all applicable federal and state laws and regulations, including requirements related to reclamation, air quality, water quality and pollution control, solid waste disposal, fisheries, wildlife and plant habitat, and cultural and paleontological resources, among

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[58] 43 C.F.R. § 3809.1-4 (1981); 43 C.F.R. § 3809.11 (2002).

[59] 43 C.F.R. § 3809.2-1 (1981); 43 C.F.R. § 3809.411(a)(3)(ii) (2002) ("BLM completes the environmental review required under the National Environmental Policy Act . . . . "); 43 C.F.R. § 3809.411(d) (2002) (BLM will not make its decision until after it completes NEPA analysis).

[60] 42 U.S.C. § 4332(C) (1996).

[61] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

others.[62] Therefore, mining plans of operations such as Glamis's that are located on federal lands must comply not only with federal regulations, but also with applicable state laws.

With respect to reclamation, BLM's original 3809 regulations specifically provided that "[n]othing in this subpart shall be construed to effect a preemption of State laws and regulations relating to the conduct of operations or reclamation on federal lands under the mining laws."[63] The current 3809 regulations, promulgated in 2000, also make clear that if state laws conflict with the provisions of 3809, then the 3809 provisions must be followed; however, "there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart."[64]

### D. Glamis Must Comply With State Reclamation Laws Applicable To Mining On Federal Lands Within California

All states in the Western United States have laws requiring reclamation of hardrock mine sites on state and federal lands.[65] Generally speaking, these reclamation laws establish, *inter alia*, requirements for backfilling, revegetation, and treatment of overburden materials. They also typically require financial assurances, and include

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[62] 43 C.F.R. § 3809.2-2 (1981) ("All operations … shall comply with all pertinent Federal and State laws."); 43 C.F.R. § 3809.5 (2002) ("Unnecessary or undue degradation" is defined, in part, as a failure to comply with "other Federal and state laws related to environmental protection and protection of cultural resources."); 43 C.F.R. § 3809.420(a)(6) (2002) ("You must conduct all operations in a manner that complies with all pertinent Federal and state laws.").

[63] *See* 43 C.F.R. § 3809.3-1(a) (1981).

[64] 43 C.F.R. § 3809.3 (2002).

[65] *See, e.g.,* Alaska Reclamation Act (1963), ALASKA STAT. § 27.19.010-.100; Arizona Mined Land Reclamation Act (1994), ARIZ. REV. STAT. §§ 27-901 to -1026; Colorado Mined Land Reclamation Act (1994), COLO. REV. STAT. §§ 34-32-101 to -127; Idaho Surface Mining Act (1971), IDAHO CODE ANN. §§ 47-1501 to -1519; Montana Metal Mine Reclamation Act (1971), MONT. CODE ANN. § 82-4-336; Nevada Mined Land Reclamation Act (1989), NEV. REV. STAT. ANN. §§ 519A.010-.290; New Mexico Mining Act (1978), N.M. STAT. ANN. §§ 69-36-1 to -20; Oregon Mined Land Reclamation Act (1971), OR. REV. STAT. ANN. §§ 517.702-.992; South Dakota Mined Land Reclamation Act (1971), S.D. CODIFIED LAWS §§ 45-6B-1 to -11; Utah Mined Land Reclamation Act (1975), UTAH CODE ANN. §§ 40-8-1 to -23; Washington Surface Mining Act (1970), WASH. REV. CODE ANN. §§ 78.44.010-.930; Wyoming Environmental Quality Act (1970), WYO. STAT. § 35-11-406.

reporting and monitoring requirements. The same is true of California's reclamation requirements.

California took some of the earliest actions to prevent or mitigate environmental damage caused by mining activities. For example, California court decisions served as an effective ban on hydraulic mining in the late nineteenth century.[66] Perhaps because of California's legendary "gold rush" history, California residents had first-hand knowledge of the damage caused by mining activities, and the government of California has accordingly acted to stem the deleterious effects of mining within California.

### 1. The California Environmental Quality Act Imposes Stringent Requirements On Mining Operators

The California Environmental Quality Act ("CEQA") went into effect in 1970, the same year as NEPA.[67] CEQA has three chief purposes: (1) to ensure that state and local agencies consider the environmental impact of their decisions before approving a project; (2) to provide for public input into the environmental review process; and (3) to identify and require implementation of measures to mitigate a proposed project's environmental impacts.[68]

Mining operations such as the Imperial Project are subject to CEQA review. CEQA requires that an Environmental Impact Report ("EIR") be completed if there is a fair argument based on "substantial evidence … that the project may have a significant effect on the environment."[69] Because of the significant effect that the Imperial Project

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[66] *See Woodruff v. N. Bloomfield Gravel Mining Co*., 18 F. 753, 772-775 (C.C.Cal. 1884); *People v. Gold Run Ditch and Mining Co*., 66 Cal. 138 (1884); *see also infra* Arg. Sec. II.B.2(c).

[67] CAL. PUB. RES. CODE §§ 21000-21006 (1996).

[68] *See* CAL. CODE REGS. tit. 14, § 15002(a) (2005).

[69] CAL. PUB. RES. CODE § 21080(d) (1996); CAL. CODE REGS. tit. 14, § 15002(f)(1) (2005); *see also No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 75 (1974).

would have on the California environment, the state and federal governments required that an EIR be completed.[70]

Pursuant to a state-federal Memorandum of Understanding, the CEQA process in Glamis's case, as in most cases, was undertaken in conjunction with the federal environmental review process under NEPA, to avoid duplication of efforts.[71] The relevant federal and local agencies prepared a joint Environmental Impact Statement/Environmental Impact Report ("EIS/EIR") setting forth the environmental impacts of the project.

CEQA requires that all significant effects be mitigated to a level of insignificance.[72] CEQA also requires that, if a determination is made that mitigation measures are infeasible, and the project's effects cannot be mitigated to a level of insignificance, for the reclamation plan to be approved there must also be a determination that "specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment."[73]

Compliance with CEQA's requirements is a major part of the process to obtain state approval of a reclamation plan, and one that requires considerable time and resources.

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[70] *See* Memorandum of Understanding between BLM, County of Imperial, and Chemgold, Inc. (Mar. 20, 1995) (10 FA tab 107); *see also* 2000 FEIS (8 FA tab 61).

[71] Memorandum of Understanding between BLM, County of Imperial, and Chemgold, Inc. (Mar. 20, 1995) (10 FA tab 107).

[72] *See* CAL. PUB. RES. CODE §§ 21002, 21081 (1996).

[73] *Id.* § 21081(b).

### 2. The California Surface Mining and Reclamation Act Mandated That Mined Lands Be Restored To A Usable Condition

A year before the United States Congress enacted the reforms to the Mining Law made in FLPMA, and more than a decade before any of the Imperial Project mining claims were located, California passed the Surface Mining and Reclamation Act of 1975 ("SMARA").[74] California enacted SMARA to ensure that significant adverse environmental impacts from mining were prevented or mitigated, and that "mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses."[75] The intent of the Act was to ensure that "[r]esidual hazards to the public health and safety are eliminated."[76] SMARA also expressed the legislature's intent to ensure that a variety of values are considered in addition to mining, including "recreation, watershed, wildlife, range and forage, and aesthetic enjoyment."[77]

Under SMARA, surface mining operators are required to submit to the relevant state agencies: (i) a plan for reclaiming mined lands; and (ii) financial assurances that those lands will be reclaimed in accordance with the approved plan.[78]

SMARA defines "reclamation" as:

> [T]he combined process of land treatment that minimizes water degradation … and other adverse effects from surface mining operations, … *so that mined lands are reclaimed to a usable condition* which is readily adaptable for alternate land uses and create no danger to public health or safety. The process may extend to affected lands surrounding mined lands, *and may require backfilling*, grading, resoiling, revegetation, soil compaction, stabilization, or other measures.[79]

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[74] CAL. PUB. RES. CODE § 2700-2797 (2001).

[75] *Id*. § 2712(a) (2001).

[76] *Id*. § 2712(c) (2001).

[77] *Id*. § 2712(b) (2001).

[78] *Id*. § 2770 (2001).

[79] *Id*. § 2733 (2001) (emphasis added).

SMARA applies to lands within the CDCA.[80] In 1992, the California Department of Conservation, the BLM and the U.S. Forest Service ("USFS"), entered into a Memorandum of Understanding ("MOU").[81] Under the MOU, the responsible California local agency, typically the relevant county planning office, is the "lead agency" and has the primary responsibility to enforce the requirements of SMARA.[82] Although reclamation requirements are implemented at the county level in California, they are subject to oversight by the Office of Mine Reclamation ("OMR") within the California Department of Conservation.[83]

The State Mining and Geology Board ("SMGB"), also within the California Department of Conservation, is empowered by SMARA to adopt state policy for surface mining operations.[84] SMARA directs the SMGB to adopt mining regulations that include "measures to be employed by lead agencies in specifying grading, backfilling, resoiling, revegetation, soil compaction, and other reclamation requirements."[85] Additionally, SMARA provides that the state policy for reclamation "shall be continuously reviewed and may be revised."[86]

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[80] CDCA Plan (amended 1999), at 91 (10 FA tab 96).

[81] Memorandum of Understanding between the Department of Conservation and the Surface Mining and Geology Board, the Forest Service, and BLM (Oct. 19, 1992), a*vailable at* http://www.fs.fed.us/im/directives/field/r5/fsm/1500/1531.1-1531.12b.html (10 FA tab 108).

[82] *See id*.

[83] *See* Declaration of Douglas W. Craig (Sept. 17, 2006) ("Craig Declaration") ¶ 7.

[84] CAL. PUB. RES. CODE § 2755-56 (2001).

[85] *Id*.

[86] *Id*. § 2759.

## II. An Extensive Array of Domestic Legislation And International Instruments Protect Native American Cultural Resources

In addition to the broad array of federal and state regulation in the mining area, a similarly extensive legislative and regulatory scheme is designed to ensure the preservation of Native American cultural, historical, and religious sites. The fact that protection of Native American sacred sites has steadily increased over the past few decades is perhaps an outgrowth of the fiduciary relationship that exists between the United States Government and Native American tribes. These protections reflect very clear directives from both the executive and legislative branches of the U.S. Government instructing federal agencies to pay particular attention to the preservation of Native American cultural resources and sacred sites on federal lands. The state of California, like many other states, has similarly adopted a series of laws designed to accomplish the same end.

### A. Congress Has Increasingly Legislated In The Interest Of Historic And Cultural Preservation

The first law enacted by Congress to address cultural preservation was the Antiquities Act of 1906, which authorized the President to set aside historic landmarks and structures as national monuments, prohibited the unauthorized destruction of historic ruins on lands owned or controlled by the federal government, and provided penalties for destroying or damaging historic ruins on public lands.[87] The effectiveness of the Antiquities Act was enhanced in 1935 when Congress passed the Historic Sites, Buildings and Antiquities Act ("Historic Sites Act"), which established a "national policy to preserve for public use historic sites, buildings, and objects of national significance for

[87] *See* Antiquities Act of 1906, 16 U.S.C.§§ 431-33m (2000).

the inspiration and benefit of the people of the United States."[88] In furtherance of this policy, Congress authorized the Secretary of the Interior to investigate to obtain accurate historical and archaeological information regarding particular sites[89] and to enter into "cooperative agreements" with states and private individuals to preserve any historic site "used in connection therewith for a public use."[90] In 1949, in an effort to strengthen the policy of historic preservation set forth in the Historic Sites Act, Congress chartered the National Trust for Historic Preservation in the United States, a non-profit organization established "to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest."[91]

With these early historic preservation statutes, Congress sought to protect historic sites of obvious national significance. However, after recognizing an additional need to protect properties of "historical, architectural, or cultural significance at the community, State or regional level," Congress passed the National Historic Preservation Act (the "NHPA") in 1966.[92] In addition to expanding historical resource protection to properties of significance to particular American communities, Congress intended that the NHPA would accelerate the federal government's "historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for

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[88] Historic Sites Act, 16 U.S.C. § 461 (2000); *see also* Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 68 (1993).

[89] 16 U.S.C. § 462(c) (1998).

[90] *Id*. § 462(e).

[91] 16 U.S.C. §§ 468-468d (2000). Just as the Historic Sites Act authorized the Secretary of the Interior to enter into cooperative agreements with federal and state agencies to ensure the preservation of historic sites, in this statute Congress empowered the National Trust with that same authority. *See* 16 U.S.C. § 468c(g).

[92] H.R. REP. NO. 89-1916, (1966), *reprinted in* 1996 U.S.C.C.A.N. 1307, 3309.

Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities."[93]

More specifically, the NHPA authorized the Secretary of the Interior "to expand and maintain a National Register of Historic Places," ("National Register"), to be "composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture."[94] Furthermore, the NHPA established the Advisory Council on Historic Preservation ("ACHP") as an independent federal agency comprised of twenty members solely devoted to promoting the protection of the Nation's historic resources and advising the President and Congress on historic preservation policy.[95]

Pursuant to Section 106 of the NHPA, "[t]he head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking," and the head of "any Federal department or independent agency" having the power to license such an "undertaking"[96] must, prior to the approval of the expenditure of any federal funds on the undertaking or prior to the issuance of any license, take into account the effect of such undertakings on "any district, site, building, structure, or object that is

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[93] National Historic Preservation Act, 16 U.S.C. § 470(b)(7) (2000).

[94] 16 U.S.C. § 470a(a)(1)(A) (2000).

[95] *See* 16 U.S.C. § 470i (2000). Of the twenty members, the President appoints fifteen members: four historic preservation experts, four laypersons, four heads of other federal agencies, one Native American or Native Hawaiian member, one mayor and one governor. The remaining five members are the heads of the Department of Agriculture and the DOI, the Architect of the Capitol, the Chair of the National Trust for Historic Preservation, and the President of the National Conference of State Historic Preservation Officers. *Id*.

[96] The Section 106 implementing regulations described below define a federal "undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." 36 C.F.R. § 800.16(y) (2004).

included in or eligible for inclusion in the National Register."[97] The NHPA specifically requires the head of any such agency to afford the ACHP "a reasonable opportunity to comment with regard to such undertaking,"[98] and, in carrying out responsibilities under Section 106, to "consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance" to any property eligible for inclusion on the National Register.[99]

Among the ACHP's primary responsibilities is the promulgation of regulations governing federal agency compliance with Section 106 of the NHPA ("Section 106 regulations"). Those regulations establish the framework for what is described as the Section 106 process.[100] Pursuant to those regulations, the Section 106 process generally involves several steps. *First*, in any instance where it determines that a proposed federal action is an "undertaking" with the potential to affect historic properties for purposes of the NHPA, the agency involved must invite the appropriate State and/or Tribal Historic Preservation Officer ("SHPO" or "THPO")[101] and any Native American tribe that "might attach religious and cultural significance" to the area potentially affected by the undertaking to be consulting parties.[102] While the Section 106 regulations require consultation with Native American tribes potentially affected by an undertaking, they also recognize that "an Indian tribe or Native Hawaiian organization may be reluctant to

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[97] 16 U.S.C. § 470f (2000).

[98] *Id*.

[99] *Id.* at § 470a(d)(6)(B). The Advisory Council on Historic Preservation specifically instructs that consultation with Indian tribes is required "regardless of the location of the historic property"; *i.e.*, regardless of whether the affected property is located on federal, state, Tribal, or private land. 36 C.F.R. § 800.2(c)(2)(ii) (2004).

[100] *See* 36 CFR pt. 800 (2004).

[101] 36 CFR § 800.3(c) (2004).

[102] *Id*. § 800.3(f)(2).

divulge specific information regarding the location, nature, and activities associated with such sites."[103] *Second*, in consultation with the appropriate entities, the agency must determine the "area of potential effects"[104] of the undertaking, identify any historic properties in that area, and determine if any such property is eligible for listing on the National Register.[105] *Third*, in consultation with the appropriate entities, the federal agency must assess whether the historic properties identified will be adversely affected by the undertaking. A historic property would be adversely affected if the undertaking would directly or indirectly alter any of the property's historic characteristics, such as causing physical damage to the property, or altering or introducing "visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features."[106] *Fourth*, if the federal agency finds that a historic property or properties will

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[103] 36 CFR § 800.4(a)(4) (2004); *see also* COMMITTEE ON HARDROCK MINING ON FEDERAL LANDS ET AL., HARDROCK MINING ON FEDERAL LANDS, at 70 (1999) explaining:

> [s]ome tribes have only recently begun to identify and protect their cultural and historic interests. Tribes may be reluctant to identify important areas or resources in order to protect their sacredness or prevent intrusion and plunder by others. This reluctance makes it difficult to fully consider tribal interests in a NEPA review and permitting process that relies on full participation of stakeholders and full disclosure and discussion of relevant information.

[104] The regulations define an "area of potential effect" as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist." The definition provides further that "[t]he area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." 36 CFR § 800.16(d) (2004).

[105] 36 CFR § 800.4 (2004). In 1980, Congress amended the NHPA to direct the Secretary of the Interior, in conjunction with the American Folklife Center, to study means of "preserving and conserving the intangible elements of our cultural heritage" and to make recommendations for legislative and administrative actions by the Federal government to "preserve, conserve, and encourage the continuation of the diverse traditional prehistoric, historic, ethnic, and folk cultural traditions that underlie and are a living expression of our American heritage." National Historic Preservation Act, Pub. L. No. 96-515, 94 Stat. 2987, at § 502 (1980) (codified at 16 U.S.C. §§ 470–470t (2000)). Pursuant to this amendment, the Secretary of the Interior recommended that the National Park Service prepare guidelines to assist in the documentation of "traditional cultural properties" which had previously been treated as ineligible for election to the National Register. In National Register Bulletin 38, the National Park Service promulgated such guidelines. *See* Patricia L. Parker & Thomas F. King, "Guidelines for Evaluating and Documenting Traditional Cultural Properties" (1998), *available at* http://www.cr.nps.gov/nr/publications/bulletins/nrb38 (10 FA tab 109).

[106] 36 C.F.R. § 800.5(a)(2)(v) (2004).

be adversely affected by the undertaking, the regulations require the federal agency to attempt to resolve those adverse affects and instruct that resolutions may be memorialized in a memorandum of agreement.[107] *Fifth* and finally, if the federal agency, the SHPO, or the ACHP determines that further consultation will not produce an agreement to resolve such adverse effects, it may terminate consultation and request that the ACHP comment directly to the head of the agency on the effect of the undertaking on historic properties. The head of the federal agency is then required to consider such comments and respond to them prior to making a final decision on the undertaking.[108]

Thus, the NHPA and specifically the Section 106 process impose significant procedural obligations on federal agencies to address federal undertakings' potential effects on historic properties. Additionally, the Section 106 regulations note that federal agency officials should coordinate their Section 106 review process with "any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act" and other legislation specific to particular agencies.[109]

As noted above, in 1969, just a few years after enacting the NHPA, Congress enacted NEPA,[110] which requires the appropriate governmental agency to prepare an EIS to ensure that "environmental and cultural values [are] considered along with economic

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[107] *Id*. § 800.6.

[108] *Id*. § 800.7.

[109] *Id*. § 800.3(b).

[110] National Environmental Policy Act, 42 U.S.C. §§ 4321–70a (2000).

and technological values when proposed federal projects are assessed."[111] NEPA also expressly directed the federal government to use all practical means "to the end that the Nation may . . . preserve important historic, cultural, and natural aspects of our national heritage."[112]

### B. Both Congress And The California Legislature Have Enacted Legislation Specifically Designed To Ensure The Preservation Of Native American Culture

Ten years later, in 1979, Congress enacted the Archaeological Resources Protection Act ("ARPA")[113] to ensure that "any material remains of past human life or activities which are of archaeological interest" to the Nation are preserved for future generations.[114] ARPA was based on a Congressional finding that contemporaneous federal legislation did not "provide adequate protection to prevent the loss and destruction of [] archaeological resources" on public lands.[115] In relevant part, ARPA imposed criminal penalties on the excavation and removal of objects located on public and Native American lands without an authorized permit.[116]

In November 1990, Congress passed the Native American Graves Protection and Repatriation Act ("NAGPRA") to protect the disposition of Native American cultural

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[111] Marilyn Phelan, *A Synopsis of Laws Protecting our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 73 (1993); *see also* 42 U.S.C. § 4332(C) (2000).

[112] 42 U.S.C. § 4331(b)(4) (2000).

[113] Archeological Resources Protection Act, 16 U.S.C. §§ 470aa-70mm (2000).

[114] 16 U.S.C. §§ 470aa(b), 470bb(1) (2000).

[115] *Id*. § 470aa(a)(3).

[116] *Id*. § 470cc-470ee. Pursuant to the provisions of both FLPMA and ARPA, BLM required cultural resource contractors in the California Desert District to obtain Cultural Resource Use Permits before beginning any field work that might disturb archaeological resources in that area. *See, e.g.,* Letter from Richard Johnson, Deputy State Director, BLM, to Brian F. Mooney, President, Brian F. Mooney Associates (June 19, 1996) (7 FA tab 6).

items discovered on federal or tribal lands. [117] This legislation, which establishes a process for the repatriation of Native American human remains, funerary objects, cultural patrimony,[118] and sacred objects, was enacted after congressional hearings revealed that 42.5 per cent of the 34,000 human remains in the possession of the Smithsonian Institute were remains of North American Indians.[119] In the numerous hearings that ensued to address the repatriation of those remains, tribal witnesses and representatives of the archeological community alike testified to the "great need for Federal legislation which could provide additional protections to Native American burial sites."[120]

Thus, with NAGPRA, Congress specifically legislated to preserve the cultural properties of Native Americans. NAGPRA expressly recognizes "the unique relationship between the Federal government and Indian tribes,"[121] which the United States Supreme Court has described as fiduciary in nature.[122] This fiduciary relationship has been the basis for both prior and subsequent legislative and executive action specifically to promote not only the historical preservation of Native American cultural properties, but also to ensure that federal agencies give due consideration to the religious rights of Native Americans.

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[117] Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (1992).

[118] NAGPRA defines "cultural patrimony" as "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself." 25 U.S.C. § 3001(3)(D) (1992).

[119] S. REP. NO. 101-473, at 1 (1990).

[120] *Id*. at 3.

[121] 25 U.S.C. § 3010 (1992) ("This chapter reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.").

[122] *See, e.g., Rice v. Cayetano,* 528 U.S. 495, 529-30 (2000) (Stevens, J. and Ginsburg, J. dissenting on other grounds) (citing *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Kagma*, 118 U.S. 375, 384-85 (1886); and *Cherokee Nation v. Georgia*, 8 L.Ed. 25 (1831) as recognizing the "fiduciary character of the special federal relationship with descendants" of Native American tribes.).

For example, in 1978, Congress passed the American Indian Religious Freedom Act ("AIRFA") which recognizes "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise" their traditional religions and to have access to their sites and sacred objects for such purposes.[123] The legislative history for that Act provides that "denial [] of access to Indians to …. certain [sacred] sites …. is analogous to preventing a non-Indian from entering his church or temple."[124]

In 1996, President Clinton issued Executive Order No. 13007, which directed federal agencies responsible for managing federal lands to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners" and to "avoid adversely affecting the physical integrity of such sacred sites" with their land use decisions.[125] Executive Order 13007 further instructed each federal agency to implement procedures for carrying out the stated purposes of the order in a manner that comported with an Executive Memorandum defining "Government-to-Government Relations with Native American Tribal Governments."[126]

The State of California has been a leader among state governments in adopting laws specifically designed to protect Native American cultural, historical, and religious sites.[127] For example, in 1976, prior to the enactment of AIRFA and NAGPRA, the

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[123] American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1988).

[124] H.R. REP. NO. 95-1308 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1262, 1263.

[125] Exec. Order No. 13,007, at § 1(a), 61 Fed. Reg. 26,771 (May 29, 1996), *reprinted in* 42 U.S.C. § 1996 (2000).

[126] Exec. Order No. 13,007, at § 2(a) (citing Exec. Memorandum, 59 Fed. Reg. 22,951 (Apr. 29, 1994), *reprinted in* 25 U.S.C. § 450 (note) (2004)); *see also* BLM News Release, BLM Receives Important Legal Opinion Involving Proposed Glamis Imperial Mine in California Desert (Jan. 14, 2000) (10 FA tab 99).

[127] California was among the first five states to pass legislation designed to ensure the repatriation of Native American remains, similar to NAGPRA. *See* Jack F. Trope & Walter R. Echo-Hawk, *The Native American*

California Legislature passed the Native American Historical, Cultural and Sacred Sites Act ("Sacred Sites Act"), which prohibits state agencies and private parties from occupying public property under a public grant in any manner that would "cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine" unless clear and convincing evidence demonstrates that the public interest necessitated such destruction.[128] This Act also created and empowered the Native American Heritage Commission (the "NAHC") to bring actions "to prevent severe and irreparable damage to, or assure appropriate access for Native Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property."[129] In subsequent years, the California Legislature strengthened this law's provisions by extending the powers and duties of the NAHC to make recommendations regarding Native American sacred places on private lands,[130] and by making it the policy of the state to repatriate Native American remains and associated grave artifacts.[131]

### C. Various International Instruments Recognize The Importance Of Adequately Preserving Historic And Cultural Properties

International law also recognizes the importance of preserving and protecting areas of cultural importance. Since the 1960s, the United Nations Educational, Scientific and Cultural Organization ("UNESCO") has adopted several conventions and declarations to ensure that cultural property of universal value is preserved and protected

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*Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 53 (1992).

[128] CAL. PUB. RES. CODE § 5097.9 (1976).

[129] CAL. PUB. RES. CODE § 5097.94(g), 5097.97 (1982).

[130] *Id*. § 5097.94(a)-(c) (1982).

[131] CAL. PUB. RES. CODE § 5097.991 (1991).

from intentional destruction. One of the earliest such documents, UNESCO's *Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works*, for instance, provides that Member States should enact legislation on the national as well as local level to ensure the "preservation or salvage" of cultural property consistent with the recommendation's "norms and principles."[132] It also provides that "[a]t the preliminary survey stage of any project involving construction in a locality recognized as being of cultural interest . . . several variants of the project should be prepared" before any decision is made regarding its approval.[133]

In 1973, in recognition of the fact that the destruction of such sites impoverishes "the heritage of all the nations of the world," and not just the heritage of individual communities, UNESCO adopted the World Heritage Convention, which the United States subsequently ratified and incorporated into the NHPA.[134] Each State Party to the World Heritage Convention endeavors "to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes," as well as to adopt "appropriate legal, scientific, technical, administrative and financial measures necessary" for the protection of this heritage.[135] The Convention defines "cultural heritage" as inclusive of "archaeological sites which are of outstanding universal value from the

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[132] *See, e.g., Recommendation concerning the Preservation of Cultural Property endangered by Public or Private Works*, General Conference of the U.N. Educational, Scientific and Cultural Organization, 15th Sess., Preamble and ¶¶ 5, 14 (Nov. 19, 1968) (recognizing that "cultural property is the product and witness of the different traditions and of the spiritual achievements of the past and thus is an essential element in the personality of the peoples of the world").

[133] *Id.* ¶ 21.

[134] *Convention concerning the Protection of the World Cultural and Natural Heritage*, General Conference of the U.N. Educational, Scientific and Cultural Organization, 17th Sess., Preamble (Nov. 16, 1972). *See* 16 U.S.C. § 470a-1 (1994); *see also* 36 C.F.R. pt. 73 (1982) (outlining the policies and procedures governing the United States' participation in the World Heritage Convention).

[135] *Convention concerning the Protection of the World Cultural and Natural Heritage*, art. 5.

historical, aesthetic, ethnological or anthropological points of view."[136] While the Convention establishes an "Intergovernmental Committee" to review and maintain an international register, or inventory, of properties eligible for protection according to its terms, it specifically states that the fact that a site is not included on that list "shall in no way be construed to mean that it does not have an outstanding universal value."[137] Thus, the principles of cultural preservation reflected in federal and state law are mirrored in international instruments that reflect the "policy" of the international community.

## III. Glamis's Proposed Open-Pit Cyanide Heap leach Gold Mine: The Imperial Project

In 1987, Glamis began acquiring the rights to unpatented mining claims in the Imperial Project area.[138] Over several years, through a variety of business partnerships, joint ventures, and acquisitions, Glamis ultimately obtained sole ownership of the unpatented mining claims.[139] All of the mining claims that comprise the Imperial Project site were located after 1980.[140] The Imperial Project is comprised of 187 lode mining claims,[141] and 277 mill site locations[142] on approximately 1,600 acres of federally-owned land.[143]

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[136] *Id.* art. 1.

[137] *Id.* art. 12.

[138] Mem. ¶ 29.

[139] *Id.*; Statement of C. Kevin McArthur ¶¶ 4-5 (Apr. 26, 2006) ("McArthur Statement"); Memorandum from A.D. Rovig, President, Glamis Gold, Inc., to J.R. Billingsley, Vice President, Administration, Glamis Gold, Ltd. (Feb. 18, 1994) (7 FA tab 2).

[140] BLM, Mineral Report, Plat Showing Mining Claim Locations, Attach. I-3 (Sept. 27, 2002); *id.*, Table Showing Lode Mining Claims, Attach. II-7 (Sept. 27, 2002) (10 FA tab 98).

[141] *See* 30 U.S.C. § 23 (2000) (setting length and width limitations for mining claims "upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits").

[142] *See* 30 U.S.C. § 42 (2000) (authorizing mining claimants to locate and patent "nonmineral land not contiguous to the vein or lode [that] is used or occupied by the proprietor of such vein or lode for mining or milling purposes").

[143] BLM, Mineral Report, at 11, 13 (Sept. 27, 2002) (6 FA tab 255).

As mentioned above, Glamis's mining claims are located in the CDCA, on Class L lands.[144] Class L is the second most restrictive classification, intended to "protect [] sensitive, natural, scenic, ecological, and cultural resource values. Public lands designated as Class L are managed to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished.[145]

As noted earlier, the Imperial Project is located one mile south of the Indian Pass ACEC.[146] Among the open-pit, metallic mines located in the CDCA, only Glamis's proposed Imperial Project would be located on a so-called "green fill" site – one where no significant mining had previously occurred.[147] As a result, the Imperial Project would

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[144] *See* 2000 FEIS at 1-15 (8 FA tab 61).

[145] CDCA Plan (amended 1999) (10 FA tab 96), at 13.

[146] *Id*. at 104; *see also* 2000 FEIS at 1-4 (8 FA tab 61).

[147] *Compare* BLM, Mineral Report, at 20 (Sept. 27, 2002) (6 FA tab 255) (noting that no mining activity had previously occurred on the Imperial Project site), *with Final Environmental Assessment / Environmental Impact Report for the Proposed American Girl Mining Project,* at ES-2 (Nov. 1988) (7 FA tab 52) ("American Girl FEIR") (showing that approximately half of the surface disturbance acreage of the American Girl mine was already disturbed by previous, historic mining activities from the early part of the twentieth century); *Final Supplemental Environmental Impact Report for the Proposed Chemgold Inc. Picacho Mine Dulcina Pit Phase 2,* at 3-1 (Oct. 1991) (7 FA tab 54) ("Picacho, Dulcina Pit FEIR") (showing that the area in which the Picacho mine is located had been mined since the late 1800s, and that five to ten percent of the mine site surface was disturbed by that previous mining activity); *Mesquite Gold Project Final Environmental Impact Report / Environmental Assessment,* at 3-1 (Sept. 1984) (7 FA tab 51) ("Mesquite FEIR") (noting that "[p]ast small scale mining and sand and gravel extraction have disturbed much of the site); *Baltic Mine Project Final Environmental Impact Statement / Environmental Impact Report*, at ES-6 (Oct. 1992) (8 FA tab 55) (" Rand Baltic FEIS") (showing that the land on which the Baltic mine was located had been prospected since the 1860s and included a large mine until the 1920s); *Rand Mining Company The Rand Project Amended Plan of Operations*, at 3 (Nov. 1993) (8 FA tab 55B) (detailing the extensive history of mining in and around the various Rand project sites dating from the late 1800's and early 1900's); *Castle Mountain Project Final EIS/EIR Master Summary and Response to Comments*, at S-5 (Aug. 1990) (7 FA tab 53) ("Castle Mountain FEIS") (stating that extensive previous mining activities centered around the Hart Mining District "where gold and fine kaolin clay are found on and in the vicinity of the project site."); *Soledad Mountain Project EIS/EIR*, at ¶¶ 282 – 306 (June 1997) (8 FA tab 59) ("Soledad FEIS") (detailing numerous historic sites throughout the project area related to previous mining activities on the site); *A Class III Cultural Resource Inventory of the Briggs Project*, at 19-20 (Oct. 28, 1992) (describing the archaeological evidence of historic mining activities on the mine site) (8 FA tab 55A).

have created 1,362 acres of entirely new surface disturbance.[148] In addition, apart from the proposed Imperial Project, only one other open-pit metallic mine in the CDCA is located entirely on BLM-administered lands: the Briggs mine in Inyo County, owned by Canyon Resources Corp. The other mines in the CDCA are located on a combination of public and private lands.[149]

Glamis's plan of operations called for (1) the excavation of three open pits; (2) the construction and operation of a cyanide heap leach facility; (3) the creation of two waste rock stockpiles; and (4) the construction and operation of ancillary facilities.[150] As discussed below, under Glamis's proposed plan, following completion of mining operations the largest of the three pits would be left open in perpetuity,[151] and correspondingly large waste rock piles would be left on the landscape.[152]

### A. Unbackfilled Open-Pit Metallic Mines, Such As Glamis's Proposed Imperial Project, Leave Enormous Open Pits And Mounds Of Waste Materials On Mined Lands That Threaten The Environment And Public Health And Safety

Glamis's proposed Imperial Project, like other open-pit metallic mines, would leave an enormous open pit and correspondingly large mounds of waste materials on

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[148] 2000 FEIS at 2-5 (8 FA tab 61).

[149] *See* Picacho, Dulcina Pit FEIR at 3-3 (7 FA tab 54) (showing that the vast majority of the Picacho mine site – 484 of 633 acres – was on patented, privately-owned land); American Girl FEIR at 1-13 (7 FA tab 52) (showing that approximately thirty percent of the American Girl mine was located on private lands); Castle Mountain FEIS, at S-6 (7 FA tab 53) (noting that the mine project is located on public and private lands); Rand Baltic FEIS, at 1-8 (8 FA tabs 55-56) (showing that the Rand project is on both public and private lands); Soledad FEIS, at ¶¶ 282 – 306 (8 FA tab 59) (analyzing potential impact of project on both public and private lands); *Plan of Operations for the Proposed Mesquite Mine Expansion*, at Map 1 (Nov. 23, 1998) (showing that much of the Mesquite Mine site was on private lands by 1998) (8 FA tab 60A).

[150] 2000 FEIS at S-2 (8 FA tab 61).

[151] State Mining and Geology Board, Executive Officer's Report, Agenda Item 2 at 4 (Dec. 12, 2002) (6 FA tab 267); 2000 FEIS at 2-7, 2-8 (8 FA tab 61); Letter from Jason Marshall, Assistant Director, Department of Conservation, to John Morrison, Assistant Planning Director, Imperial County Planning/Building Department, and Douglas Romoli, BLM (Feb. 26, 1998), at 1 (7 FA tab 15).

[152] State Mining and Geology Board, Executive Officer's Report, Agenda Item 2 at 4 (Dec. 12, 2002) (6 FA tab 267); 2000 FEIS at 2-14 (8 FA tab 61).

mined lands. As proposed, the Imperial Project's largest pit, the East Pit, would be left open in perpetuity, measuring nearly one mile long, over one half mile wide, and 800 feet deep.[153] The overburden piles would extend as long as one mile or more across and measure up to 300 feet above the natural grades.[154] In total, the project would require the excavation of approximately 150 million tons of ore and 300 million tons of waste rock,[155] with an estimated recovery of approximately 1.4 million ounces of gold.[156]

The cyanide heap leach process enables such projects to be economic, notwithstanding the need to excavate multiple tons of low-grade ore in order to produce a single ounce of gold. Use of cyanide in gold mining increased on an "enormous" scale in the late 1970's and 1980's, while "[c]ontinued improvements in cyanidation technology have allowed increasingly lower grade gold ores to be mined economically using leach operations."[157] Cyanide heap leach mining is generally used for low-grade ores containing less than .04 ounces of gold per ton of ore.[158]

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[153] State Mining and Geology Board, Executive Officer's Report, Agenda Item 2 at 4 (Dec. 12, 2002) (6 FA tab 267); 2000 FEIS at 2-7, 2-8 (8 FA tab 61).

[154] State Mining and Geology Board, Executive Officer's Report, Agenda Item 2 at 4 (Dec. 12, 2002) (6 FA tab 267); 2000 FEIS at 2-14 (8 FA tab 61).

[155] State Mining and Geology Board, Executive Officer's Report, Agenda Item 2 at 4 (Dec. 12, 2002) (6 FA tab 267); 2000 FEIS at S-3 (8 FA tab 61); Letter from Jason Marshall, Assistant Director, Department of Conservation, to John Morrison, Assistant Planning Director, Imperial County Planning/Building Department, and Douglas Romoli, BLM (Feb. 26, 1998), at 2 (7 FA tab 15).

[156] Expert Report of Navigant Consulting, Inc. (Sept. 19, 2006) ("Navigant Rpt.") ¶ 11.

[157] U.S. ENVIRONMENTAL PROTECTION AGENCY, ABANDONED MINE SITE CHARACTERIZATION AND CLEANUP HANDBOOK, § 3.5 (2000).

[158] U.S. ENVIRONMENTAL PROTECTION AGENCY, TECHNICAL RESOURCE DOCUMENT, EXTRACTION AND BENEFICIATION OF ORES AND MINERALS 1-19 (vol. 2, Gold 1994); *see also* Dan Peplow and Robert Edmonds, "The Ecotoxicology of Mine Waste Contamination at Different Levels of Biological Organization in the Methow Valley, Okanogan County, Washington," (May 2003), Chapter 1, Introduction, at 2 ("In metalliferous mining, high volumes of waste are produced because of the low concentration of metals in the ore. For example, gold (Au), which is commercially viable at less than one-half ounce per ton, creates a huge volume of mine waste when mined. Mine waste historically has been disposed of at the lowest cost by creating heaps of mine spoils on site.").

The cyanide heap leach process requires piling extracted ore into heaps, which are located on top of a pad and an impervious liner.[159] A cyanide solution is then sprayed over the heaps.[160] The cyanide solution trickles down through the ore, dissolving finely disseminated gold in the rock.[161] Next, the pad underlying the heap channels the cyanide solution into a holding pond.[162] Using metallic zinc powder, the precious minerals are separated from the cyanide solution, while the used cyanide is recovered and reconstituted in order to be resprayed over the heap.[163]

The enormous open pits and mounds of waste materials left on open-pit metallic mine sites, particularly mines using the cyanide heap leach process, threaten the environment, public health, and safety.[164] The open pits can host toxic "pit lakes," which

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[159] U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL HARDROCK MINING FRAMEWORK, app. A at A-14 (1997); U.S. ENVIRONMENTAL PROTECTION AGENCY, TECHNICAL RESOURCE DOCUMENT, EXTRACTION AND BENEFICIATION OF ORES AND MINERALS 1-23, 1-24 (vol. 2, Gold 1994).

[160] U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL HARDROCK MINING FRAMEWORK, app. A at A-14 (1997); U.S. ENVIRONMENTAL PROTECTION AGENCY, TECHNICAL RESOURCE DOCUMENT, EXTRACTION AND BENEFICIATION OF ORES AND MINERALS 1-24, 1-25 (vol. 2, Gold 1994).

[161] *Id.*

[162] *Id.*

[163] U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL HARDROCK MINING FRAMEWORK, app. A at A-14 (1997); U.S. ENVIRONMENTAL PROTECTION AGENCY, TECHNICAL RESOURCE DOCUMENT, EXTRACTION AND BENEFICIATION OF ORES AND MINERALS 1-24, 1-25, 1-28, 1-34, 1-35, 1-36 (vol. 2, Gold 1994).

[164] *See, e.g.,* Letter from Jason Marshall, Assistant Director, Department of Conservation, to John Morrison, Assistant Planning Director, Imperial County Planning/Building Department, and Douglas Romoli, BLM (Feb. 26, 1998), at 2 (7 FA tab 15) ("According to the DEIR/DEIS, the East Pit will be reclaimed by providing minimal efforts to insure health and safety."); Letter from James S. Pompy, Manager, Office of Mine Reclamation, to Jesse Soriano, Imperial County Planning Department (Feb. 21, 1997), at 2 (7 FA tab 11) ("The issue of site safety around the excavated pits still remains to be addressed to the satisfaction of the county."); Letter from Jason Marshall, Assistant Director, Department of Conservation, to Jesse Soriano, Imperial County Planning/Building Department, and Keith Shone, BLM (Dec. 16, 1996), at 2 (7 FA tab 8) ("Potential impacts to public safety may exist for people on foot near the pits."). Given the environmental and health and safety impacts associated with cyanide heap leach mining and, more generally, open-pit mining operations, numerous jurisdictions have imposed bans on such activities: Montana (MONT. CODE ANN. § 82-4-390 (1998)); Turkey (*Ozay v. Ministry of the Environment (Ankara)*, 6th Chamber of the Higher Administrative Court, ref. no. 1996/5348, ruling no. 1997/2311 (Turk.), *available at* http://korte-goldmining.infu.uni-dortmund.de/TurkLP.html); Czech Republic (Act No. 44/1988 Coll. (Mining Act), § 30(2) (Czech Rep.), *available at* http://www.lexadin.nl/wlg/legis/nofr/eur/lxwecze.htm); Argentina (Ordenanza [Ordinance] 1.068/05, San Carlos de Bariloche Department, Rio Negro Province, Dec. 19, 2005, *available at*

are formed by the release of sulfates, acids, and metals into ground or surface water following the oxidation of exposed walls of open pits.[165] Among other things, pit lakes can create a hazard for migratory birds and other wildlife.[166] In addition, the large open pits and waste piles can threaten wildlife by impeding the movement and migration of land animals.[167] The large open pits and waste mounds also can serve as an attractive nuisance for outdoor enthusiasts (such as hikers and rock climbers) and off-road vehicles.[168]

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http://www.losandes.com.ar/2005/1220/ sociedad/nota291662_1.htm); Costa Rica (Mineral Code, Law No. 6797, arts. 8, 103 (Oct. 4, 1982) (amended 2002), *available at* http://historico.gaceta.go.cr/2005/08/COMP_08_08_ 2005.html#Toc111003582).

[165] Glenn C. Miller, *Precious Metals Pit Lakes: Controls on Eventual Water Quality*, SOUTHWEST HYDROLOGY (Sept./Oct. 2002), at 16 (7 FA tab 211); COMMITTEE ON HARDROCK MINING ON FEDERAL LANDS ET AL., HARDROCK MINING ON FEDERAL LANDS, app. B (Potential Environmental Impacts of Hardrock Mining) (1999), at 153, 156 (5 FA tab 177); *see also* Declaration of Dr. John G. Parrish (Sept. 16, 2006) ("Parrish Declaration") ¶ 10.

[166] *See* COMMITTEE ON HARDROCK MINING ON FEDERAL LANDS ET AL., HARDROCK MINING ON FEDERAL LANDS, app. B (Potential Environmental Impacts of Hardrock Mining) (1999), at 156 (5 FA tab 177) ("[T]he concentration of metals, other contaminants, and salinity in the pit through evaporation may become a long-term water quality issue, especially for migratory birds and terrestrial wildlife. For example, waters of the Berkeley pit in Butte, Montana, were lethal to migrating snow geese that used the lake as a stopover in 1995 (Hagler Bailly Consulting, Inc., 1996)"); Terry Braun, *Introduction to Pit Lakes in the Southwest*, SOUTHWEST HYDROLOGY (Sept./Oct. 2002), at 13 ("Regardless of a state's position on pit water quality issues, a migratory bird kill at a pit lake will trigger the involvement of federal authorities.") (6 FA tab 202); *see also* California Regional Water Quality Control Board, Central Valley Region, Res. No. 99-129, Referral to the Attorney General for Civil Liability for Jamestown Mine (Sept. 17, 1999) (10 FA tab 101), *available at* http://www.waterboards.ca.gov/enforcement/docs/ enforders/99-5129.pdf (finding that a pit lake on the Jamestown gold mine site in Tuolumne County, California contained concentrations of arsenic that exceeded California regulatory limits for drinking water "by greater than 200 times"). Recognizing the risks associated with pit lakes, the FEIS required Glamis to conduct, "[p]rior to completion of mining," an assessment of the potential for pit lake formation in the East Pit. 2000 FEIS at 4-75 (8 FA tab 61). The FEIS noted that if the assessment indicated a "reasonable potential" for pit lake formation, Glamis would be required to partially backfill the East Pit "to an elevation higher than the level of any pit lake which may be predicted to form" from groundwater inflow. 2000 FEIS at 4-75 (8 FA tab 61).

[167] 2000 FEIS 4-62 (8 FA tab 61); Parrish Declaration ¶ 10; *see also* COMMITTEE ON HARDROCK MINING ON FEDERAL LANDS ET AL., HARDROCK MINING ON FEDERAL LANDS, app. B (Potential Environmental Impacts of Hardrock Mining) (1999), at 165-66 (5 FA tab 177).

[168] *See* Letter from Jason Marshall, Assistant Director, Department of Conservation, to John Morrison, Assistant Planning Director, Imperial County Planning/Building Department, and Douglas Romoli, BLM (Feb. 26, 1998), at 2 (7 FA tab 15) ("[a]s OMR stated in their December letter, the use of large boulders around the excavation probably will not sufficiently deter hikers or off-highway vehicle enthusiasts"); Letter from James S. Pompy, Manager, Office of Mine Reclamation, to Jesse Soriano, Imperial County Planning Department (Feb. 21, 1997), at 2 (7 FA tab 11) (same); Letter from Jason Marshall, Assistant

### B. Glamis Proposed To Locate The Imperial Project On A Major Prehistoric Travel Corridor That Is Central To The Spirituality And Cultural Continuity Of The Quechan

It is clear from "all ethnohistoric and ethnographic accounts" that the proposed Imperial Project site is "situated well within the traditional cultural territory of the Quechan Indians."[169] The Quechan are a Yuman-speaking group of the Hokan linguistic family that are culturally and linguistically related to many other Native American tribes of the lower Colorado River, including the Mohave, Cochimi, Cocopah, Halcidhoma and Havasupai tribes.[170] The Quechan are among the "probable descendants" of the prehistoric Patayan culture that developed around A.D. 700.[171] In the first half of the nineteenth century, the Quechan inhabited the west and east banks of the Colorado River, with the northern boundary of their territory extending as far as Blythe, California, the southern boundary extending to Sonora, Mexico, the western boundary extending to

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Director, Department of Conservation, to Jesse Soriano, Imperial County Planning/Building Department, and Keith Shone, BLM (Dec. 16, 1996), at 2 (7 FA tab 8) (same); Parrish Declaration ¶ 10; *see also* MARGARET M. LYNOIS, DAVID L. WELDE & ELIZABETH VON TILL WARREN, IMPACTS: DAMAGE TO CULTURAL RESOURCES IN THE CALIFORNIA DESERT 14 (1980) (noting the "increased recreational use of the California Desert during the past 10 years," with campers and off-road vehicles bringing "large numbers of recreationists into the desert").

[169] Michael Baksh, Tierra Environmental Services, *Native American Consultation for the Glamis Imperial Project* (Sept. 22, 1997) ("Baksh 1997"), at 5 (9 FA tab 82).

[170] Jerry Schaefer & Carol Schultze, ASM Affiliates, Inc., *Cultural Resources of Indian Pass: An Inventory and Evaluation For Imperial Project* (June 1996) ("Schaefer & Schultze 1996"), at 12 (9 FA tab 81).

[171] Andrew R. Pigniolo, Jackson Underwood & James H. Cleland, KEA Environmental, Inc., *Where Trails Cross: Cultural Resources Inventory and Evaluation for the Imperial Project, Imperial County, California* (Dec. 1997) ("*Where Trails Cross*"), at 40-41 (9 FA tab 83) (also noting that there is some evidence to suggest that the trail complexes and cleared areas in and around the project area might have existed 12,000 to 7,000 years ago); *see also* ELIZABETH VON TILL WARREN ET AL., A CULTURAL RESOURCES OVERVIEW OF THE COLORADO DESERT PLANNING UNITS 34-53 (1981) (9 FA tab 68) (containing a detailed cultural chronology of the prehistory of southeastern California).

California's Cahuilla Mountains, and the eastern boundary stopping just short of Gila Bend, Arizona.[172]

While tribal conflicts altered the boundaries of traditional territories of the various Yuman tribes throughout the seventeenth, eighteenth and nineteenth centuries, the lower Colorado River groups including the Cocopah, Mohave, and Quechan "resisted the acculturative influences of colonial missionization more successfully than did many other groups of the southwest and southern California" and, as such, are characterized by a degree of "unbroken cultural continuity."[173]

Notwithstanding the fact that they lived in scattered settlements, or rancherias, along the Colorado River, "the Quechan recognized themselves as a single, united tribe."[174] Perhaps because of the strength of their cultural identity, the Quechan were able to unify in times of war despite these distances and to remain in their ancient traditional homeland, "without the usual serious lapses caused by major relocations" that many other tribes were forced to suffer.[175] This basic territorial stability enabled the Quechan to develop a strong mythological heritage and a spiritual life inextricably linked to the land.[176]

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[172] James H. Cleland & Rebecca McCorkle Apple, EDAW, Inc., *A View Across the Cultural Landscape of the Lower Colorado Desert: Cultural Resource Investigations for the North Baja Pipeline Project* (Dec. 2003) ("Cleland & Apple 2003"), at 24 (10 FA tab 89) (citing Robert L. Bee, *Quechan* (1982), at 37).

[173] Cleland & Apple 2003, at 40 (10 FA tab 89).

[174] Vickie L. Clay & Bertrand T. Young, *Cultural Resources Inventory of Pad #5 (106.9 acres) at the Picacho Peak Mine, Imperial County, California* 7 (Mar. 7, 1991) (9 FA tab 77); *see also* ELIZABETH VON TILL WARREN ET AL., A CULTURAL RESOURCES OVERVIEW OF THE COLORADO DESERT PLANNING UNITS 63 (1981) (9 FA tab 68).

[175] Boma Johnson, Archaeology Plus, *Cultural Resources Overview of the North Baja Pipeline Project* (Aug. 27, 2001), *in* Clyde M. Woods, *North Baja Pipeline Project Native American Studies* (Sept. 2001), at 34 (10 FA tab 86).

[176] *Id*.

The Quechan religious tradition is typical of other Native American tribes in that it is in many ways coextensive with the Tribe's cultural identity and many of the Tribe's rituals are tied to specific places within their traditional territory.[177] At the same time, in important respects, the Pan-Yuman spiritual tradition (including that of the Quechan) is unquestionably distinct from the tradition that predominated among most Native American tribes in the Southwest because it is premised upon a unique creation myth.[178] The Pan-Yuman creation myth is closely linked to the landscape that the tribes traveled, and accordingly, this myth is memorialized in the archaeological remains of the region. Since the nineteenth century, the principal ethnographers of the Quechan have consistently recounted the importance of the Tribe's creation myth.

According to the Pan-Yuman creation myth, which the Quechan traditionally recount over the course of four days, the Yuman tribes were created by the god *Kukumat*, on the sacred mountain, *Avikwaame*, a site now known variously as Spirit Mountain or Newberry Mountain, [179]

The Quechan believe it was on *Avikwaame* that *Kukumat* fathered with the first female a

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[177] Letter from Jace Weaver, American Studies Program, Yale University, regarding the Advisory Council on Historic Preservation Hearing on the Glamis/Imperial Mine (Mar. 12, 1999) (7 FA tab 26); *see also* Valerie Taliman, *Sacred Landscapes*, SIERRA MAGAZINE, Nov.-Dec. 2002, at 2, *available at* http://www.sierra.club.org/sierra/200211/sacred_printable.asp (explaining that many Native American tribes "have origin stories that define traditional cultural sites or places of reverence, which Native people have depended on for millennia for cultural vitality and spiritual sustenance").

[178] Letter from Jace Weaver, American Studies Program, Yale University, regarding the Advisory Council on Historic Preservation Hearing on the Glamis/Imperial Mine (Mar. 12, 1999) (7 FA tab 26) (explaining that the Quechan culture is unique because its creation story is based on an "earthdiver" myth, "wherein the land is brought up from the depths of primordial waters," while the creation myth that predominated among other Southwestern Native American tribes was one of "emergence," "wherein humanity emerges out of the womb of the earth").

[179] *See Where Trails Cross* at 50 (9 FA tab 83) (citing DARYLL C. FORDE, ETHNOGRAPHY OF THE YUMA INDIANS (1931), at 214-244); *see also* 2 JAY VON WERLHOF, THAT THEY MAY KNOW AND REMEMBER: SPIRITS OF THE EARTH 9 (2004) (10 FA tab 90).

son named *Kumastamho*.[180] The Quechan also believe that on this sacred mountain *Kumastamho*, the god-son, taught the men of the tribe to recede into a dream state (*sru ma*) in order to access the power to cure illness and to relieve the anxieties of those who feared for their health and well-being.[181]

Because of the importance of this creation story, the act of dreaming features prominently in Quechan culture. For the Quechan, as for the Mohave and other Yuman tribes, the dream experience is the major source of power.[182] It is akin to prayer in other religious traditions, although no direct supplications to deities are made. It is considered integral to overall cultural well-being and survival because it allows people to obtain advice from the supernatural world about ethical issues, morality and the problems of everyday living.[183] Traditionally, the entire Quechan social hierarchy was determined by these dreams – leaders divined they had the power to lead; shamans divined they had the power to cure; and warriors divined they had the power to prevail in battle entirely through the dreaming process.[184] In fact, the political organization of the Quechan was distinct from that of other Yuman tribes because power was concentrated in the hands of one leader, the *Kwoxot*, who assumed his position of authority by virtue of the power of

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[180] *See* VON WERLHOF at 10 (10 FA tab 90).

[181] *See id*.

[182] *See* Cleland & Apple 2003, at 21 (10 FA tab 89), (citing Bee 1982, at 49-50; JACK D. FORBES, WARRIORS OF THE COLORADO: THE YUMAS OF THE QUECHAN NATION AND THEIR NEIGHBORS (1965), at 63; FORDE 1931, at 201-204; A.L. KROEBER, HANDBOOK OF THE INDIANS OF CALIFORNIA (1925), at 754; Kenneth M. Stewart, "Mohave," *in* SOUTHWEST (Alfonso Ortiz ed., Smithsonian Institution) (1983), at 65).

[183] *See Where Trails Cross* at 61 (9 FA tab 83), (citing Personal communication from Preston Arroweed, (1997); Personal communication from Lorey Cahcora (1994); FORDE 1931, at 180-181.).

[184] *See* Baksh 1997 at 10-11 (9 FA tab 82); *see also* Robert L. Bee, "Quechan," *in* SOUTHWEST (Alfonso Ortiz ed., Smithsonian Institution) (1983) (9 FA tab 71), at 92 (explaining that the Quechan's political leader "quite literally dreamed his way into office," as a group of elderly men determined a candidate's eligibility for office based on the content of his dreams).

his dream, or *icama*, experiences.[185] The dreams of the Quechan are also tied closely to the natural and cultural landscape, with personal dreams paralleling Yuman religious myth "in the sense that most are about journeys of spiritual discovery, often along trails leading to mountains of religious significance where important spirits reside."[186] As an early ethnographer of the Yuman tribes described the role of dreaming in Mohave culture,

> [t]here is no [other] people whose activities are more shaped by this psychic state, or what they believe to be such, and none whose civilization is so completely, so deliberately, reflected in their myths.[187]

Just as it elucidates the significance of dreaming to the Quechan, the Pan-Yuman creation myth also reveals the origin of the Tribe's most sacred ritual: the *keruk* cremation story. According to that myth, upon the eve of his death, the people asked their creator, *Kukumat*, what would happen to him in death; and he explained that he would "return to where he came from."[188] Following his death, his body was cremated, his house was burned, and *Kumastamho*, his son, directed the grieving people to conduct the *keruk* ceremony to aid the mourning process.[189]

Thus, according to their creation story, the Yuman tribes conducted their first *keruk* ceremony after the death of their creator. After this sacred ritual was completed, the Yumans believe that *Kumastamho* completed the creation cycle that his father had

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[185] R. Paige Talley, *Report for the Glamis/Sand Hills Ethnographic Study* 5-6 (June 15, 1980) (9 FA tab 67). The reference to "Glamis" in the title of this study is to the town of Glamis, California, not to the claimant in this arbitration.

[186] *Where Trails Cross* at 61 (9 FA tab 83).

[187] *Id.* (citing KROEBER 1925, at 755).

[188] 2 JAY VON WERLHOF, THAT THEY MAY KNOW AND REMEMBER: SPIRITS OF THE EARTH 12 (2004) (10 FA tab 90).

[189] *See Where Trails Cross* at 63 (9 FA tab 83) (citing FORDE 1931, at 214-244).

begun, leading his people down from *Avikwaame* into the desert.[190] While the Mohave stayed in the north, closest to *Avikwaame*, the Quechan believe *Kumustamho* "led the Quechan and other southdwellers along *Xam Kwatcam*, a sacred trail meaning 'another going down.'"[191] The Quechan believe this trail was laid for them by their creator "to physically connect Avi Kwame Mountain with their riverine tribal lands."[192] With its spiritual significance to the Quechan thus derived from its connection to Spirit Mountain and its association with the first *keruk* ceremony, the *Xam Kwatcan* trail has subsequently been described as a complex trail network, encompassing the Medicine Trail, the Salt Song Trail, the Creation Trail, the Keruk Trail and also the Trail of Dreams.[193] Accounts of the creation myth surrounding *Avikwaame* and the *Xam Kwatcan* trail have been recorded by all the principal ethnographers of the Quechan: Eugene J. Trippel (1889),[194] John P. Harrington (1908),[195] Alfred L. Kroeber (1925),[196] Daryll C. Forde (1931),[197] Leslie Spier (1933),[198] Jack D. Forbes (1965),[199] and synthesized by Woods, Raven and Raven (1986).[200]

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[190] *See* VON WERLHOF at 17 (10 FA tab 90).

[191] *Id.* at 19 (2004).

[192] *Id*.

[193] Clyde M. Woods, *North Baja Pipeline Project Native American Studies* 8-10 (Sept. 2001) (10 FA tab 87).

[194] Eugene Trippel, *The Yuma Indians*, 13 The Overland Monthly 561-584 (1889), *cited in* Baksh 1997 at 11 (9 FA tab 82).

[195] John P. Harrington, *A Yuma Account of Origins*, 21(82) JOURNAL OF AMERICAN FOLK-LORE 324-348 (1908), *cited in* Baksh 1997 at 11 (9 FA tab 82).

[196] Alfred L. Kroeber, *Handbook of the Indian of California,* Smithsonian Institution (1925), *cited in* Baksh 1997 at 11 (9 FA tab 82).

[197] Daryll C. Forde, *Ethnography of the Yuman Indians*, 28(4) University of California Publications in American Archaeology and Ethnology 83-278 (Berkeley 1931), *cited in* Baksh 1997 at 11(9 FA tab 82).

[198] Leslie Spier, YUMAN TRIBES OF THE GILA RIVER (University of Chicago Press, Chicago 1933) (Reprinted: Cooper Square Press, New York, 1970), *cited in* Baksh 1997 at 11(9 FA tab 82).

The Quechan believe their creator laid these trails for them, both to facilitate the dreaming process and to enable them to return to the place of their origin. In the late nineteenth and early twentieth centuries, the Quechan performed the *keruk* every few years to commemorate the death of an important person or persons, to re-enact the creation story, to protect the people from evil, and to bestow power on the living.[201] The ceremony lasted for four days and became an important occasion for the establishment of personal and economic relationships.[202] As such, relatives, friends and even members of other tribes would travel great distances along the trails to attend these important spiritual and cultural events.[203]

The Quechan Tribe currently occupies a 25,000 acre reservation on the west side of the Colorado River near Winterhaven, California.[204] Although much of the Tribe's traditional territory lies north and east of its present day reservation, the Quechan continue to return to portions of their traditional territory to practice their cultural and religious traditions.[205]

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[199] Jack D. Forbes, WARRIORS OF THE COLORADO: THE YUMAS OF THE QUECHAN NATION AND THEIR NEIGHBORS (University of Oklahoma Press, Norman, Oklahoma 1965), *cited in* Baksh 1997 at 11 (9 FA tab 82).

[200] *See* Clyde M. Woods, Shelly Raven & Christopher Raven, *The Archaeology of Creation: Native American Ethnology and the Cultural Resource of Pilot Knob*, Report Prepared by Wirth Environmental Services for U.S. Department of Interior Bureau of Land Management, El Centro Resource Area (1986), *cited in* Baksh 1997 at 11 (9 FA tab 82).

[201] *See Where Trails Cross* at 63 (9 FA tab 83) (citing early accounts of the *keruk* ceremony by Forde (1931, at 224-25) and Forbes (1965, at 67)); *see also* Baksh 1997 at 11 (9 FA tab 82) (citing Bee 1982, at 50).

[202] *See* Cleland & Apple 2003, at 22 (10 FA tab 89).

[203] *Id*.

[204] *See Where Trails Cross* at 51 (9 FA tab 83).

[205] *See* Letter from Courtney Ann Coyle, Attorney for Quechan Tribe, to Tom Zale, Acting Field Manager, BLM (Jan. 29, 1999) (7 FA tab 23); *see also* ELIZABETH VON TILL WARREN ET AL., A CULTURAL RESOURCES OVERVIEW OF THE COLORADO DESERT PLANNING UNITS 65 (1981) (9 FA tab 68) (indicating that as of 1981, the *keruk* ceremony was performed annually on the reservation, rather than on the traditional ceremonial trail, "probably as a result of agency pressure").

## IV. Federal Processing Of Glamis's Plan Of Operations

The federal processing of a plan of operations is a multi-faceted, multi-agency process that must take into account numerous statutory and regulatory requirements. Evaluating a plan of operations for compliance with the mining laws, including FLPMA's prohibitions against unnecessary or undue degradation – and undue impairment within the CDCA – is just one part of that process. As noted above, BLM must also comply with the National Environmental Policy Act of 1969,[206] which requires federal agencies to analyze the environmental impacts from federal actions that have the potential to significantly impact the human environment.[207] To comply with NEPA when the potential impact is significant, federal agencies must prepare an EIS that assesses the environmental impacts of the proposed project, as well as the impacts of several alternatives to the project.[208] The EIS process also commonly provides the context within which other federal requirements are considered, such as compliance with the Clean Water Act, the Endangered Species Act, and the results of the Section 106 process under the NHPA. In 1994, Glamis submitted to the BLM its initial plan of operations for the proposed Imperial Project.[209] In 1996, BLM prepared a Draft Environmental Impact Statement. In response to significant concerns raised in the comment process to the 1996 DEIS, including concerns about the project's impact on cultural resources in the area,

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[206] *See supra* Facts Sec. I(c). The regulations to implement NEPA are promulgated by the Council on Environmental Quality ("CEQ").

[207] *See* 42 U.S.C. § 4332(C) (1994); *supra* Facts Sec. I(c). There are three basic levels of analysis conducted under NEPA, dependent upon whether the proposed action is likely to significantly affect the environment. The first is a categorical exclusion determination (a finding of no significant impact) made if the proposed action meets certain pre-defined agency criteria. Second, is preparation of an Environmental Assessment leading to a finding of no significant impact. Third, is the preparation of an EIS, which is the most extensive level of analysis undertaken when there is potentially significant impact. *See generally* 40 C.F.R. pt. 1501 (1978).

[208] *See supra* Facts Sec. I(c).

[209] *See* Chemgold Inc., Imperial Project Plan of Operations (Nov. 1994) (10 FA tab 103).

Glamis made alterations to its plan of operations and BLM decided to prepare a new DEIS. After another archaeological survey and ethnographic study was completed, BLM issued a new DEIS in late 1997. After extensive work responding to comments on the DEIS, engaging in the Section 106 process before the ACHP, and evaluating the unique legal issues raised by the Imperial Project, BLM issued a Final EIS in 2000 recommending the "No Action" alternative.[210] In January of 2001, the Secretary of the Interior issued a Record of Decision ("ROD") denying the Imperial Project.[211] This ROD was rescinded later in 2001.[212] After the rescission, BLM began processing the Imperial Project plan of operations again by examining the validity of Glamis's mining claims. On September 27, 2002, BLM completed the validity examination and issued a mineral report concluding that Glamis held valid mining claims.[213] DOI and BLM were continuing to process Glamis's plan of operations when Glamis submitted this claim to arbitration.

Below we detail the relevant portions of the federal processing of Glamis's plan of operations. We begin with an overview of all of the archaeological studies conducted in the Imperial Project area, culminating with the surveys conducted in support of the 1996 and 1997 DEISs. We then describe the EIS process in greater detail, including the unprecedented number of comments received on the Imperial Project. We continue by addressing two parts of the EIS process with which Glamis takes issue – the consultation with the ACHP in accordance with Section 106 of the NHPA, and the preparation of the

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[210] 2000 FEIS, vol. I, at 2-70 (8 FA tab 61).

[211] Record of Decision for the Imperial Project Gold Mine Proposal (Jan. 17, 2001) (5 FA tab 212).

[212] Rescission of Record of Decision for the Imperial Project Gold Mine Proposal (Nov. 23, 2001) (5 FA tab 219).

[213] BLM Mineral Report (Sept. 27, 2002) (6 FA tab 255).

DOI Solicitor's 1999 M-Opinion that addressed the unique legal issues raised by the Imperial Project's impact on historic resources and Quechan cultural resources and religious practices. Finally, we conclude by describing the issuance of the FEIS, the ROD denying the project and its Rescission, the conduct of the validity examination, and Glamis's communications to BLM to cease processing.

### A. Several Archaeological Surveys Of The Proposed Imperial Project Site Identified Numerous, Significant Native American Cultural Resources

Pursuant to Section 106 of the NHPA, BLM was obligated to take into account the effect of the proposed Imperial Project on properties included in or eligible for the National Register and to allow the Advisory Council on Historic Preservation an opportunity to comment on the project.[214]

As noted above, the ACHP has promulgated the Section 106 regulations to govern how government agencies conduct this process. Section 106 also authorizes the ACHP to enter into a "Programmatic Agreement" with a federal agency to govern that agency's responsibilities under the Section 106 process.[215] Recognizing that the BLM has more in-house archaeological expertise than most other federal agencies, the ACHP entered into such a nationwide Programmatic Agreement with BLM and the National Conference of State Historic Preservation Officers in March 1997.[216] This Programmatic Agreement gave BLM flexibility to establish the procedures it would follow to identify and

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[214] National Historic Preservation Act, § 106 (codified at 16 U.S.C. § 470 to 470x-6 (2000)); *see supra* Fact Sec. II.A.

[215] 36 C.F.R. pt. 800 (2004).

[216] Programmatic Agreement among the Bureau of Land Management, the Advisory Council on Historic Preservation, and the National Conference of State Preservation Officers Regarding the Manner in Which BLM Will Meet its Responsibilities Under the National Historic Preservation Act (Mar. 26, 1997) (10 FA tab 111) ("Programmatic Agreement").

cataloging the potentially historic sites.[217] It also clarified the consultative relationship between BLM and the various SHPOs.[218] The nationwide Programmatic Agreement was written at a general level, and was intended to only take effect to govern the Section 106 process in a given state when a more specific protocol was negotiated between the BLM and SHPO for that state. The California Protocol became effective on April 6, 1998.[219] BLM's and the California SHPO's work done pursuant to the NHPA before April 1998 thus was governed by the Section 106 regulations, while its work after April 1998 was governed by the Programmatic Agreement and the California Protocol.[220]

### 1. The Cultural And Archaeological Significance Of The Proposed Mine Site Was Documented Before Glamis Acquired Its Interest In The Imperial Project Mining Claims

The earliest archaeological surveys of the Indian Pass area were conducted by an archaeologist named Malcolm Rogers, who discovered and recorded numerous archeological sites in an area just south of what is now the proposed Imperial Project mine and process area.[221] Rogers' visits in 1925, 1939, 1941, and 1942 to the area just south of the Imperial Project site resulted in the identification of the two most heavily

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[217] Programmatic Agreement at 4 (10 FA tab 111).

[218] *Id*. at 7-8 (detailing procedures to increase information sharing and communication between BLM and SHPOs).

[219] State Protocol Agreement Between the California State Director of the BLM and the California SHPO Regarding the Manner in Which the BLM Will Meet Its Responsibilities Under the National Historic Preservation Act and the National Programmatic Agreement Among the BLM, the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers, at 17 (Apr. 6, 1998) (10 FA tab 114).

[220] Declaration of John M. Fowler, ¶ 11 (September 18, 2006) ("Fowler Declaration"). The regulations governing the Imperial Project Section 106 review were promulgated in 1986. The ACHP issued a substantial revision of the Section 106 regulations that took effect in 1999, after most of the review of the Imperial Project had been completed. Thus, the ACHP relied exclusively on the 1986 regulations in conducting its review of the Imperial Project. *Id.*

[221] *See Where Trails Cross* at 284 (9 FA tab 83).

incised Native American trails of the region.[222] Since Rogers' early surveys, archaeologists have discovered that many of the features he identified in the vicinity of these trails – such as geoglyphs,[223] quartz shatter,[224] spirit breaks,[225] shaman's hearths,[226] trail shrines,[227] and vision circles[228] – serve as evidence that Native Americans used the

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[222] *See id*.

[223] Geoglyphs, sometimes referred to as ground figures, earth figures (BOMA JOHNSON, EARTH FIGURES OF THE LOWER COLORADO AND GILA RIVER DESERTS (1985)), earthen art (JAY VON WERLHOF, SPIRITS OF THE EARTH: A STUDY OF EASTERN ART IN THE NORTH AMERICAN DESERTS (1987)) and intaglios (MICHAEL BAKSH, ETHNOGRAPHIC AND ETHNOHISTORIC INSIGHTS INTO THE QUEN SABE INTAGLIOS (1994); JOSEPH A. EZZO & JEFFREY H. ALTSCHUL, GLYPHS AND QUARRIES OF THE LOWER COLORADO RIVER (1993)), have been described as the "hallmarks of Lower Colorado prehistory." *See Where Trails Cross* at 70 (9 FA tab 83). These anthropomorphic and zoomorphic figures are believed to have played a prominent role in the *keruk* ceremony, documenting the central mythological figures in the Pan-Yuman creation ceremony. *See* Baksh 1997, at 11 (9 FA tab 82) (citing ALTSCHUL & EZZO 1993). It is believed that the primary function of the geoglyphs along the *Xam Kwatcam* trail and elsewhere in the Colorado River valley was to serve as a mode of communication between the local tribal people and their deities and ancestral spirits. *See* Boma Johnson, Archaeology Plus, *Cultural Resources Overview of the North Baja Pipeline Project* (Aug. 27, 2001) (10 FA tab 86), *in* Clyde M. Woods, *North Baja Pipeline Project Native American Studies* (Sept. 2001), at 41 (10 FA tab 87).

[224] Quartz shatter is associated with spiritually significant trails because the Quechan would shatter the milky white stone as a symbol of power and purification when they approached a spiritual area. *See* Cleland & Apple 2003, at 36 (10 FA tab 89) (citing Personal communication from Lorey Cachora (1997); BOMA JOHNSON 1985, at 37; Personal communication from Weldon Johnson (1987)).

[225] Spirit breaks, or rocks placed in a line across or alongside a trail, are also associated with spiritually significant trails, because the Quechan believed by erecting such breaks they could deflect harmful spirit beings from following tribe members as they traversed the trails. *See* Cleland & Apple 2003, at 36 (10 FA tab 89). Malcolm Rogers detected spirit breaks when older trails were crossed by later period trails. Evidently, the Quechan erected such spirit breaks to prevent harmful spirit beings from entering the newer trail. *See id*. at 35-36 (10 FA tab 89) (citing Malcolm J. Rogers, "San Dieguito I in the Central Aspect," *in* M.J. ROGERS ET AL., ANCIENT HUNTERS OF THE FAR WEST (1966), at 51).

[226] Shaman's hearths are miniature hearths thought to be associated with the vision quest activities of shamans, spiritual leaders or others seeking spiritual experience. They are typically composed of rock rings 30-60 cm in diameter and the small fires that the shamans built within them are part of the traditional Quechan meditation-dreaming process. *See Where Trails Cross* at 150 (9 FA tab 83).

[227] These features consist of small piles of cobbles or pebbles and are thought to have been offerings by trail travelers to ensure a safe journey. *See* Cleland & Apple 2003, at 37 (10 FA tab 89); *see also* Transcript of Advisory Council on Historic Preservation Public Hearing (Holtsville, CA) (Mar. 11, 1999), at 46 (10 FA tab 115) (for Malcolm Rogers' description of cairns).

[228] Vision circles, also called "power circles," range in size from 1.6 to 3.3 feet in diameter and occasionally have a small cobble or boulder in their center. *See* Cleland & Apple 2003, at 37 (10 FA tab 89) (citing EZZO & ALTSCHUL 1993, at 17, 114; BOMA JOHNSON 1985, at 37). Power circles were used by travelers along the trails, both during actual and dream travel, "to pray and meditate to obtain power for the successful completion of the journey." *See* Cleland & Apple 2003, at 37 (10 FA tab 89) (citing Personal communication from Lorey Cachora (1997)). When such power circles are found in clusters, the Quechan believe the site served as a teaching center in which spiritual leaders would recount traditional legends to help their students understand more fully the connection between the physical and spiritual worlds. *See id.*

area for spiritual and ceremonial purposes for centuries.[229] Furthermore, given the abundance of whole and reconstructable ceramics that Rogers recorded in the Indian Pass vicinity, the area on which Glamis proposed to build the Imperial Project was well known in regional archaeological literature as the "type-site" for Patayan ceramics.[230]

Thus, when Glamis's predecessors in interest, Gold Fields Mining Corporation ("Gold Fields Mining") and AMIR Mines Ltd. ("AMIR Mines"), first proposed to conduct exploratory mining activities in the area, BLM required that they fund a number of archaeological surveys to determine if such an undertaking would adversely affect any historic properties in the area consistent with Section 106's requirements. Each of these studies documented the existence of additional, previously unrecorded archeological sites. Furthermore, a contemporaneous independent study by the Imperial Valley College Desert Museum ("IVCDM"), confirmed that the largest archeological site within what would become the Imperial Project area contained a braided trail with numerous features suggesting its use for symbolic or religious purposes.[231]

The first cultural resource inventory conducted on the lands which now encompass the proposed Imperial Project was funded by Gold Fields Mining in 1982 for

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(citing Personal communication from Lorey Cachora (1997)). Archaeologists refer to larger cleared circles surrounded by rocks as sleeping circles, which were used by weary travelers to rest during physical travel or to induce dream travel. *See id.* (citing Lorey Cachora, personal communication 1997).

[229] *See Where Trails Cross* at 66 (9 FA tab 83).

[230] Michael R. Waters, *The Lowland Patayan Ceramic Typology, in* HOHOKAM AND PATAYAN PREHISTORY OF SOUTHWESTERN ARIZONA 537-70 (Randall H. McGuire & Michael B. Schiffer, eds., 1982) (9 FA tab 70).

[231] Jay von Werlhof, IVCDM, *Archeological Investigations of Gold Fields Indian Pass Project Area* 46-53 (Mar. 1, 1988) (9 FA tab 76).

what was then described as its "Indian Rose prospect."[232] The inventory was conducted by WESTEC Services, Inc. ("WESTEC").[233] This survey detected "significant historical resources" within the area examined.[234] Specifically, WESTEC found "

,"[235] The investigators noted that, even at that time, "

."[236] Notwithstanding the large transect intervals[237] employed, the limited duration, and the small area surveyed in the study,[238] it was apparent to these surveyors that the project area "was visited by prehistoric populations for several thousand years," and that mitigation measures would be necessary to avoid the adverse impact of mining on these sites.[239]

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[232] Dennis Quillen, WESTEC Services, Inc., *Cultural Resource Inventory of Gold Fields Mining Corporation's Indian Rose Mining Prospect, Imperial County, California* (June 1982) ("Quillen 1982"), at 1 (9 FA tab 69). This inventory was conducted on lands extending . *Id.* The cultural resource inventory conducted in conjunction with the 1997 DEIS/DEIR describes the Imperial Project's ultimate location as "

. *See Where Trails Cross* at 51 (9 FA tab 83).

[233] WESTEC's Class III inventory was conducted at 30 meter transect intervals and covered 200 acres. Quillen 1982, at 3, 10 (9 FA tab 69).

[234] *Id.*

[235] Quillen 1982, at 4, 6 (9 FA tab 69).

[236] *Id.* at 7.

[237] A transect interval indicates the distance between archaeological surveyors as they examine the ground for archaeological features. *See* Declaration of James H. Cleland (Sept. 18, 2006) ("Cleland Declaration") ¶ 11.

[238] *See supra* n. 233 (noting that the survey utilized 30 meter transect intervals and covered only 200 acres).

[239] Quillen 1982, at 9-10 (9 FA tab 69). At the time, WESTEC Services proposed avoidance of all potentially significant sites "by the establishment of a buffer zone of 30 m surrounding each site," and if complete avoidance were unfeasible, it stated that a data recovery program involving "a complete surface micro-mapping and collection of each artifact from locales that cannot be avoided" was required. *Id.* at 10.

In 1987, AMIR Mines contracted, also with WESTEC, to survey fifteen additional drill sites in an area that would become part of the Imperial Project site. The 1987 survey resulted in the location of additional archaeological sites,[240] and AMIR Mines agreed to avoid these sites by modifying its development plan.[241] The survey's authors also concluded that a more detailed examination of the area "through the use of small transect interval surveys may show these individual resource areas to be part of a regional pattern of sites."[242]

Around the same time WESTEC conducted its 1987 survey, the IVCDM performed an independent survey of what it described as the Gold Fields Indian Pass Project Area.[243] Given the extent of its survey work in the region, the IVCDM was designated the Southeast California Information Center of the California Historical Resources Inventory System ("Southeast Information Center") and became the official archival house for southeastern California, responsible for assigning numbers to all sites recorded in the region.[244] As early as 1974, IVCDM archaeologists had followed the "trail systems from the Colorado River through [what would become the Imperial]

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[240] Dennis Gallegos & Andrew Pigniolo, WESTEC Services, Inc., *Cultural Resource Inventory and Avoidance Program for Fifteen Drill Sites Within the AMIR Indian Rose Area Lease* (July 1987) ("Gallegos & Pigniolo 1987"), at 18 (9 FA tab 74) (noting nine previously unrecorded archaeological sites and six isolates (*i.e.,* an area having one to three artifacts)).

[241] *Id*.

[242] *Id*. The 1987 survey used three meter transect intervals, covering an area approximately 20 meters in all directions from each drill hole location. Gallegos & Pigniolo 1987, at 8 (9 FA tab 74). This survey method was consistent with the requirements of the Society of California Archaeology and the National Park Service. *Id.* at 10.

[243] Jay von Werlhof, IVC Barker Museum, *Archeological Investigations of Gold Fields Indian Pass Project Area* (Mar. 1, 1988) ("Von Werlhof 1988"), at 16 (9 FA tab 76). These surveys were funded by the IVC Foundation as part of the systematic survey of archeological sites in eastern Imperial and southeastern Riverside counties, which the IVCDM had been conducting since 1973. *Id*.

[244] *See* Jay von Werlhof, IVC Barker Museum, *Phase I Class III Archaeological Investigations of Gold Fields Indian Pass Project Area* (Jan. 7, 1984) (9 FA tab 73).

project area to Pilot Knob Mesa."[245] Consequently, when Gold Fields Mining and AMIR Mines began mineral prospecting in this otherwise dormant area, IVCDM researchers conducted additional surveys of what would become the proposed mine site.[246]

IVCDM's survey, which was conducted over an eight-day period at close transect intervals, resulted in the identification of thirty-two archaeological sites.[247] The largest site among these, labeled covered an area of approximately 360,000 square meters of terrain bordering the east edge of Indian Pass Road and included "

."[248] Notably, the survey revealed

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These findings provided evidence that

was used by Native Americans for ceremonial purposes: the shaman's hearths suggested that Native American spiritual leaders used the trail in the meditation-dreaming process; the spirit breaks indicated the desire of Native American travelers to deflect unwelcome spirits; and the quartz reduction stations evidenced that those who used the trail engaged in a ritual purification process when they traversed it.

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[245] Von Werlhof 1988, at 16 (9 FA tab 76) (emphasis added).

[246] *Id.* at 25 (9 FA tab 76). As of the date of that report, IVCDM noted that

. *Id.* at 6, 25.

[247] *Id.* at 27, 32. The IVCDM described its surveying methodology as designed to attempt "maximal coverage of the project area." According to the report's author, the topography of the area did not lend itself to straight line transect intervals, and furthermore, its practice was to employ zig-zag lines or intuitive explorations of sites. He did note, however, that along the ancient flood plains in the project area the crew was able to advance in a lateral line, surveying at 5 to 10 meter intervals. *Id.* at 29.

[248] *Id.* at 46.

[249] Von Werlhof 1988, at 53 (9 FA tab 76).

The IVCDM surveyors also recorded another "major" preceramic trail, identified as , within the project area, which they believed united with north and south of the project site.[250] Based on the discovery of these and other trails, the IVCDM archaeologists concluded that an area that eventually would fall within the footprint of the Imperial Project was situated along "a major north-south trail system that connected with the Colorado River, the Indian Pass site, and the Mohave Trail."[251]

In the same month that the IVCDM published its survey of the proposed mine site, March 1988, WESTEC produced its third cultural resource survey of the area for AMIR Mines. Notably, the 1988 WESTEC inventory focused on the same site and trail system, as had the IVCDM survey. At this time, the Imperial Project consisted of only twenty-seven drill sites and connecting access roads.[252] In its survey, WESTEC documented two previously unrecorded trails branching from the previously recorded trail (designated within the site. The WESTEC survey noted that Trail was "destroyed by Indian Pass Road at its southern end, but probably continued along this same route to the south."[253] Because of Trail potential significance, the WESTEC surveyors recommended that additional work be undertaken to determine the site's northern boundary and its relationship to previously recorded rock alignments and petroglyphs in the area.[254] It also recommended that the

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[250] Von Werlhof 1988, at 66 (9 FA tab 76).

[251] *Id.*

[252] WESTEC conducted its third survey in an intensive manner: at five-meter transect intervals covering an area of approximately twenty meters in all directions from every drill hole. Dennis Gallegos & Andrew Pigniolo, WESTEC Services, Inc., *Cultural Resource Inventory Number 2 for Twenty-Seven Drill Sites Within the AMIR Indian Rose Area Lease* 3-1 (Mar. 1988) (9 FA tab 75). As a result of its survey, WESTEC extended the site definition boundaries of CA-IMP-5067 by a considerable margin.

[253] *Id.* at 3-4.

[254] *Id.* at 4-1.

site be "avoided of direct impacts" until its eligibility for inclusion on the National Register was determined.[255]

Thus, Glamis's immediate predecessor in interest, AMIR Mines, was aware that the project area contained at least one site , that was potentially eligible for election to the National Register and that a mitigation plan of complete avoidance was recommended to ensure its preservation. Furthermore, by that time, the IVCDM – the entity responsible for maintaining an inventory of all archaeological sites in the area – had identified

. Thus, when Imperial Gold acquired AMIR Mines' interest in the Indian Rose prospect and conducted its own "intensive pedestrian survey" of the cultural resources within a 355-acre area of what would later become the proposed Imperial Project, it was on notice that adverse impacts to might have to be avoided.

### 2. The First Block Survey Of The Proposed Imperial Project Revealed That The Area Was Associated With Quechan Religious and Cultural Traditions

The first cultural resource inventory of the proposed mine site that Imperial Gold (another of Glamis's predecessors in interest) funded was conducted by Brian F. Mooney Associates over three days in 1991, with a team of four archeologists that included a Quechan tribal historian, Lorey Cachora.[256] Just as the 1988 WESTEC and IVCDM

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[255] *Id.* at i.

[256] Unlike the IVCDM study which took place over an eight-day period at five to ten meter transect intervals, this study took place over three days at comparatively large, twenty meter, transect intervals. The report notes, however, that the surveyors examined the area around the proposed drill site and access areas more closely. *See* Jerry Schaefer & Drew Pallette, Brian F. Mooney Associates, *Cultural Resource Survey and Assessment of the BEMA Indian Rose Project Area* (June 1991) at 14 (9 FA tab 78).

cultural resource inventories had, the Brian F. Mooney Associates survey identified [redacted] as "a trail complex following a large wash on the west side of the project area that provides a route to Indian Pass and on to the Colorado river."[257]

The survey noted a large number of lithic and ceramic scatters associated with that trail complex and identified another trail, [redacted] as "most likely a tributary trail extending from the larger trail complex."[258] After identifying [redacted] and its tributary trail, the surveyors noted that [redacted]

[redacted]

### 3. The Archaeological Surveys Conducted In Association With The 1996 EIS/EIR Confirmed That A Major Prehistoric Trail Network Intersected The Proposed Imperial Project Mine And Process Area

In 1995, in conjunction with the preparation of the first DEIS/DEIR, Chemgold Inc. ("Chemgold"), another of Glamis's predecessors in interest, retained Environmental Management Associates ("EMA"). In turn, EMA subcontracted with ASM Affiliates Inc. ("ASM") to conduct an archaeological survey and cultural resource inventory of the

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[257] *Id.* at 25.

[258] *Id.*

[259] *See id.*

[260] *See id.*

proposed Imperial Project site.[261] The first ASM cultural resource survey was completed over the course of two days in the summer of 1995. After reviewing ASM's draft inventory report, BLM required ASM to resurvey the area over several days in February 1996.[262] In requiring the resurvey, BLM focused on ASM's assessment that the trails and their associated features within the project area were potentially National Register eligible, and it recommended further consultation with the Quechan to determine their significance.[263]

The results of the 1996 resurvey were significant, as evidenced by the fact that ASM identified forty-nine sites within the project area, only eight of which were updates or expansions of previously recorded sites.[264] The results confirmed that "[t]here can be no doubt that the area *in and around* the Imperial Project was utilized by pre-contact Native Americans as a travel route and as a source for tool-grade lithics."[265] The survey recorded the presence of all of which it deemed eligible for inclusion in the National Register because they were part of

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[261] Letter from C. Kevin McArthur, General Manager, Chemgold, Inc., to Dwight L. Carey, Environmental Management Associates (May 25, 1995) (7 FA tab 3).

[262] *See* Schaefer & Schultze 1996, at 1 (9 FA tab 81); *see also* Jerry Schaefer & Carol Schultze, ASM Affiliates, Inc., *Cultural Resources of Indian Pass: An Inventory and Evaluation for the Imperial Mine Project, Imperial County, California* (Sept. 1995) (9 FA tab 80). BLM required the resurvey because it was concerned about establishing the definitive significance of several archaeological sites discussed in ASM's preliminary inventory report, including site
*See* Letter from Jerry Schaefer, Senior Archeologist, ASM Affiliates, Inc., to Steven Baumann, Chemgold, Inc. (Jan. 26, 1996) (7 FA tab 4). BLM also expressed concern about the historical significance o
*id.*

[263] *See id.*

[264] *See* Schaefer & Schultze 1996, at 19 (9 FA tab 81). Given that the study included not only the 1,650 acre project area, but also 562 acres of buffer zones around the project itself (as well as its access and utility corridors), relatively wide, twenty meter, transect intervals were employed to survey the land. Sites were defined as containing a minimum of five artifacts within a twenty-five square meter area, and a fifty-meter area with no artifacts was the minimum used to separate artifact clusters into distinct sites. *See id.* at 3, 17.

[265] *Id.* (emphasis added).

"one of the more important east-west and north-south prehistoric transportation networks in the region."[266]

Not only did the survey's authors recognize the archeological significance of this trail system as confirmation of a major pre-historic travel route, they acknowledged that the earlier surveys by the IVCDM and Brian F. Mooney Associates revealed the substantial spiritual significance to Native Americans of portions of this network, namely [redacted].[268] Furthermore, the ASM survey repeatedly stressed that additional consultation with the Quechan regarding the trails would likely reveal additional oral traditions that enhance the trails' importance.[269]

In its re-survey, ASM [redacted]

ASM regarded the site as remarkable not because of the "Running Man" geoglyph, which it concluded was most likely of recent origin due to the fact that Malcolm Rogers made no mention of it when he first documented the site in 1939, but because of the

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[266] *Id.* at 61. The criteria for determining if a property is eligible for election to the National Register of Historic Places revolves around establishing the "significance" of the property. *See* 36 C.F.R. § 60.4 (1981). The regulations define the significance of a site as evidenced by its relationship to "American history, architecture, archeology, engineering, and culture" and the integrity of its "location, design, setting, materials, workmanship, feeling and association." *Id.* Furthermore, the regulations require that any object or property deemed eligible for election to the National Register also: (A) be "associated with events that have made a significant contribution to the broad patterns of our history"; (B) be "associated with the lives of persons significant in our past"; (C) "embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction"; or (D) "have yielded, or may be likely to yield, information important in prehistory or history". *Id.*

[267] *Schaefer & Schultze* 1996, at 27 (9 FA tab 81)

[268] *Id.*

[269] *Id.* at 63.

[270] *Id.* at 44.

intersection of the "most heavily incised trails with some of the highest associated artifact concentration" in that desert area.[271] ASM found that although these trails, which it designated

, intersected outside the project area, they also had segments within the project area.[272]

#### 4. Concerns About The Adequacy Of The 1996 Archaeological Survey And Cultural Resource Inventory Led BLM To Require A Resurvey Of The Proposed Project Mine And Process Area

BLM first informally advised the Quechan Tribe of the Chemgold Imperial Project proposal in 1995 during a meeting on the Mesquite Landfill project.[273] Because Chemgold proposed to build the project on the Quechan's traditional tribal lands, the Tribe requested a Government-to-Government meeting to discuss the proposal.[274] As soon as the Quechan Cultural Committee had an opportunity to review the preliminary draft of the 1996 ASM study, it requested that BLM conduct a more extensive re-survey considering the Tribe's "customary and usual" use of the proposed mine site by the Tribe for religious and other purposes.[275] Additionally, the Quechan requested that the site be resurveyed not as "a single event," but in the context of its relationship with other groupings of Native American artifacts in the area.[276]

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[271] *Id.* at 65, 41.

[272] *Id.* at v.

[273] *See* Baksh 1997, app. A (Contact Program with the Quechan Indian Tribe) (9 FA tab 82).

[274] *See* Memorandum regarding Government to Government Meeting on Imperial Project (Apr. 11, 1996) (3 FA tab 71).

[275] *See* Letter from Pauline Owl, Chairwoman, Cultural Committee, to Terry A. Reed, Area Manager, BLM (May 14, 1996) (3 FA tab 72).

[276] *See* Letter from Earl E. Hawes, Program Manager, Quechan Environmental Programs, to Terry A. Reed, Area Manager, BLM (May 14, 1996) (3 FA tab 72). EMA made some revisions to the DEIS/DEIR, which

When the 1996 Draft EIS/EIR was released in November 1996, a "high level of public concern" was expressed to BLM concerning "the impacts of the proposed operation on Native American cultural resources relating to the history and religious practices of the Fort Yuma Quechan Tribe."[277] Furthermore, the Director of the IVCDM, who had been responsible for surveying the area in the 1980s, complained that the 1996 DEIS/EIR had misidentified several archaeological sites and had failed to capture the spiritual significance and sacredness of the land on which Chemgold proposed to mine.[278] In response to this high level of concern from both the general public and the Quechan Tribe, BLM asked Glamis to conduct a new "Class III (intensive) cultural resource inventory of the entire project area" to verify that "all cultural resources within the area of potential effect [sic] are properly identified and evaluated."[279]

**5. The Archaeological Surveys Conducted In Association With The 1997 DEIS/EIR Confirmed That The Proposed Imperial Mine Would Adversely Impact An Area That Was Spiritually And Culturally Significant To The Quechan**

In 1997, Glamis (through EMA) retained a new subcontractor, KEA Environmental, Inc. ("KEA"), to conduct the new cultural resource inventory for the 1997 DEIS.[280] Given the Quechan's concern that the proposed mine's impact on the entire Indian Pass area be considered, KEA expanded the APE beyond the project

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was released in November 1996, in response to the comments made by both Mr. Hawes and Ms. Owl, but these revisions did not squarely address the site's cultural or religious significance to the Tribe. *See* Memorandum from Dwight L. Carey, EMA, to Keith Shone, BLM; Jesse Soriano, Imperial County Planning Department; and Steve Baumann, Chemgold, Inc. (Aug., 5, 1996) (7 FA tab 7).

[277] Letter from Ed Hastey, State Director, BLM, to Solicitor, Department of Interior (Jan. 5, 1998) (explaining why the BLM instructed that a second DEIS/EIR be conducted) (7 FA tab 13).

[278] *See* Letter from Jay von Werlhof, Director/Archaeologist, IVC Desert Museum, to Jesse Soriano, Planner, Imperial County Planning/Building Department (Dec. 30, 1996) (7 FA tab 9).

[279] *See* Letter from Terry Reed, Area Manager, BLM, to Michael Jackson, President, Quechan Tribe (May 30, 1997) (3 FA tab 85).

[280] *See* Cleland Declaration ¶ 4.

boundaries so that it could identify any visual or auditory obstruction that the mine might cause.[281] Because the previous surveys had already documented so many archaeological sites in the Imperial Project area, KEA surveyed the APE with "closer interval survey transects" of five meters.[282] Given that BLM required the re-survey because the cultural resource inventories performed for the 1996 DEIS were perceived to be inadequate, KEA's decision to employ five-meter transect intervals complied with then "currently accepted regional professional standards."[283] Furthermore, unlike in previous surveys in which trails were recorded simply as features within other archaeological sites, KEA recorded each trail as a separate archaeological entity.[284] Finally, in addition to surveying the proposed mine and process area, KEA also inventoried sixteen, one kilometer long, transects outside the project APE, so that the surveyors could determine the density of the archaeological features in the APE and address the potential for avoiding impacts outside the proposed mine site.[285]

Because the Quechan had expressed grave concerns about the project area in their comments on the November 1996 DEIS, BLM instructed KEA to determine whether there existed one or more "traditional cultural properties (TCPs)" in the project area.[286]

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[281] *See* Cleland Declaration ¶ 9; *see also* Letter from Earl E. Hawes, Program Manager, Quechan Environmental Programs, to Terry A. Reed, Area Manager, BLM (May 14, 1996) (3 FA tab 72). As discussed above, the APE encompassed the geographical area within which the Imperial Project may have directly or indirectly caused alterations in the character or use of historic properties. *See supra* Fact Sec. II.A.

[282] *Where Trails Cross* at 131 (9 FA tab 83); *see* Cleland Declaration ¶ 11.

[283] BLM, Manual No. 8111, Cultural Resource Inventory and Evaluation (Dec. 12, 1988)*; see* Cleland Declaration ¶ 11.

[284] *Where Trails Cross* at 260 (9 FA tab 83); *see* Cleland Declaration ¶ 16.

[285] *Where Trails Cross* at 132 (9 FA tab 83); *see* Cleland Declaration ¶ 15.

[286] *Where Trails Cross* at 281 (9 FA tab 83); *see also* Kaldenberg Declaration ¶¶ 16-17. The National Park Service defines a TCP as "a district, site, building, structure, or object that is 'eligible for inclusion in the National Register because of its association with the cultural practices and beliefs of a living community that (a) are rooted in that community's history, and (b) are important for maintaining the continuing cultural

Places "associated with the traditional beliefs of a Native American group about its origins, its cultural history, or the nature of the world," and places "where Native American religious practitioners have historically gone, and are known or thought to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice," are examples of "TCPs."[287] The Quechan originally indicated to BLM that

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[289] **Because of BLM's uncertainty as to whether these areas should be treated as a single or separate TCPs and because of its desire to limit the costs Glamis would incur in the re-survey, BLM requested that KEA leave open the ultimate boundaries of the TCP and instead define only "areas of traditional cultural concern" ("ATCC") in the project vicinity.**[290]

In its study, KEA found that the site that was discussed extensively in the 1988 IVCDM and WESTEC surveys, contained archaeological features associated with the two major prehistoric trail systems in the area.[291]

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identity of the community.'" *Where Trails Cross* at 132 (citing Patricia L. Parker & Thomas E. King, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, 38 NAT'L REG. BULL. 1 (1992)).

[287] *Id.*

[288] *See* Kaldenberg Declaration ¶ 16; Cleland Declaration ¶ 27.

[289] *Where Trails Cross* at 285 (9 FA tab 83); Cleland Declaration ¶ 37.

[290] *Where Trails Cross* at 282 (9 FA tab 83). *See also* Kaldenberg Declaration ¶ 17; Cleland Declaration ¶ 27.

[291] *Where Trails Cross* at 169 (9 FA tab 83).

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KEA recorded numerous other sites within the project area that evidence the area's religious significance to the Quechan.[297] For example,

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[292] *Id.*; *see* Cleland Declaration ¶ 18.

[293] *Where Trails Cross* at 188 (9 FA tab 83); *see* Cleland Declaration ¶ 19.

[294] *Where Trails Cross* at 168 (9 FA tab 83); *see also Where Trails Cross*, Confidential Appendices (California Department of Parks and Recreation, Primary Record, Resource F-4) (9 FA tab 84); Cleland Declaration ¶¶ 19, 24.

[295] *Where Trails Cross* at 188 (9 FA tab 83); *see* Cleland Declaration ¶ 19.

[296] *Where Trails Cross* at 168 (9 FA tab 83); *see* Cleland Declaration ¶ 19.

[297] *See* Cleland Declaration ¶ 17.

[298] *Where Trails Cross* at 153 (9 FA tab 83) (describing as extending over 2,990 meters north/south and 800 meters east/west).

[299] *Id.* at 155. As previously discussed, the geoglyphs are anthropomorphic or zoomorphic figures believed to have played a prominent role in the *keruk* ceremony; quartz shatter is associated with the purification process required before the Quechan would traverse spiritually significant trails; and the vision quest circles or "power circles" are thought to have been used by travelers along the trails as places of prayer, mediation and dreaming. *See supra*, Fact Sec. III.B.; *see* Cleland Declaration ¶ 17.

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In surveying the project "ancillary area," KEA noted that the Running Man site was very similar to other large sites in the project mine and process area, and that its significance was primarily related to the nearby intersection of trails

. The survey suggests little dispute about the fact that the Running Man geoglyph was constructed sometime after Malcolm Rogers first surveyed the site in 1939, but it notes that

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On the basis of these findings, KEA concluded that the Indian Pass Running Man ATCC was eligible for election to the National Register.[304]

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[300] *Where Trails Cross* at 256 (9 FA tab 83); *see* Cleland Declaration ¶ 25.

[301] *Where Trails Cross* at 197(9 FA tab 83); *see* Cleland Declaration ¶ 20.

[302] *Where Trails Cross* at 197-206 (9 FA tab 83); *see* Cleland Declaration ¶ 21.

[303] *Where Trails Cross* at 284 (9 FA tab 83).

[304] *Id.* at 285; *see* Cleland Declaration ¶ 31.

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KEA suggested that additional fieldwork be conducted to clarify the relationship of the physical route of the Trail of Dreams to the project area.[306]

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Determining the precise location of the Trail of Dreams was of central importance to the authors of the KEA study, because the Quechan posited their claim regarding the site's extreme importance in part on the fact that

[310] Furthermore, the Quechan articulated several clear concerns about the impact

[305] *Where Trails Cross* at 293-94 (9 FA tab 83); *see* Cleland Declaration ¶ 33.

[306] *Where Trails Cross* at 293-94 (9 FA tab 83); *see* Cleland Declaration ¶ 34.

[307] *Where Trails Cross* at 293 (9 FA tab 83); *see* Cleland Declaration ¶ 33-36.

[308] *Id.*

[309] *Where Trails Cross* at 294 (9 FA tab 83).

[310] *See id.* at 122-24.

of the proposed mine on this trail. *First*, the Quechan expressed concern that the proposed project would significantly "jeopardize their present and future ability to travel along this trail, both in a physical sense [and] during dreams."[311] *Second*, the Quechan expressed concern that the construction of the proposed mine would preclude the area from continuing to serve as a "strong" final resting place for their ancestors.[312] *Third*, the Quechan expressed a desire to use the area as a learning and teaching center, precisely because it had served as one of four key "teaching areas" where early religious leaders had studied.[313] *Fourth,* while the Quechan understood that the Running Man site would not be directly impacted by the proposed project, "the tribal members feel that views of the horizon, including those of Picacho Peak and the Indian Pass area, would be significantly impacted by the construction of stockpiles."[314]

Given that the Quechan Tribe's opposition to the proposed Imperial Project was based in large part on its belief that the mine would destroy the Trail of Dreams, determining the precise location of the Trail of Dreams was also of great importance to Glamis.[315] Accordingly, Glamis funded a specific Trails Reconnaissance survey of the proposed Imperial Mine site in 1998.[316] As a result of the 1998 survey, KEA concluded that t

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[311] *See id.* at 123.

[312] *Id.*

[313] *Id.*

[314] *Id.*

[315] Cleland Declaration ¶ 34.

[316] *Id.*

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Thus, after commissioning and completing eight cultural resource inventories of the area in which it proposed to locate the Imperial Project, Glamis confirmed what the surveyors had indicated from the outset: that the APE contained a braided pre-historic trail and that considerable archaeological evidence existed to support the conclusion that the trail was used by Native Americans for ceremonial purposes.[320] In 1991, a Quechan consultant explained to Glamis's surveyors that the Quechan associated this trail with the dreaming process.[321] In 1996, Glamis learned from still other surveyors that the trail was eligible for election to the National Register.[322] Later that year, the same surveyors explained to Glamis that the most heavily incised trails in the entire CDCA had segments within the proposed mine and process area and intersected near it.[323] Then, in 1997, on

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[317] Jackson Underwood & James H. Cleland, KEA Environmental, Inc., *Trails of the Indian Pass Area, Imperial County, California* (July 1998) (10 FA tab 85); *see* Cleland Declaration ¶ 34-36.

[318] Underwood & Cleland, *Trails of the Indian Pass Area* 33, 47 (10 FA tab 85); *see* Cleland Declaration ¶ 35.

[319] Underwood & Cleland, *Trails of the Indian Pass Area* 33-34, 48 (10 FA tab 85); *see* Cleland Declaration ¶ 36.

[320] Von Werlhof 1988, at 46-53 (9 FA tab 76).

[321] *See* Schaefer & Pallette 1991, at 25 (9 FA tab 78).

[322] Schaefer & Schultze 1996, at 61 (9 FA tab 81).

[323] *Id.* at v, 41.

its first occasion to formally participate in the cultural resource inventory process, a team of Quechan monitors positively identified a segment of these heavily incised trails in the APE as the Trail of Dreams.[324] Finally, in 1998, the cultural resource surveyors provided Glamis with archaeological evidence that the segment of the Trail of Dreams the Quechan identified within the proposed mine site, corresponded in age and integrity to the major prehistoric trail leading from the Running Man geoglyph to the Indian Pass area.[325]

### 6. No Other CDCA Mine Had As Significant An Impact On Native American Cultural And Spiritual Resources As Did The Proposed Imperial Project

The Imperial Project is the only mine in the CDCA that would have caused a significant adverse impact – even after mitigation measures were implemented – on historic cultural resources and Native American cultural resources.[326] By the time BLM prepared its 1996 DEIS for the Imperial Project, the cultural resource surveys completed at that time – which included all of the studies described above except for the KEA study – had identified thirty-five Native American cultural features within the project area that were likely significant and potentially eligible for inclusion on the National Register.[327] By contrast, of the other CDCA mines, only the Mesquite FEIR noted a direct impact of

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[324] *Where Trails Cross* at 168 (9 FA tab 83); *Where Trails Cross*, Confidential Appendices (California Department of Parks and Recreation, Primary Record, Resource F-4) (9 FA tab 84).

[325] Jackson Underwood & James H. Cleland, KEA Environmental, Inc., *Trails of the Indian Pass Area, Imperial County, California* 33-34, 48 (July 1998) (10 FA tab 85); *see* Cleland Declaration ¶ 35.

[326] "[E]ven with the application of additional proposed mitigation measures, mine construction, operations, facilities and conditions would result in significant adverse effects to prehistoric cultural resources, Native American traditional cultural uses and values, and visual resources." FEIS 2000, Abstract at 2 (8 FA tab 61).

[327] *Imperial Project Draft EIS/EIR* (Nov. 1996), at 3-74. These studies occurred before the KEA study, with which Glamis takes issue, and before Glamis alleges any so-called improper interference by DOI officials in the Imperial Project review. Mem. ¶¶ 96 – 97, 123 – 124.

more than two National Register eligible sites.[328] When BLM approved the Picacho and the Rand mines – cited by Glamis as particularly significant in its decision to pursue the Imperial Project[329] – BLM concluded that those mines would cause no significant impact to Native American cultural sites (regardless of National Register eligibility).[330] The same is true of the American Girl, Castle Mountain, and Soledad Mountain mines.[331]

Only two other CDCA mines impacted any National Register-eligible sites potentially related to Native American cultural resources – the Briggs mine and the Mesquite mine. Neither mine's environmental analysis, however, identified any significant, non-mitigatable impacts to cultural resources. The Briggs mine impacted

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[328] Mesquite FEIR at 4-52 (7 FA tab 51). Glamis also points to the Mesquite Regional Landfill and the North Baja Pipeline as CDCA projects that had impacts on cultural resources. Mem. ¶¶ 155-56. While the Mesquite landfill site was over 4,000 acres, it contained only ten sites eligible for listing on the National Register. *Mesquite Regional Landfill Cultural Resources Treatment Plan*, at 4 (May 1994) (9 FA tab 79). Approval of the Mesquite regional landfill also included relocating the boundary of an ACEC to transfer five acres of land to the project site, but only because those five acres were "devoid of the important cultural resources for which the ACEC was established." *See* Record of Decision, *Boundary Modification of the Singer Geoglyphs Area of Critical Environmental Concern, Mesquite Regional Landfill*, at 5 (Sept. 20, 1996), (3 FA tab 76). The North Baja Pipeline route intersected several trails. The federal government was able to minimize the impact of the project by requiring changes to the proposed pipeline route to avoid all archaeological features associated with the trails and to ensure that the route intersected "at or very near to places on the trail that have already been disturbed." James H. Cleland, Rebecca McCorkle Apple & Andrew York, *Historic Properties Treatment Plan for the North Baja Gas Pipeline* (December 2001) (10_FA tab 88). Also, because the pipeline would be located primarily underground, BLM determined it would leave no significant permanent visual impact or alterations to the landscape. Record of Decision, *North Baja Pipeline Project*, at 15 (Apr. 2002) (5 FA tab 229).

[329] Mem. ¶¶ 66, 68.

[330] Picacho, Dulcina Pit FEIR at 4-9 (7 FA tab 54); *see also id.* at 4-10 (observing that there were no "recorded pre-mining sites on the property or in the immediate vicinity of the Picacho Mine site"). The various Rand project areas did not encompass or impact any National Register eligible historic sites. *See Rand Final Environmental Impact Statement / Environmental Impact Report* (Apr. 1995), at ES-16 (8 FA tab 56) (indicating the project would have no significant effects on any National Register-eligible sites); Baltic FEIS at 4-15 (same) (8 FA tab 55).

[331] American Girl FEIR at 4-34 to -35 (7 FA tab 52); Castle Mountain *FEIS*, at S-20 (7 FA tab 53); Soledad FEIS, ¶¶ 282-306 (8 FA tab 59).

three potentially National Register eligible sites.[332] The FEIS found no significant impact after mitigation because the sites were fenced off from the project and preserved.[333]

The Mesquite mine impacted only five sites eligible for listing on the National Register of Historic Places and eight other potentially eligible sites, despite the fact that the Mesquite mine initially involved a surface disturbance nearly double that of the Imperial Project.[334] The potentially impacted National Register sites did not include any trail segments of similar integrity to those in the Imperial Project area because the heavy wash and erosion in the Mesquite area had already erased evidence of trails there.[335]

Finally, as explained above, in the early 1980's the law did not require the same consultation with tribes as that required beginning in the early 1990's, so the Mesquite mine was approved without the benefit of significant input from Native American tribes.[336] Thus, when the Mesquite FEIR and cultural survey were completed, BLM was not necessarily fully aware of the Mesquite Mine area's potential significance to the Quechan tribe. The cultural survey concluded that the historic Yuman peoples had merely traversed the Mesquite project area, but had not attributed any ceremonial significance to it.[337] In fact, most of the Mesquite cultural survey focused on the artifacts believed to have been left by the San Dieguito people who had used the area for ceremonial purposes before 6000 B.C.[338]

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[332] Briggs Project Final EIS/EIR (May 1995) ("Briggs FEIS"), at 4-45 (8 FA tab 57).

[333] *Id*. at S-46.

[334] Mesquite FEIR at 2-11 (7 FA tab 51).

[335] Jay von Werlhof, *Archaeological Examinations of the Gold Fields Project Area, Mesquite District, Imperial County* 19 (Nov. 2, 1983) (9 FA tab 72).

[336] *See supra* Fact Sec. II.A.

[337] Von Werlhof, *Archaeological Examinations of the Gold Fields Project Area,* at 46 (9 FA tab 72).

[338] *Id*.

### B. EIS Process

To prepare an EIS, the lead agency must: (1) issue a notice of intent to prepare an EIS;[339] (2) solicit input from other federal agencies, state and local government agencies, any impacted Native American tribes, the proponent of the action, and any other interested parties on the proper scope of the EIS;[340] (3) prepare a draft EIS addressing the issues identified in the scoping process;[341] (4) engage in a public comment period on the DEIS, including obtaining comments from other relevant government agencies from all levels of government;[342] (5) issue a final EIS; and (6) take action by completing a Record of Decision on the proposed agency action in light of the FEIS.[343]

An EIS should include discussions of: (1) the purpose of, and need for, the action; (2) alternatives to the action (including the no action alternative); (3) the affected environment; (4) the environmental consequences of the proposed action; (5) lists of preparers, and agencies, organizations and persons to whom the statement is sent; (6) an index; and (7) an appendix.[344] To finalize an EIS, the preparing agency must respond to the comments received by either modifying the alternatives in the DEIS, developing and evaluating alternatives not included in the DEIS, improving or modifying its analysis to the DEIS, making factual corrections, or explaining why the comments do not warrant making a change in the DEIS.[345]

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[339] 40 C.F.R. § 1501.7 (1978).

[340] *Id*. §§ 1501.7, 1508.25.

[341] *See id*. § 1502.

[342] *See id*. pt. 1503.

[343] *See id*. pt. 1505.

[344] *Id*. § 1502.10.

[345] *Id*. § 1503.4.

As noted, Glamis submitted its plan of operations to the BLM in December 1994. On March 24, 1995, BLM published in the *Federal Register* a notice of intent to prepare an EIS for the Imperial Project.[346] After sixteen months of study, BLM issued the first draft EIS/EIR in November 1996.[347] The BLM held two public hearings – on February 6 and 13, 1997, in El Centro and El Mesa, California, respectively – to receive public input on the DEIS. Forty-nine people spoke at these meetings.[348] In addition, the BLM received more than 425 comment letters.[349] Some of the comments noted that the BLM must undertake and complete consultations with the Quechan and any other Native American tribes potentially affected.[350] Many commentors also noted that the cultural resource inventories completed to date were incomplete.[351] The comments also identified concerns about the Imperial Project's detrimental impacts on visual resources, wildlife and wildlife habitats, and groundwater, among other things.[352] The United States Environmental Protection Agency, for instance, commented that

> [I]n addition to potentially serious impacts to aquatic resources, the proposed project would have direct and possibly un-mitigable impacts to Native Americans and would be located within visual and aural distance of two wilderness areas, and in close proximity to an area of critical environmental concern and a Desert Tortoise Critical Habitat Area; within BLM's California Desert Conservation Area, and within the area of the Indian Wash Habitat Management Plan. It is evident that the proposed action, and indeed the preferred alternative, has the potential for intense

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[346] Notice of Intent to Prepare an Environmental Impact Statement (EIS) on a Proposed Gold Mine / Processing Operation, 60 Fed. Reg. 15,579 (Mar. 24, 1995).

[347] *Imperial Project Draft EIS/EIR* (Nov. 1996) (8 FA tab 58). The comment period for the 1996 DEIS was extended twice and lasted from November 1996 until March 24, 1997. 2000 FEIS at 1-5, 7-1 (8 FA tab 61).

[348] 2000 FEIS at 7-1 (8 FA tab 61).

[349] *Id*.

[350] *Id*. at 1-9.

[351] *Id*.

[352] *Id*. at 1-11.

> environmental impacts. Given that, we recommend that BLM seriously consider alternatives such as reducing the scale of mining operations, mining in other locations; and "no action."[353]

In response to concerns raised in the comments about the impacts of the Imperial Project on environmental and cultural resources, Glamis made substantial revisions to its proposed plan of operations.[354] "Owing to the large number of comments received," BLM withdrew the 1996 DEIS,[355] and determined to reissue a new DEIS that would provide more detail about the proposed project.[356] BLM decided to treat the comments received on the 1996 DEIS as scoping comments for the 1997 DEIS.[357] Scoping comments are used to determine the scope of the issues that should be addressed in the EIS process, but do not require a specific response as do comments to a DEIS.[358]

BLM issued another DEIS in November 1997.[359] Due to the intense public interest in the Imperial Project, the mandatory ninety-day comment period for the 1997 DEIS was extended to 135 days,[360] during which the BLM received 541 additional comments.[361] Of these comments, 353 were from private citizens, fifty-one were from organizations or corporations, three were from tribal officials or representatives, and

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[353] *Id*., vol. III, at E001-4 (emphasis in original) (8 FA tab 62).

[354] *Id*. at 1-10. Glamis, for example, reduced the amount of waste rock to be mined, reduced the size and number of the waste piles, entered into agreements with BLM for woodland habitat preservation at another site, and agreed to purchase off-site tortoise mitigation lands. *Id.* at 1-12.

[355] *Id*., vol. III; Letter from Terry A. Reed, Area Manager, BLM, to Interested Citizen (July 30, 1997) (9 FA tab 62) (announcing reason for withdrawal and reissue of Imperial Project DEIS).

[356] 2000 FEIS, vol. III (8 FA tab 62); BLM News Release, BLM and Imperial County to Revise Draft EIS/EIR for Proposed Imperial Project Gold Mine (June 11, 1997) (8 FA tab 60).

[357] 2000 FEIS at 1-5 to -6 (8 FA tab 61).

[358] 40 C.F.R. §§ 1501.7, 1503.4, 1508.25 (1978).

[359] 2000 FEIS at 1-6 (8 FA tab 61).

[360] 40 C.F.R. § 1506.10(b)(1)&(d) (1978) (specifying ninety days for the comment period, and empowering the lead agency to extend the comment period).

[361] 2000 FEIS, vol. III, at Introduction-1 (8 FA tab 62).

fourteen were from government agencies or elected officials.[362] Seventy-three speakers presented their comments at two public hearings held on December 10 and 11, 1998.[363] Many of the individual comment letters were quite extensive and thorough. For example, the Sierra Club, the Mineral Policy Center, the California Wilderness Coalition, and the Wilderness Society filed a comment letter more than 100 pages long that raised issues with nearly every aspect of the DEIS.[364] The responses to this one comment letter occupied nearly eighty pages.[365]

In part due to the significant cultural concerns at stake, the Imperial Project generated greater public interest and comments than other projects in the CDCA. BLM received more than 425 written comments on the 1996 DEIS, and 541 written and oral comments on the revised 1997 DEIS.[366] By contrast, BLM received twenty or fewer comments – many from other government agencies – on each of the draft EISs for the Mesquite mine, Rand-Baltic mine, the American Girl mine, and a 1995 expansion of the American Girl mine.[367] The Rand-Glamis project generated 27 comments.[368] The Briggs mine elicited 67.[369] The only mine receiving a similar volume of comments to the

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[362] 2000 FEIS, vol. III, at Introduction-4 (8 FA tab 62). Many letters criticized the DEIS. Extensive comments were made regarding the anticipated increase of air and soil pollution from emissions from the project, impacts to wildlife, impacts to the Quechan sacred sites, hydrology, proper use of federal lands, impacts to plant species, the economics of the project, and reclamation measures. *See generally* 2000 FEIS, vol. III, at J003, J006, J007, J009, J014.

[363] 2000 FEIS, vol. III, at Introduction-4. (8 FA tab 62)

[364] *Id*., vol. III, at I013-1 to -133.

[365] *Id*., vol. III, at I013-134 to -223.

[366] *Id*. at 7-1, 7-3.

[367] Mesquite FEIR at 1-3 to -4 (7 FA tab 51); Baltic FEIS at 11-2 to -3 (8 FA tab 55); American Girl FEIR app. F (7 FA tab 52); Record of Decision for the Oro Cruz Operation of the American Girl Mining Project (Jan. 30, 1995), at 9 (3 FA tab 61).

[368] Rand FEIS at 12-2 (8 FA tab 56).

[369] Briggs FEIS at S-23 to –24 (8 FA tab 57).

Imperial Project was the Castle Mountain mine, which generated over 500 comments.[370] Only one percent of the comments on the Castle Mountain mine addressed cultural resource issues, however, and the FEIS for that project concluded that there were no significant adverse affects to any cultural resources.[371]

### C. ACHP Comments

In light of the proposed Imperial Project's significant impact on this archaeologically rich and culturally significant area, BLM wrote to the ACHP on August 25, 1998, requesting its comments on the project.[372] BLM's request was made pursuant to paragraph 4.b(3) of the Nationwide Programmatic Agreement, which provides that "[a]t a minimum, the BLM will request the Council's review in . . . highly controversial undertakings . . . . "[373] The ACHP occasionally appoints a working group of members to more directly participate in the review of certain controversial projects as a way to ensure maximum ACHP attention to the matter, and to get members more directly involved in the Section 106 review process.[374]

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[370] Castle Mountain FEIS at S-2 (7 FA tab 53).

[371] *Id*. at S-20. There was no single issue that accounted for the large number of comments generated in response to this EIS. The single largest topic of comment, about one fifth of the total comments, concerned wildlife issues, primarily the anticipated impacts of the mine on the desert tortoise. *Id*.

[372] Letter from Ed Hastey, State Director, BLM, to John Fowler, Executive Director, ACHP (Aug. 25, 1998) (4 FA tab 139); Gallegos & Pigniolo, WESTEC Services, Inc., *Cultural Resource Inventory Number 2 for Twenty-Seven Drill Sites Within the AMIR Indian Rose Area Lease* 4-1 (Mar. 1988) (9 FA tab 75).

[373] Letter from Ed Hastey, State Director, BLM, to John Fowler, Executive Director, ACHP (Aug. 25, 1998), at 2 (4 FA tab 139); Programmatic Agreement among the Bureau of Land Management, the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers Regarding the Manner in Which BLM Will Meet its Responsibilities Under the National Historic Preservation Act (Mar. 26, 1997), at 7 (10 FA tab 111).

[374] Fowler Declaration ¶ 17. This procedure has also been employed in considering the proposal for a new museum and visitor center at the Gettysburg National Military Park, http://www.achp.gov/casearchive/cases7-99PA2.html (10 FA tab 94); in considering the location and design of the World War II Memorial on the National Mall in Washington, D.C., http://www.achp.gov/casearchive/casesfall00DC.html) (10 FA tab 91); in considering a proposal to enclose the courtyard of the Old Patent Office in Washington, D.C., http://www.achp.gov/casessum05DC.html (10

Because the proposed Imperial Project was a controversial undertaking, the ACHP Chairman appointed a working group of three ACHP members to participate directly in the ground-level review of the Imperial Project.[375] This working group was comprised of Ray Soon, the ACHP's Native Hawaiian organization Member, the Administrator of the EPA (represented by Richard Sanderson), and the Chairman of the National Trust for Historic Preservation (represented by Elizabeth Merritt).[376]

Over the next few months, in accordance with its mandate, the ACHP working group consulted with various interested parties through public hearings, direct meetings, and correspondence. As part of this consultation process, the ACHP gave the public opportunities to submit comments in writing and held a public hearing on March 11, 1999, in Holtville, California.[377] At the meeting Glamis representatives had the opportunity to present the company's views directly to the ACHP working group.[378] Forty-six additional speakers – individuals both in favor of, and opposed to, the mine – addressed the ACHP working group.[379] Among the speakers were private citizens, BLM officials, Quechan Tribal members, and individuals who had conducted many of the cultural surveys of the Imperial Project area.[380]

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FA tab 93); and in advising the Navy regarding the disposition of a historic building in Philadelphia, http://www.achp.gov/casearchive/cases7-99PA1.html (10 FA tab 92).

[375] Fowler Declaration ¶ 18.

[376] *Id*.

[377] Transcript of Advisory Council on Historic Preservation Public Hearing (Holtsville, CA) (Mar. 11, 1999) (10 FA tab 115).

[378] *Id*. at 14-36.

[379] *Id*.

[380] *Id*. at 123-127.

The ACHP also exchanged correspondence and conducted meetings directly with Glamis, the Quechan Tribe, and relevant officials at the BLM.[381] Through these consultations, the ACHP was thoroughly informed about the respective positions of the parties on the impacts of the Imperial Project, and the extent to which any mitigation measures could lessen those impacts. Glamis described the mitigation measures it was willing to undertake on the Imperial Project site, and presented its view that Native American resources in the area were already sufficiently protected.[382]

In describing its position to the ACHP, Glamis acknowledged that the Imperial Project would cause irreparable harm to the Quechan's sacred trail system, irrespective of mitigation measures taken.[383] Although Glamis now argues that its proposed project would not have damaged the Trail of Dreams,[384] it noted during the Section 106 process that "[its] plan does not retain the original braided trail in its entirety . . . ."[385]

The consultation process can conclude in two ways: the ACHP may enter into a Memorandum of Understanding with the federal agency and the SHPO (and other relevant parties may be invited to sign) that outlines the mitigation measures to be taken; or, if an agreement cannot be reached, the federal agency; the SHPO; or the ACHP, at its

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[381] *See* Fowler Declaration ¶ 22 and attached correspondence (Letter from Walter E. Stern, Counsel for Glamis Imperial Corp., to John Fowler, Executive Director, ACHP (May 18, 1999) (providing additional input from Glamis regarding the Section 106 process); Letter from Courtney Ann Coyle, Counsel for the Quechan Tribe, to John M. Fowler (July 13, 1999) (responding to the May 18 letter from Glamis's counsel); Letter from Charles Jeannes, Counsel, Glamis Gold Inc., and Gary Boyle, Project Manager, Glamis Imperial Corp., to John M. Fowler (Aug. 13, 1999) (4 FA tab 198) (thanking the ACHP and BLM officials for meeting with Glamis in July 1999, and presenting additional arguments regarding the Section 106 process); Letter from Walter E. Stern to John M. Fowler (Aug. 18, 1999) (responding to the July 13 letter from Courtney Ann Coyle)).

[382] Letter from Charles Jeannes, Counsel, Glamis Gold Inc., and Gary Boyle, Project Manager, Glamis Imperial Corp., to John M. Fowler, Executive Director, ACHP (Aug. 13, 1999) (4 FA tab 198).

[383] *Id*. at 7.

[384] Sebastian Rpt. at 34-35.

[385] Letter from Jeannes and Boyle, to Fowler (Aug. 13, 1999), at 4 (4 FA tab 198).

discretion, may determine that further consultations would not be productive.[386] The ACHP then issues comments directly to the head of the relevant agency.[387] Pursuant to this authority, on October 19, 1999, the ACHP issued comments on the Imperial Project directly to the Secretary of the Interior. Based on the consultations conducted and its analysis of the Imperial Project, the ACHP advised the Secretary of the Interior that the Imperial Project would "unduly degrade" the area and that there were no available mitigation measures available to avoid "the serious and irreparable degradation of the sacred and historic values of the ATCC that sustain the tribe."[388]

### D. The DOI Solicitor's 1999 M-Opinion

Several months before the ACHP became involved in the Section 106 review process, the BLM California State Director, Ed Hastey, sent a letter to the DOI Solicitor's office requesting a legal opinion.[389] In response to the strong concerns the Quechan Tribe had expressed to him about the Imperial Project at a December 1997 meeting, Mr. Hastey requested that the regional Solicitor's office "in consultation with Solicitor Leshy review the legal issues involved and provide us as soon as possible with a clear legal opinion on *our decision-making parameters and legal responsibilities in this case.*"[390] The Solicitor, as the DOI's chief legal officer, is delegated all the authority of the

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[386] 36 C.F.R. § 800.5(e)(6) (2004). The ACHP has also exercised this authority to terminate consultation and issue direct comments to the Secretary of the Interior in the controversial Section 106 process regarding the location and design of the World War II Memorial on the National Mall. *See* ACHP Archive of Prominent Section 106 Cases: Fall 2000, "District of Columbia: Creation of World War II Memorial," *available at* http://www.achp.gov/casearchive/casesfall00DC.html (10 FA tab 91).

[387] 36 C.F.R. § 800.5(e)(6) (2004).

[388] Letter from Cathryn Buford Slater, ACHP, to Bruce Babbitt, Secretary of the Interior (Oct. 19, 1999) (5 FA tab 201).

[389] Memorandum from Ed Hastey, State Director, BLM, to John Leshy, Solicitor (Jan. 5, 1998) (3 FA tab 98).

[390] *Id.* at 1 (emphasis added).

Secretary over the legal work of the DOI.[391] In accordance with this authority, the Solicitor's Office embarked on a comprehensive review of the relevant legal authorities that governed BLM's actions in considering the Imperial Project's effects on the Quechan's sacred sites.

The preparation of the 1999 DOI Solicitor's opinion ("1999 M-Opinion") regarding the Imperial Project was prepared with public input. Glamis submitted written comments on the issues to be addressed by the M-Opinion before it was completed.[392] Glamis also met with Solicitor Leshy concerning the opinion, and the opinion specifically addressed Glamis's arguments.[393]

The M-Opinion was issued on December 27, 1999, and approved by the Secretary of the Interior on January 3, 2000. The 1999 M-Opinion concluded that under the CDCA's "undue impairment" standard, BLM could impose reasonable mitigation measures to protect historic, cultural, or other resources in the CDCA that were different from the mitigation measures that could be required under the "unnecessary or undue degradation" standard as that standard was defined by the 3809 regulations, even if those mitigation measures would make a particular operation uneconomic.[394] Under the 3809 regulations, a particular level of degradation was not considered unnecessary or undue if that level of degradation did not exceed what would be caused by a prudent operator

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[391] 43 U.S.C. § 1455 (1994); 209 Department of Interior Manual §§ 3.1 & 3.2A (11) (1992) (granting the Solicitor "all the authority of the Secretary" over "[a]ll the legal work of the Department").

[392] Letter from Charles Jeannes, Senior Vice President and General Counsel, Glamis Gold, Inc., and Gary Boyle, General Manager, Glamis Imperial Corp., to Bruce Babbitt, Secretary of the Interior (Nov. 10, 1999) (7 FA tab 31).

[393] *Id*.; Memorandum from John Leshy, Solicitor, to Acting Director, BLM (Dec. 27, 1999), at 17 (5 FA tab 205).

[394] *Id*.

operating in a usual and customary manner.[395] The 1999 M-Opinion concluded that the "undue impairment" standard applicable in the CDCA did not contain the same "prudent operator" limitations on mitigation, and thus a plan of operations might also be denied if the impairment was "particularly 'undue'" and no reasonable measures were available to mitigate the harm.[396]

On April 14, 2000, Glamis filed suit in federal court in Nevada challenging the 1999 M-Opinion.[397] At that same time, it requested that BLM suspend processing of its plan of operations.[398] In so doing, Glamis wrote that it "strongly believe[d]" that it would be "inappropriate" for BLM to continue work on the plan of operations while the lawsuit was pending.[399] Glamis highlighted the "tremendous waste" of money and resources that would result were BLM to process its Imperial Project plan of operations under such circumstances.[400] When BLM indicated that it would continue to process the plan of operations, notwithstanding Glamis' legal challenge to the 1999 M-Opinion,[401] Glamis responded that it was "appalled" that BLM would "spend taxpayer resources to accelerate completion of the EIS and ROD in the face of a legal challenge."[402]

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[395] 43 C.F.R. § 3809.0-5(k) (1980); Memorandum from Leshy, to Acting Director, BLM (Dec. 27, 1999) at 8 (5 FA tab 205).

[396] *Id*. at 17-18.

[397] *Glamis Imperial Corp. v. Babbitt*, CV-N-00-0196 (D. Nev.), Compl. for Declaratory and Injunctive Relief (Apr. 13, 2000).

[398] Letter from C. Kevin McArthur, President, Glamis Imperial Corp., to Al Wright, Director, BLM California State Office (Apr. 14, 2000) (7 FA tab 32).

[399] *Id*.

[400] *Id*.

[401] Letter from Al Wright, Director, BLM California State Office, to C. Kevin McArthur, President, Glamis Imperial Corp. (May 19, 2000) (7 FA tab 33).

[402] Letter from C. Kevin McArthur, President, Glamis Gold Ltd., to Al Wright, Director, BLM California State Office (June 15, 2000) (7 FA tab 34).

The federal court dismissed Glamis's suit challenging the 1999 M-Opinion on the basis that the case was not ripe because no adverse final agency action had been taken against the Imperial Project on the basis of the 1999 M-Opinion.[403] In doing so, the court noted that "[b]y brining this suit, Glamis did not seek judicial review of an agency's decision, but rather, impermissible judicial interference in an ongoing administrative process."[404]

### E. Final Environmental Impact Statement

In November of 2000, BLM issued the FEIS on the proposed Imperial Project recommending the "no action" alternative as the preferred alternative.[405] In light of the completed cultural resource inventories, the ACHP recommendation, and the 2000 M-Opinion, BLM concluded, "even with the application of additional proposed mitigation measures, mine construction, operations, facilities and conditions would result in significant adverse effects to prehistoric cultural resources, Native American traditional cultural uses and values, and visual resources."[406]

The most significant unavoidable adverse impacts of the Imperial Project were on the cultural and visual resources in the area. Regarding cultural resources, the FEIS stated that none of the National Register eligible sites within the project area could be avoided: "The Indian Pass-Running Man ATCC, including the Trail of Dreams; seven (7) multi-component archaeological sites; and twelve (12) prehistoric trail sites in the Project mine and process area, each of which were evaluated as eligible for the National

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[403] *Glamis Imperial Corp. v. Bruce Babbitt, et al.*, Order Granting Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Case No. 00-CV-1934, at 7 (Oct. 31, 2000). The venue of the case had been moved from Nevada to California. *Id*. at 2.

[404] *Id*.

[405] 2000 FEIS at 2-70, Abstract at 1 (8 FA tab 61).

[406] *Id*., Abstract at 2.

Register under Criteria 'A,' 'C' and/or 'D,' would not be avoided under the Proposed Action."[407] The FEIS also concluded that only the preferred "no action" alternative would reduce the adverse impacts on these resources below the level of significance.[408] The FEIS contained a similar conclusion regarding the visual impacts of the project.[409]

### F. The Issuance And Rescission Of The Record Of Decision For The Imperial Project

On January 17, 2001, Secretary of the Interior Bruce Babbitt signed a Record of Decision denying the plan of operations for the Imperial Project.[410] The ROD was based on several key conclusions, including that the Imperial Project would have caused unavoidable adverse impacts on historic sites with significant Native American cultural value and on the visual quality in the "undisturbed landscape."[411] The ROD also concluded that because the impacts could not be mitigated, the project would have caused "undue impairment" to CDCA resources and would have been inconsistent with the CDCA Plan.[412] Secretary Babbitt based his authority to issue the ROD on the 1999 M-Opinion.[413]

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[407] *Id*. at 4-98.

[408] *Id*. at 4-149, 4-159, 4-168.

[409] *Id*. at 4-112. "The Proposed Action would result in a visual contrast with the surrounding area and would change the existing character of the landscape to a degree which would not conform with the BLM Class II visual objectives which have been applied to this Class L-designated area. This lack of conformance is a significant, unmitigatable impact." *Id*; *see also* 2000 FEIS at 4-149, 4-160, 4-169.

[410] Record of Decision for the Imperial Project Gold Mine Proposal (Jan. 17, 2001) (5 FA tab 212).

[411] *Id.* at 2.

[412] *Id.*

[413] Record of Decision for the Imperial Project (Jan. 17, 2001), at 3.

Glamis filed a lawsuit in federal court challenging the denial of its plan of operations on March 12, 2001.[414] While the lawsuit was pending, Glamis had numerous meetings and phone calls with senior officials in the Solicitors Office and in the Office of the Assistant Secretary of the Interior for Land and Minerals.[415] On September 13, 2001, in a meeting with Solicitor William Myers and other DOI officials, Glamis representatives outlined the company's theory of why the 1999 M-Opinion was flawed.[416] One month later, on October 23, 2001, Solicitor Myers issued an M-opinion (the "2001 M-Opinion") reversing the 1999 M-Opinion and recommending the "rescission and reconsideration" of the January 2001 ROD.[417] On November 23, 2001, DOI rescinded the 1999 M-Opinion and ROD: Secretary of the Interior Gale Norton, determined, based on the reasoning of the 2001 M-Opinion, that a plan of operations should not be denied on the basis of FLPMA's "undue impairment" standard unless and until the DOI promulgates regulations to define that standard.[418] Following DOI's rescission, Glamis withdrew its lawsuit challenging the 2001 denial of its plan of operations.[419]

DOI did not conclude in either the 2001 M-Opinion or the rescission of the ROD that the 1999 M-Opinion's interpretation of the "undue impairment" standard was substantively incorrect, or that the "undue impairment" standard was equivalent to the "unnecessary or undue degradation" standard. Rather, DOI rescinded the earlier decision

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[414] *Glamis Imperial Corp. v. United States Dep't of Interior*, No. 1-01CV00530 (D.D.C.), Compl. for Declaratory and Injunctive Relief (Mar. 12, 2001).

[415] *See* Letter from Earl E. Devaney, Inspector General, U.S. Department of Interior, to Senator Barbara Boxer, at 2-3 (Mar. 11, 2003) (6 FA tab 277) ("Inspector General Letter").

[416] *See* Inspector General Letter, at 2-3 (Mar. 11, 2003) (6 FA tab 277).

[417] Memorandum from William Myers, Solicitor, to Gale Norton, Secretary of the Interior (Oct. 23, 2001) ("2001 M-Opinion"), at 3 (5 FA tab 216).

[418] Rescission of Record of Decision for the Imperial Project Gold Mine Proposal (Nov. 23, 2001) (5 FA tab 219).

[419] *Glamis Imperial Corp. v. U.S. Dep't of the Int.*, Order, No. 1-01CV00530, at 1 (Dec. 18, 2001).

on the procedural ground that the "undue impairment" standard should be defined by a formal rule-making process before being applied to a given plan of operations.[420]

### G. Validity Examination

In certain circumstances, BLM will conduct a validity examination to determine if a claimant's mining claims are valid under the Mining Law.[421] In order to be valid, a mining claim must be supported by the discovery of a valuable mineral deposit.[422] Thus, a validity examination evaluates, among other things, whether the mining claim in question contains a valuable mineral deposit. To conduct a validity examination and prepare the mineral report that details the examination's conclusions, a BLM mineral examiner ascertains whether the claimant located and maintained the claim properly, reviews public information about the company and project, evaluates the economics of the plan of operations, and verifies the technical data underlying the mining operator's assertions about the quality and quantity of minerals contained within the mining claims.[423]

Because of the low grade of gold ore Glamis was planning to mine, and in response to comments received in the EIS process, in early 1998 BLM began to conduct an informal review of the validity of Glamis's mining claims.[424] This informal review

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[420] Rescission of Record of Decision (Nov. 23, 2001) (5 FA tab 219); 2001 M-Opinion at 19 (5 FA tab 216).

[421] 43 CFR § 3809.100(a) (2005).

[422] 30 U.S.C. § 23; *Castle v. Womble*, 19 Pub. Lands Dec. 455, 455 (1894) ("A mineral discovery, sufficient to warrant the location of a mining claim, may be regarded as proven, where mineral is found, and the evidence shows that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine.").

[423] BLM Manual H-3890-1, Handbook for Mineral Examiners (Mar. 17, 1989).

[424] 2000 FEIS at 1-13 to -15 (8 FA tab 61).

relied entirely on publicly available data.[425] Based on the information supplied by Glamis, the preliminary conclusion drawn from the informal review was that the Imperial Project could be profitable, but that several key factors required verification.[426]

In its initial assessment of the project, BLM indicated that the recovery rate was one of the most important factors in determining whether the Imperial Project could be profitable and, thus, whether the claims were valid.[427] The recovery rate was particularly crucial to the economics of the Imperial Project because the grade of ore was lower than any other gold mine in the CDCA and among the lowest for any mine in the United States.[428] To produce one ounce of gold at the Imperial Project would require extracting eighty-six tons of ore. By contrast, to produce one ounce of gold, the Mesquite mine required sixty-eight tons of ore; the Rand mine sixty tons; and the Picacho mine only thirty-seven..[429]

In September 1998, BLM began conducting a full validity examination of the mining claims and mill sites associated with the proposed Imperial Project.[430] In November and December 1998, the BLM mineral examiner requested additional metallurgical tests on ore samples taken from the Imperial Project site.[431] In February 1999, BLM sent Glamis two letters requesting additional information necessary to

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[425] Robert Waiwood, Review of Glamis-Imperial's Imperial Project Position in the Gold Market (June 19, 1998), at 1 (7 FA tab 19).

[426] *Id*. at 33.

[427] *See id*. at 2.

[428] BLM Mineral Report (Sept. 27, 2002), at 5, 34 (6 FA tab 255); Robert Waiwood, Review of Glamis-Imperial's Imperial Project Position in the Gold Market, at 21 (Table 1) (7 FA tab 19).

[429] BLM Mineral Report (Sept. 27, 2002), at 63 (6 FA tab 255).

[430] *See* Memorandum from Richard Grabowski, Deputy State Director, BLM, to Bakersfield Field Manager, BLM (Sept. 15, 1998) (4 FA tab 143).

[431] Letter from Robert M. Waiwood, BLM, to Jerry Eykeibosh, ITS-Bondar-Clegg (Nov. 25, 1998) (7 FA tab 20); Letter from Robert M. Waiwood to Jerry Eykeibosh (Dec. 17, 1998) (7 FA tab 21).

complete the mineral report.[432] Between April and June 1999, Glamis notified BLM that it wished to use a higher gold recovery rate than had been previously indicated, and provided justifications for its request.[433] When the ROD denying the Imperial Project was issued, the validity determination appeared moot.

Once the ROD was rescinded, BLM completed the validity examination rapidly with significant input from Glamis.[434] In February 2002, following BLM's announcement that a validity examination of Glamis's mining claims was being initiated,[435] DOI agreed to a series of more than half a dozen meetings with Glamis representatives to discuss the validity exam and the ultimate release of the corresponding validity report, together with other issues concerning the Imperial Project.[436] On

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[432] Letter from Rob Waiwood, BLM, to Dan Purvance, Glamis-Imperial Gold Corp. (Feb. 3, 1999) (7 FA tab 24); Letter from Rob Waiwood, BLM, to Steve Baumann, Glamis-Imperial Gold Corp. (Feb. 4, 1999) (7 FA tab 25).

[433] *See* BLM Mineral Report (Sept. 27, 2002), at 33 (6 FA tab 255) (noting that in April 1999 BLM and Glamis representatives met to discuss a higher recovery rate); Letter from Gary C. Boyle, General Manager, Glamis Imperial Corp., to Rob Waiwood, BLM (June 25, 1999) (7 FA tab 27) (providing justifications for the higher recovery rate).

[434] As discussed above, in 2000 and 2001 Glamis brought two lawsuits challenging BLM and DOI decisions regarding the 1999 M-Opinion and the ROD denying Imperial Project plan of operations. *See supra* Fact Sec. IV.D, F.

[435] BLM Press Release, BLM Initiates Validity Examination on Glamis Imperial Mining Claims (Feb. 13, 2002) (5 FA tab 223).

[436] Inspector General Letter, attach. at 3 (referencing April 24, 2002 meeting where gold pricing policy to be used in validity report was discussed) (7 FA tab 45),; i*d.* at 3-4 (referencing April 26, 2002 meeting, which was attended by the Assistant Secretary for Land and Minerals Management, among others); i*d.* at 5 (referencing April 30, 2002 meeting, also attended by the Assistant Secretary for Land and Minerals Management, among others); i*d.* at 6 (referencing a meeting held in May 2002, which was attended by Solicitor Myers, among others); i*d.* at 6 (referencing June 11, 2002 meeting); i*d.* at 7 (referencing July 2002 meeting); i*d.* at 7 (referencing September 18, 2002 meeting, which was attended by Solicitor Myers, among others); i*d.* at 8 (referencing a second meeting on September 18, 2002, attended by the Assistant Secretary for Land and Minerals Management, among others). In addition to these meetings, Glamis engaged in several telephone conversations with DOI officials during this time. *See* i*d.* at 9 (referencing approximately ten calls between Glamis representatives and the Deputy Assistant Secretary for Land and Mineral Management and approximately three calls with the Deputy Assistant Director for Minerals, Realty and Resources Protection).

September 27, 2002, BLM issued the mineral report, finding that Glamis had valid mining claims in connection with the Imperial Project site.[437]

### H. Glamis's Request To Cease Processing Its Plan Operations And Submission Of Its Claim To Arbitration

Once the mineral report was issued, there were still numerous issues to be resolved in order to finish processing the Imperial Project plan of operations. Key amongst those issues was whether, given the lapse of time since its completion, the 2000 FEIS and related agency consultations were sufficient, or whether some or all of that EIS would need reconsideration.[438] Before BLM had the opportunity to resolve this issue – just ten weeks after BLM issued Glamis's validity report and before any of the challenged California measures had been adopted – Glamis again requested that BLM suspend "all ongoing efforts to process the Imperial Project Plan of Operations . . . ."[439] BLM responded on January 7, 2003, stating that it was "willing to suspend processing" of the Imperial Project plan of operations "at Glamis' specific request."[440] BLM also requested that Glamis resubmit its suspension request together with a commitment relieving BLM of any legal liability to Glamis for the suspension.[441] Waiting nearly three months to respond, Glamis eventually replied, stating that "we cannot reaffirm our

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[437] BLM Mineral Report (Sept. 27, 2002) (6 FA tab 255).

[438] Briefing Document on Glamis Imperial Gold Mine (Apr. 8, 2003), at 2 (6 FA tab 286) (noting that the next step after the mineral report in further processing the Imperial Project plan of operations was to review the 2000 FEIS to determine if it was "still adequate on which to base a new decision to approve or deny the mine").

[439] Letter from C. Kevin McArthur, President, Glamis Gold Ltd., to Mike Pool, California State Director, BLM (Dec. 9, 2002) (6 FA tab 265).

[440] Letter from Mike Pool, California State Director, BLM, to C. Kevin McArthur, President, Glamis Gold Ltd. (Jan. 7, 2003) (6 FA tab 271).

[441] *Id*.

request to the DOI to suspend the Glamis plan of operations when we have no reasonable expectation that an alternative resolution for the Imperial Project is likely."[442]

DOI then again began processing Glamis's plan of operations, considering such issues as the sufficiency of the 2000 FEIS, and whether the recently-enacted California Senate Bill 22 and/or the SMGB's amendments to its regulations, discussed below, should be applied to the Imperial Project as part of the federal processing.[443] On April 2, 2003, Glamis sent DOI a detailed memorandum arguing that Senate Bill 22 and the SMGB's regulations were preempted by federal law.[444]

Between April 2003 and July 2003, BLM and DOI took various steps to proceed with reconsideration of the Imperial Project plan of operations.[445] Less than four months after refusing to reaffirm its request that DOI suspend processing of its plan of operations, Glamis filed its Notice of Intent in this matter. Glamis thanked DOI officials for their attention to the Imperial Project, but noted that "the underlying issues involved have, unfortunately, become so intractable that new avenues must be pursued," and asserted that its property interests "have been effectively expropriated."[446] By this filing, Glamis confirmed that it wished to obtain compensation from the United States (through settlement negotiations or arbitration) for its mining claims that it asserted were "effectively expropriated," and made no further request that DOI continue processing its

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[442] Letter from Charles A. Jeannes, Senior Vice President, Glamis Gold Ltd., to Mike Pool, California State Director, BLM (Mar. 31, 2003) (6 FA tab 280).

[443] *See* Draft Working Document (June 26, 2003) (6 FA tab 292).

[444] Letter from R. Timothy McCrum, Counsel for Glamis Imperial Corp., to Fred Ferguson, Associate Solicitor, Department of the Interior (Apr. 2, 2003) (7 FA tab 46).

[445] Briefing Document on Glamis Imperial Gold Mine (Apr. 8, 2003), at 2 (6 FA tab 286); Draft Working Document (June 26, 2003) (6 FA tab 291).

[446] Letter from Timothy McCrum, Counsel for Glamis Gold Ltd., to Patricia Morrison, Deputy Assistant Secretary for Land and Minerals, DOI, at 1, 3 (July 21, 2003) (7 FA tab 47).

plan of operations. Glamis has never renewed a request directly to DOI or BLM that it proceed with processing its plan of operations.

## V. The California Measures

Glamis challenges two distinct measures taken by California in this arbitration. The first is California Senate Bill 22 ("SB 22"), passed by the California Legislature and signed into law by Governor Davis, which requires that open-pit metallic mines within one mile of a Native American sacred site be backfilled to "achieve the approximate original contours of the mined lands prior to mining."[447] The second is the 2002 amendments to the SMGB's regulations promulgated by the SMGB pursuant to its authority under SMARA. The SMGB amendments do not implement SB 22. Rather, they contain backfilling and recontouring requirements similar to those in SB 22, but apply to *all* open-pit metallic mines in California. Both measures are discussed more fully below.

### A. Senate Bill 22

In 2001, Senator Byron Sher introduced Senate Bill 483 ("SB 483") in the California Legislature to amend SMARA to address reclamation of abandoned mined lands.[448] In mid-2001, language was added to SB 483 to amend SMARA to include protection for Native American sacred sites.[449] The bill, as amended, prohibited a lead agency from approving a reclamation plan and financial assurance for surface mining of hardrock minerals within one mile of any Native American sacred site in an area of special concern (defined as an ACEC, or Class C or L lands located within the CDCA)

[447] CAL. PUB. RES. CODE § 2773.3 (2003).

[448] California Senate, Senate Bill No. 483 (introduced Feb. 22, 2001) (5 FA tab 213).

[449] California Senate, Senate Bill No. 483 (amended Aug. 26, 2002) (5 FA tab 245). SB 483 was intended to extend the time allowed under state law to remediate or reclaim abandoned mines under SMARA. *Id*.

unless the reclamation plan provided that all materials would be backfilled and graded to "achieve the approximate original contours of the mined lands prior to mining," and the "financial assurances are sufficient in amount to provide for the backfilling and grading."[450]

In February 2002, Senator John Burton introduced SB 1828 in the California Legislature. SB 1828, like SB 483, required backfilling and recontouring of any open-pit metallic mine within one mile of a Native American sacred site in an area of special concern. SB 1828, however, would also have potentially restricted *any* development, not just mining operations, for which an EIR was required under CEQA, if the project was located within twenty miles of a Native American reservation.[451] SB 1828 was thus far broader in its scope than SB 483. The stated purpose of SB 1828 was to protect Native American sacred sites and the ability of Native Americans to practice their religion.[452] As part of this effort, the California Research Bureau ("CRB") prepared a report on disputes or conflicts between development projects and Native American sacred places in California.[453]

The CRB reported on four then-ongoing disputes, including the proposed Imperial Project's expected impact on sites sacred to the Quechan.[454] The Imperial Project was the only known proposed mining project in California that threatened Native American

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[450] *Id*.

[451] California Senate, Senate Bill No. 1828 (introduced Feb. 22, 2002) (5 FA tab 224).

[452] *See id.*

[453] *See* Memorandum from Kimberly Johnston-Dodds, Policy Analyst, to Senator John L. Burton (Mar. 22, 2002) (5 FA tab 228).

[454] *See id.* at 1-4.

sacred sites.[455] Subsequent to the CRB report, SB 1828 was amended to prohibit state agencies from issuing permits for projects that would adversely impact sacred sites unless the affected tribe agreed to mitigation measures.[456]

Glamis's Executive Vice President and General Counsel, Charles Jeannes, testified at a California Senate Committee hearing on April 22, 2002 regarding SB 1828.[457] The California Mining Association, of which Glamis is a member, spent more than $100,000 between June 2002 and March 2003 lobbying against California Senate Bills 1828, 483 and 22, and the SMGB's regulations, discussed below.[458] Glamis played an active, instrumental role in the Association's lobbying and public relations efforts opposing the senate bills.[459]

Senate Bills 483 and 1828 were "single-joined," such that SB 483 could not become law unless SB 1828 was also signed into law.[460] Governor Gray Davis signed SB 483 on September 30, 2002. Governor Davis, however, vetoed SB 1828, in part because it would give:

> Native Americans influence over the CEQA process that no other party, agency or governmental body now has. If we are to develop a process beyond the standard CEQA procedures, there should be a greater effort at collaborative discussions that seek a strong consensus.[461]

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[455] *See id*.

[456] California Senate, Senate Bill No. 1828 (amended April 1, 2002) (5 FA tab 230).

[457] Statement of Charles A. Jeannes ¶ 15 (Apr. 17, 2006) ("Jeannes Statement").

[458] *See* California Secretary of State, Lobbying Activity: California Mining Association, *available at* http://cal-access.ss.ca.gov/lobbying/employers/detail.aspx?id=1142897&session=2001&view=activity (showing funds spent); s*ee also* California Mining Association, Mining Company members of the CMA, *available at* http://www.calmining.org/about/ ma.shtml.

[459] Memorandum from Adam Harper, California Mining Association (Oct. 1, 2002) (7 FA tab 37) (thanking Glamis for its assistance with public relations efforts opposing SB 1828); E-mail from Denise M. Jones, California Mining Association, to Charles Jeannes, Senior Vice President, Glamis Gold Ltd. (Aug. 13, 2002) (7 FA tab 36) (detailing the Association's public relations efforts).

[460] California Senate, Senate Bill No. 483 § 8 (chaptered Sept. 30, 2002).

[461] Governor Gray Davis, Veto Message for SB 1828 (Sept. 30, 2002) (6 FA tab 256).

Governor Davis indicated that, despite his veto, he agreed with the California Legislature that Native American sacred sites deserved greater protection from the adverse impacts of open-pit cyanide heap leach mining projects, including Glamis's Imperial Project.[462] As a result of Governor Davis's veto, neither SB 483 nor SB 1828 became law.

In April 2003, the California Legislature enacted Senate Bill 22, which de-coupled the vetoed SB 1828 from the approved SB 483, thereby allowing SB 483 to become law. Thus, SB 22 effectuated this previously signed legislation, which amended SMARA to include provisions to protect Native American sacred sites from the environmental degradation associated with open-pit cyanide heap leach mining. SB 22 prohibits California authorities from approving a reclamation plan for surface mining of metallic minerals if the operation is located within one mile of any Native American sacred site and is located in an area of special concern, as defined by reference to the CDCA Plan of 1980, unless all excavations are backfilled and graded to achieve the approximate original contours of the land prior to mining.[463] SB 22's reclamation requirements do not apply to any surface mining operation in existence on January 1, 2003, for which the lead agency had issued final approval of a reclamation plan and financial assurance prior to September 1, 2002.[464]

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[462] Governor Gray Davis, Signature Message for SB 483 (Sept. 30, 2002) (6 FA tab 257).

[463] *See* CAL. PUB. RES. CODE § 2773.3 (2003).

[464] *See id.* § 2773.5.

### B. State Mining & Geology Board Regulations

As noted earlier, the 1975 Surface Mining and Reclamation Act empowers the SMGB to adopt state policy for surface mining operations.[465] The SMGB's mandate is to "adopt regulations that establish state policy for the reclamation of mined lands in accordance with" SMARA,[466] where such state policy "shall include, but shall not be limited to, measures to be employed by lead agencies in specifying . . . backfilling . . . and other reclamation requirements."[467] The definition of "reclamation" under SMARA requires mined lands to be reclaimed "to a usable condition which is readily adaptable for alternate land uses and create no danger to public health or safety,"[468] which "may require backfilling . . . or other measures."[469]

In January 1993, the SMGB, implementing SMARA, adopted state reclamation standards, requiring that, "[w]here backfilling is required for resource conservation purposes … fill material shall be backfilled to the standards required for the resource conservation use involved."[470]

By 2002, the California Resources Agency had "become increasingly concerned with the impact that large metallic mining projects, particularly those involving the cyanide heap leach extraction process, have on the environment of California."[471]

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[465] *Id.* §§ 2755-56.

[466] *Id.* § 2755.

[467] *Id.* § 2756.

[468] *Id.* § 2733.

[469] *Id.*

[470] CAL. CODE REGS. tit. 14, § 3704(b) (1993).

[471] Letter from Mary D. Nichols, Secretary for Resources, to Allen M. Jones, Chairman, State Mining & Geology Board (Oct. 17, 2002) (6 FA tab 259).

Although SMARA requires that the land be restored to a "usable condition," local lead agencies were approving reclamation plans in which the end use for the land was listed as "open space."[472] The result was "large, unfilled pits and mounds of overburden or mine waste rock material on the surrounding landscape."[473] The Executive Officer to the SMGB observed that "where open pit excavations remain on the landscape, it often is difficult to envision how the remaining open pit is readily adaptable for a beneficial alternate use, or how the 'open space' itself is usable."[474]

The California Legislative Analyst's Office ("LAO"), a nonpartisan government entity that provides fiscal and policy advice to the California Legislature, in its analysis of the 2001-02 budget bill, found that the provisions of SMARA were not being enforced at a "potentially significant" number of mines, and that the Department of Conservation, "has seldom determined whether reclamation plans and financial assurances substantively comply with SMARA."[475] The LAO recommended that the Legislature direct the Department of Conservation, a department of the Resources Agency, to submit a plan for monitoring the adequacy of reclamation plans and financial assurances.[476]

In response to a request from the Resources Agency in December 2002,[477] the SMGB adopted emergency regulations "necessary for the immediate preservation of the

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[472] State Mining and Geology Board, Executive Officer's Report (Dec. 12, 2002), Agenda Item 2 at 3 (6 FA tab 267).

[473] *Id*.

[474] *Id.*; *see also* Final Statement of Reasons for CAL. CODE REGS. tit. 14, § 3704.1, at 3 (6 FA tab 304).

[475] California Legislative Analyst's Office, Analysis of the 2001-02 Budget Bill, Department of Conservation, *available at* http://www.lao.ca.gov/analysis_2001/resources/res_6_3480.htm.

[476] *Id*.

[477] Letter from Mary D. Nichols, Secretary for Resources, to Allen M. Jones, Chairman, State Mining and Geology Board (Oct. 17, 2002) (6 FA tab 259).

public general welfare"[478] by "requiring the reclamation plan for an open-pit metallic mining operation to comply with the requirements set forth in Public Resources Code Sections 2711, 2712, 2733, and 2773."[479] SMGB's regulations specified that lands disturbed by open-pit surface mining for "metallic minerals shall be backfilled to achieve not less than the original surface elevation."[480] They further provided that the topography after reclamation shall not "exceed in height the pre-miming surface contour elevations by more than 25 feet."[481] Among other requirements, the regulation mandated that "[b]ackfilling shall be engineered, and backfilled materials shall be treated, if necessary, to meet" the requirements of California's mining waste management laws and applicable water quality control plans, and "[a]ll fills and fill slopes shall be designed," *inter alia*, "to protect groundwater quality [and] to prevent surface water ponding."[482]

In the week before the emergency regulations were adopted, Jim Good, an attorney for Golden Queen Mining Company and Glamis, wrote to Adam Harper, Association Manager of the California Mining Association, proposing language to be submitted to the SMGB to ensure that the regulations would not apply to plans of operations that already had an approved reclamation plan and financial assurance prior to the expected effective date of the regulations, *i.e.*, December 12, 2002.[483] Adam Harper responded that he had discussed the "grandfathering provision" with John Parrish, the

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[478] State Mining and Geology Board, Executive Officer's Report (Dec. 12, 2002), Agenda Item 2 at 4 ( (6 FA tab 267); Notice of Emergency Rulemaking, at 4 (4 FA tab 145).

[479] Final Statement of Reasons for CAL. CODE REGS. tit. 14, § 3704.1, at 4 (6 FA tab 304).

[480] CAL. CODE REGS. tit. 14, § 3704.1(a) (2003).

[481] *Id.* § 3704.1(e).

[482] *Id*. § 3704.1(b), (d) (2003).

[483] E-mail from Jim Good, Gresham, Savage, Nolan & Tilden, LLP, to Adam Harper, Policy Analyst, California Mining Association (Dec. 9, 2002) (7 FA tab 41).

then-Executive Officer of the SMGB, and that Dr. Parrish confirmed that "it wasn't his intent that plan amendments be covered under the regulation."[484] Mr. Harper then noted that he had proposed language to Dr. Parrish that was identical to that contained in SB 483 and asked Mr. Good if the inclusion of that language would assuage his concerns.[485] Mr. Good responded that "the exemption language from SB 483 probably takes care of my concern . . . .," adding that he "would not spend many bullets opposing the emergency regulation, but save [the proposed language] if [the SMGB] decide[s] to move forward with a final regulation."[486]

The emergency regulations were adopted on December 12, 2002. Those regulations incorporate the language suggested by Mr. Harper on behalf of the California Mining Association, and, thus, do not apply to any surface mining operation for which a final approval of a reclamation plan and a financial assurance had been issued prior to December 18, 2002.[487] By December 18, 2002, Glamis did not have an approved reclamation plan or financial assurance.

SMGB's emergency regulations were set to expire on April 18, 2003, 120 days after their entry into force. As a result, at its regular business meeting held on April 10, 2003, the SMGB re-adopted its backfilling and recontouring regulation on an emergency basis. On May 30, 2003, following a public comment period in which Glamis was an active participant, and in which the Board received over 2,500 comments supporting the

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[484] *Id*.

[485] *Id*.

[486] *Id*.

[487] CAL. CODE REGS. tit. 14, § 3704.1(i) (2003).

regulations and only four comments in opposition,[488] the regulations went into permanent effect.[489]

Consistent with the intent of SMARA, the amended regulations ensure that a company's overall assessment of mining costs includes reclamation costs of backfilling and recontouring, rather than passing along those costs to the public.[490] The goal of the SMGB regulations was to require mining companies to take responsibility for cleaning up their mine sites after the completion of operations and return them to a condition that allows alternative uses and avoids environmental harms, thereby meeting the purpose and intent of SMARA.[491]

Unlike Senate Bill 22, the SMGB regulations apply to all open-pit metallic mines in California, regardless of their proximity to Native American sites. The requirement to backfill an open-pit excavation to the surface does not apply "if there remains an insufficient volume of materials to completely backfill the open-pit excavation to the surface."[492]

Glamis and its lobbyists played an active role in opposing the promulgation of the SMGB regulations. Glamis submitted written comments to the SMGB opposing the backfilling regulations, and commented orally at SMGB meetings.[493] The CMA also

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[488] Parrish Declaration ¶¶ 17, 19.

[489] CAL. CODE REGS. tit. 14, § 3704.1 (2003).

[490] *See* Parrish Declaration ¶ 20.

[491] State Mining and Geology Board, Executive Officer's Report (Apr. 10, 2003), Agenda Item 3 at 6, 15 (6 FA tab 267); *see also* Parrish Declaration ¶ 16.

[492] CAL. CODE REGS. tit. 14, § 3704.1(h) (2003).

[493] *See, e.g.,* Comments of Glamis Chief Operating Officer James S. Voorhees before the State Mining and Geology Board (Nov. 14, 2002) (10 FA tab 104); Letter from Charles A. Jeannes, Glamis Gold Ltd. to Darryl Young, Director, California Dept. of Conservation (Dec. 3, 2002) (7 FA tab 40); Charles A. Jeannes, Senior Vice President, Glamis Gold Ltd., Comments before the State Mining and Geology Board (Dec. 12, 2002) (6 FA tab 268); State Mining and Geology Board, Executive Officer's Report (Dec. 12, 2002),

submitted written and oral comments to the SMGB regarding the regulations.[494] Additionally, as mentioned above, from April 2001 through March 2003, the California Mining Association spent nearly $100,000 lobbying against the amendments to the SMGB's regulations, as well as against SB 1828, SB 483, and SB 22, discussed above.[495]

The SMGB's amended regulations are applicable to all metallic open-pit mines in California. The California Office of Mine Reclamation ("OMR"), which enforces SMGB's regulations, recently made it clear that the regulations would apply to the Soledad Mountain gold mine in Kern County, owned by Golden Queen Mining Company ("Golden Queen").[496] Golden Queen had an approved reclamation plan and a mining permit for the Soledad Mountain project several years before the SMGB's emergency regulations were enacted.[497] Golden Queen, however, did not have any financial assurances in place as of December 18, 2002.[498] The OMR notified Golden Queen that the Soledad Mountain mine thus would be subject to the backfilling and recontouring

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Agenda Item 2 at 1 (6 FA tab 267); State Mining and Geology Board, Executive Officer's Report, Agenda Item 7 (Jan. 16, 2003) (10 FA tab 113).

[494] *See, e.g.,* Letter from Adam Harper, Association Manager, California Mining Association, to the State Mining and Geology Board (Nov. 13, 2002) (7 FA tab 39); Letter from Adam Harper, Association Manager, California Mining Association, to the State Mining and Geology Board (Dec. 11, 2002) (7 FA tab 42); State Mining and Geology Board, Executive Officer's Report (Dec. 12, 2002), Agenda Item 2 at 1 (6 FA tab 267); Letter from Adam Harper, Association Manager, California Mining Association, to the State Mining and Geology Board (Jan. 14, 2003) (7 FA tab 44); State Mining and Geology Board, Executive Officer's Report (Jan. 16, 2003) (10 FA tab 113); Transcript of SMGB Regular Business Meeting, Testimony of Adam Harper, Association Manager, California Mining Association, at 14-15 (April 10, 2003) (10 FA tab 116).

[495] *See* California Secretary of State, Lobbying Activity: California Mining Association, *available at* http://cal-access.ss.ca.gov/lobbying/employers/detail.aspx?id=1142897&session=2001&view=activity (showing funds spent).

[496] Craig Declaration ¶¶ 11-12; *see also* recording of July 13, 2006 SMGB meeting (10 FA tab 112)

[497] Craig Declaration ¶ 11; *see also* letter from Jim Ellis, Operations Division Chief, Kern County Planning Department, to Douglas W. Craig, Assistant Director, Office of Mine Reclamation (Jan. 19, 2005) (7 FA tab 49).

[498] *See id*.

requirements.[499] The OMR also notified Kern County that the reclamation plan for the Soledad Mountain project would have to be amended to comply with the backfilling requirements.[500]

In response, in a recent SMGB meeting, Golden Queen unsuccessfully sought from the SMGB an exemption to the backfilling regulations for Soledad Mountain mine.[501] At that meeting, Golden Queen's attorney (and former Glamis attorney)[502] James Good noted that it was the CEQA process that presented the primary hurdle and expense for mining companies.[503] Mr. Good did not complain about the *costs* involved with backfilling, however, or state that they would make the project uneconomic.[504] In fact, Golden Queen stated in a recent filing with the U.S. Securities and Exchange Commission that it "is currently preparing and will submit a revised Surface Mining Reclamation Plan for the Project and *this will incorporate backfilling*."[505]

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[499] Craig Declaration ¶ 12; *see also* Letter from Douglas W. Craig, Assistant Director, Office of Mine Reclamation, to Richard E. Lloyd, Engineering Tech, Kern County at 2 (Jan. 15, 2005) (7 FA tab 48); letter from Douglas W. Craig to Ted James, Kern County Planning Director, at 2-3 (Jan. 5, 2006) (7 FA tab 50).

[500] *Id.*

[501] *See* recording of July 13, 2006 SMGB meeting (10 FA tab 112).

[502] *See, e.g.,* Letter from James E. Good, Gresham, Savage, Nolan & Tilden, LLP, to Ed Hastey, State Director, BLM (Feb. 27, 1998) (7 FA tab 16).

[503] *See* recording of July 13, 2006 SMGB meeting (According to Mr. Good, CEQA involved an "excruciating process." He asked that the backfilling regulations not be applied to Soledad Mountain because it wanted to be "spare[d] [] the agony" of obtaining CEQA approval a second time.) (10 FA tab 112).

[504] *Id.*

[505] U.S. Securities and Exchange Commission, Form 10-KSB, Golden Queen Mining Co., Ltd., at 15 (fiscal year ended Dec. 31, 2005), *available at* http://www.sec.gov/Archives/edgar/data/1025362/000106299306000909/form10ksb.htm (emphasis added).

The SMGB found that, as the regulations were rules of general applicability, there was no reason to grant an exemption for the Soledad Mountain project, and that the backfilling regulations would apply.[506]

Additionally, prior to the adoption of the emergency regulations, Canyon Resources Corp. ("Canyon Resources") inquired of the SMGB Executive Officer whether a new pit located a few miles from its existing Briggs gold mine site in Inyo County would be subject to the regulations.[507] The SMGB Executive Officer advised the company that to the extent the new pit would not be contiguous to the existing mine site, it would likely constitute a new mine and thus be subject to the regulations.[508]

In January 2003, shortly after the SMGB emergency regulations were adopted, Glamis conducted a detailed estimate of the cost of complying with the backfilling and recontouring regulations. On January 9, 2003, Glamis Chief Operating Officer James Voorhees memorialized the conclusions of that analysis in a memorandum entitled "Imperial Valuation – Backfilling," and sent that memorandum to Glamis President and CEO, Kevin McArthur, and Glamis Senior Vice President and General Counsel, Charles Jeannes.[509] The memorandum

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[506] *See* recording of July 13, 2006 SMGB meeting (10 FA tab 112); Craig Declaration ¶ 13.

[507] *See* Parrish Declaration ¶ 21.

[508] *See Id.*

[509] Memorandum from Jim Voorhees, Glamis Gold, Ltd., to Charles Jeannes, Senior Vice President and General Counsel, Glamis Gold, Inc. and Kevin McArthur, President and CEO, Glamis Gold, Ltd. (Jan. 9, 2003), at 1 (7 FA tab 43).

[510] *Id.*

the spot price of gold was over $635 per ounce – nearly double the spot price prevailing at the time the emergency regulations were adopted.[511]

## ARGUMENT

Under Article 24 of the UNCITRAL Arbitration Rules, Glamis "ha[s] the burden of proving the facts relied on to support [its] claim."[512] Article 24 articulates the general principle – applied consistently by international arbitration tribunals – that the burden of proof rests on the claimant.[513] Glamis has fallen far short of meeting its burden of proof with respect to every aspect of the claims it has submitted to this Tribunal for decision. Furthermore, Glamis's arguments as to the legal standards governing those claims are without merit.

### I. Glamis's Claims With Respect To Many Of The Federal Measures Are Time-Barred Under NAFTA Article 1117(2)

NAFTA Article 1117(2) establishes a three-year limitations period for an investor to submit a claim to arbitration on behalf of an enterprise. Under Article 1117(2), claims must be submitted no more than three years "from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge

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[511] Navigant Rpt. ¶ 212.

[512] UNCITRAL Arbitration Rules art. 24(1).

[513] *See, e.g.*, BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS & TRIBUNALS 327 (1953) ("International judicial decisions are not wanting which expressly hold that there exists a general principle of law placing the burden of proof upon the claimant and that this principle is applicable to international judicial proceedings."); *id*. at 334 ("[T]here is in substance no disagreement among international tribunals on the general legal principle that the burden of proof falls upon the claimant, *i.e.*, the plaintiff must prove his contention under penalty of having his case refused.") (internal quotation omitted); JACOMJIN J. VAN HOF, COMMENTARY ON THE UNCITRAL ARBITRATION RULES 160-61, nn. 298-99 (1991) (citing cases where the tribunal characterized Article 24 as a generally accepted principle of international arbitration law); *Malek v. Islamic Republic of Iran*, Case No. 193, Award No. 534-193-3 ¶ 111 (1992) ("It goes without saying that it is the Claimant who carries the initial burden of proving the facts on which he relies."); *Islamic Republic of Iran v. United States* (Case No. A/20), 11 IRAN-U.S. CL. TRIB. REP. 271, 274 (1986) (The UNCITRAL and Tribunal Rules at Articles 24 and 25 "reflect generally accepted principles of international arbitration practice….").

that the enterprise has incurred loss or damage."[514] Glamis filed its Notice of Arbitration in this matter on December 9, 2003. Accordingly, any claims for which Glamis first acquired, or should have first acquired, knowledge of an alleged breach of the NAFTA and resulting loss or damage before December 9, 2000 are time-barred under Article 1117(2).

In its Notice of Arbitration, among the "offending measures" alleged by Glamis to form the basis of its claim are the following: (i) the October 19, 1999 federal ACHP recommendation; (ii) the December 27, 1999 M-Opinion; and (iii) the November 17, 2000 Final EIS/EIR, which recommended the "no action" alternative to Glamis's plan of operations.[515] Each of these measures is time-barred under Article 1117(2). While these measures may be taken into account as background facts, none of them can serve as a basis for finding a violation of the NAFTA.[516]

Limitations provisions are strictly construed in international law.[517] As the NAFTA Chapter Eleven tribunal in *Marvin Roy Feldman Karpa v. United Mexican States* observed:

> [N]AFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense which, as such, is not subject to any suspension, prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years . . . .[518]

Applying this limitation defense, the NAFTA Chapter Eleven tribunal in *Grand River Enterprises Six Nations, Ltd. v. United States of America*, for instance, barred claimants' claims with respect to all measures of which claimants should have been aware

[514] NAFTA art. 1117(2).

(including knowledge of loss or damage resulting from those measures) prior to the three-year limitations period.[519]

Glamis knew of the allegedly "offending measures" outlined above, and of loss or damage supposedly flowing from those actions, prior to December 9, 2000. In July 2000, for example, Glamis filed a submission in U.S. court stating that it "has already been harmed" by the 1999 M-Opinion.[520] In addition, Glamis alleges that the October 1999

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[515] NOA ¶ 14.

[516] *See*, *e.g.*, *Mondev Int'l v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award ¶¶ 75, 87 (Oct. 11, 2002).

[517] *See Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002) (characterizing the NAFTA's limitations provisions as a "clear and rigid . . . defense"); *Grand River Enters. Six Nations, Ltd. v. United States of America*, Decision on Jurisdiction ¶ 29 (July 20, 2006) (same); *United States of America v. Islamic Republic of Iran*, Case No. B/36, Award No. 574-B36-2 ¶ 61 (Dec. 3, 1996) ("[T]he provision of Article 8 of the 1974 U.N. Convention that '[t]he limitation period shall be four years' is . . . a provision of treaty law binding on the Parties …."); J.L. SIMPSON AND HAZEL FOX, INTERNATIONAL ARBITRATION LAW AND PRACTICE 123 (1959) ("Treaties have imposed express time limits barring claims not made or presented within a certain time …."); BIN CHENG, GENERAL PRINCIPLES OF LAW 376 (1987) ("Prescription is, therefore, the principle underlying municipal rules of limitation. . . . '[This] rule is essentially practical and, moreover, binding ….'") (internal quotation and citation omitted); THOMAS OEHMKE, INTERNATIONAL ARBITRATION § 6.5 (1990) ("If the parties have contractually imposed a 'statute of limitations' on themselves, the courts will uphold this.").

[518] *See Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002).

[519] *Grand River Enters. Six Nations, Ltd. v. United States of America*, Decision on Jurisdiction ¶ 83 (July 20, 2006).

[520] *Glamis Imperial Corp. v. Babbitt*, No. CV-N-00-0196-DWH-VPC (D. Nev.), Plaintiff's Opposition to Defendant's Motion to Dismiss (Apr. 14, 2000), at 11; *see also id.* at 10 ("Glamis has been injured by the delays occasioned by waiting for the [1999 M-Opinion]"); *Glamis Imperial Corp. v. Babbitt,* No. 00CV1934W (S.D. Cal.), Plaintiff's Opposition to Defendant's Motion to Dismiss (Oct. 31, 2000), at 2 (same). Glamis's grave accusation that the United States made "false statement[s]" and "misrepresented material facts" to the U.S. federal court in that case are unfounded and should not be countenanced. Jeannes Statement ¶¶ 9 – 11. In making those accusations, Glamis mischaracterizes a memorandum Solicitor Leshy wrote in late October 1998, in which the Solicitor requested that BLM not finalize any decisions on the Imperial Project for two weeks while he was out of the country. Memorandum from John Leshy, Solicitor, to Ed Hastey, State Director, BLM (Oct. 30, 1998) (4 FA tab 152). Glamis's assertion that this memorandum confirms that DOI "severe[ly] delay[ed]" the processing of its plan of operations misconstrues the memo's instruction to "delay" for a mere two weeks and is belied by the evidence in the record. *See, e.g.,* Letter from Robert M. Waiwood, BLM, to Jerry Eykeibosh, ITS-Bondar-Clegg (Nov. 25, 1998) (7 FA tab 20) (requesting additional testing on ore samples from the Imperial Project); Letter from Robert M. Waiwood to Jerry Eykeibosh (Dec. 17, 1998) (7 FA tab 21) (same); Memorandum from Environmental Management Associates ("EMA"), to Glen Miller, Mick Morrison, & Steve Baumann (Jan. 15, 1999) (7 FA tab 22) (demonstrating that the DOI was continuing to work on processing Glamis's plan); Letter from Gary C. Boyle, General Manager, Glamis Imperial Corp., to Rob Waiwood, BLM (June 25,

ACHP recommendation, which Glamis quoted at length in its April 2000 federal complaint,[521] provided Solicitor Leshy with the "perfect opportunity" to complete the 1999 M-Opinion, following "several months [of] considering bases upon which he might legally deny approval of the Imperial Project."[522] And Glamis alleged in July 2000 that any action taken by BLM in reliance on the 1999 M-Opinion would cause it further harm,[523] a position that plainly applies to the "no action" recommendation set forth in BLM's November 17, 2000 Final EIS/EIR, which Glamis asserts "was based entirely" on the 1999 M-Opinion.[524]

Accordingly, Glamis itself has alleged that prior to December 9, 2000, it had incurred loss or damage as a result of the ACHP recommendation, 1999 M-Opinion, and BLM Final EIS/EIR. Accordingly, Glamis's claims with respect to those actions are time-barred under Article 1117(2). None of those actions can be the basis for a finding that the United States breached its international obligations under the NAFTA.

## II. Glamis's Expropriation Claim Is Without Merit

Glamis has failed to establish that any of its property rights has been expropriated, and, thus, that the United States has breached Article 1110 of the NAFTA. As a threshold matter, Glamis's expropriation claim challenging the California measures is not ripe. Furthermore, because Glamis's unpatented mining claims did not confer on it any

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1999) (7 FA tab 27) (providing justification for proposed increased gold recovery rate from Imperial Project).

[521] *Glamis Imperial Corp. v. Babbitt*, No. CV-N-00-0196-DWH-VPC (D. Nev.), Compl. for Declaratory and Injunctive Relief (Apr. 13, 2000), at 13.

[522] Mem. ¶ 324.

[523] *See Glamis Imperial Corp. v. Babbitt*, No. CV-N-00-0196-DWH-VPC (D.Nev.), Plaintiff's Motion for Expedited Consideration of its Motion for Summary Judgment (Apr. 14, 2000), at 2 (asserting that "BLM action under this new, binding, unlawful policy," *i.e.* the 1999 M-Opinion approved by Secretary Babbitt, would subject Glamis to additional delay and "significant financial cost").

[524] Mem. ¶ 331.

right to limit California's authority to accommodate Native American religious practice, injure Native American sacred sites, fail to minimize environmental harm, or threaten public health and safety, the California measures are not expropriatory. Even assuming, *arguendo*, that Glamis did have a property right to engage in such activities, Glamis's investment was not expropriated by either California SB 22 or the amendments to the SMGB's regulations, because: (1) the reclamation requirements did not and do not deprive Glamis of all economic use of its investment; (2) Glamis could not have had reasonable investment-backed expectations that it would not be required to backfill and recontour the Imperial Project mine site after the completion of mining operations; and (3) the California measures constitute reasonable regulations of general applicability. Finally, the federal government's actions with respect to the processing of Glamis's plan of operations did not expropriate Glamis's investment.

### A. Glamis's Expropriation Claim Challenging The California Measures Is Not Ripe

Because neither SB 22 nor the amendments to the SMGB's regulations have been applied to Glamis, Glamis's challenge to those measures as expropriatory is not ripe and should be dismissed.

BLM was continuing to process Glamis's Imperial Project plan of operations when Glamis notified the United States that it intended to commence arbitration. Because BLM did not complete its review of the plan of operations, Imperial County had no occasion to complete its own review of Glamis's proposed reclamation plan. Accordingly, Glamis has not been refused permission to develop the Imperial Project site, its reclamation plan has not been denied, and the California measures have not been

applied to it. Thus, under the NAFTA and customary international law, Glamis's expropriation claim challenging those measures is not ripe and should be dismissed.

For a claim to be ripe under the NAFTA, the claimant must allege that it has "incurred loss or damage" from an alleged breach.[525] Similarly, under customary international law, an expropriation claim is not ripe until a challenged measure actually interferes with a claimant's property right: the mere adoption of an expropriatory measure – and even a corresponding threat of its application to a claimant – without more, does not give rise to a cognizable expropriation claim.[526]

Many cases illustrate the customary international law principle that an expropriation claim is not ripe until a challenged measure actually has interfered with – rather than merely threatened – a property right. In *Malek v. Iran*, for example, the claimant argued that his farmland was expropriated as of the day he became a U.S.

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[525] NAFTA arts. 1116(1) and 1117(1).

[526] *See*, *e.g*, *International Tech. Prods. Corp. v. Iran*, 9 IRAN-U.S. CL. TRIB. REP. 206 (1985) (Award No. 196-302-3) (issuance of writ demanding payment and threatening foreclosure did not cause claimant to irreversibly lose possession and control of property and, thus, did not give rise to expropriation claim); *Pobrica* (Int'l Cl. Settlement Comm'n 1953) (Amended Final Decision, on file with the U.S. Dep't of State) ("the mere enactment of a law under which property may later be nationalized does not create a claim . . . . [A] claim for nationalization or other taking of property does not arise until the possession of the owner is interfered with"); *Mariposa* (U.S. v. Pan.), American and Panamanian General Claims Arbitration 577 (1933) ("a claim for expropriation of property must be held to have arisen when the possession of the owner is interfered with and not when the legislation is passed which makes the later deprivation of possession possible"); *Mohtadi v. Islamic Republic of Iran*, Case No. 273, Award No. 573-271-3 ¶¶ 41, 53 (1996) ("mere passage" of statute providing that undeveloped lands "will be taken over by the Government without compensation" in the event that landowners fail to develop the lands within a specified period did not "in itself effect[] a taking of the Claimant's property"); *Malek v. Islamic Republic of Iran*, Case No. 193, Award No. 534-193-3 ¶ 54 (1992) (claimant who became subject to a law providing for the sale of property "under the supervision of the local Public Prosecutor" could not, absent an actual sale, prevail on expropriation claim); *Starrett Housing Corp. v. Iran,* 4 IRAN-U.S. CL. TRIB. REP. 122 (1983) (expropriation claim arose not upon the passage of legislation providing for the appointment of a temporary manager, but rather when a temporary manager actually took control of the claimant's project); *Tradex Hellas S.A. v. Republic of Albania*, ICSID No. ARB/94/2, Award ¶ 153 (Apr. 29, 1999) (decree merely authorizing the privatization of state farms, which did not necessarily entail the privatization of the state-owned farm in which claimant held an interest, was not expropriatory); *see also Electricity Co. of Sofia & Bulgaria* (Belg. v. Bulg.), 1939 P.C.I.J. (ser. A/B) No. 77, at 23 (Apr. 4) (adoption of allegedly discriminatory tax law did not give rise to cognizable claim because claimant, the Government of Belgium, had not demonstrated that a concrete dispute with respect to the measure existed as of the date the claim was filed).

citizen (November 5, 1980), given that acquiring such nationality made him subject to Article 989 of the Civil Code of Iran, which provided that all "landed properties" of Iranians who acquire a different nationality "will be sold under the supervision of the local Public Prosecutor."[527] Even though the claimant was plainly subject to Article 989 as of November 5, 1980, the tribunal found that no expropriation claim arose between that date and the tribunal's jurisdictional cutoff date of January 19, 1981 (when the Algiers Accords were signed), because claimant had not "submitted any evidence purporting to prove that this procedure [*i.e.*, sale of claimant's property under the supervision of the local Public Prosecutor] was ever implemented in relation to the Farmland" during that time frame.[528]

Similarly, in *Mariposa*, the tribunal rejected the argument that the adoption of legislation threatening the claimant's property gave rise to an expropriation claim. In 1924, the Panamanian legislature enacted Law 62, which provided private persons with a right of action to recover state lands illegitimately held by private persons. Under Law 62, a private litigant could retain a fifty percent interest in any recovery. Four years later, in 1928, the Panamanian legislature enacted Law 100, which empowered the State to "exercise the action or actions necessary to return" to the State national properties illegitimately held by private persons.[529]

Pursuant to Law 62, a private person, Mr. Morales, petitioned the Secretary of Hacienda for permission to sue for the recovery of a tract of land known as El Encanto. The petition was denied by the Attorney General on the grounds that title for the property

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[527] *Malek v. Islamic Republic of Iran*, Case No. 193, Award No. 534-193-3 ¶ 54 (1992).

[528] *Id.*

[529] *Mariposa* (U.S. v. Pan.), American and Panamanian General Claims Arbitration 576-77 (1933).

was registered and, thus, El Encanto could not be considered illegitimately held. Following the adoption of, and apparently relying on, Law 100, the Secretary of Hacienda and Mr. Morales, without further submission to the Attorney General, entered into a contract authorizing Mr. Morales to sue for recovery of El Encanto. The validity of the defendants' title to El Encanto was upheld at trial, but reversed on appeal, with the Panamanian Supreme Court holding that El Encanto was national property and ordering cancellation of the title registered in defendants' names.

Espousing the claim of the Mariposa Development Company, which held an interest in El Encanto, the United States argued that the enactment of Law 100, together with the contract "which made Morales' suit possible," gave rise to an expropriation claim, and that the Supreme Court's decision was "merely the culminating step in a plan for expropriation," the execution of which began "long before" the decision was issued.[530] The tribunal rejected the argument, reasoning that:

> [p]ractical common sense indicates that the mere passage of an act under which private property may later be expropriated without compensation by judicial or executive action should not at once create an international claim ….[531]

It held that such a claim arises "when the possession of the owner is interfered with and not when the legislation is passed which makes the later deprivation of possession possible."[532]

The tribunal in *Tradex Hellas v. Republic of Albania* applied the same principle when rejecting an expropriation claim brought by a Greek investor in a joint venture, the object of which was the commercial and agricultural development of a State-owned

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[530] *Id.* at 577.

[531] *Id.*

[532] *Id.*

parcel of farmland in Albania.[533] Following the establishment of the joint venture, the most fertile area of the farm was, according to claimant, transferred to villagers by Albania, followed by the seizure and occupation of the entire farm by villagers.[534] The claimant alleged expropriation of its investment, relying on several acts, including several legislative acts and a speech by Albanian President Sali Berisha. The tribunal found none of the acts to be expropriatory.

One of the legislative acts in question, which provided for the privatization of state farms, stated in relevant part that the "Central Agency for Restructuring and Privatization is assigned to determine the agricultural enterprises or their components to be distributed, time and order of distribution and issuing of relevant instructions."[535] Claimant argued that this act was a self-executing law that did not require any additional implementation to effect a formal expropriation of its farm.[536] The tribunal rejected this argument, finding that the act merely authorized the privatization of state farms, which were to be selected in the future by the agency, and that there was no indication in the act that lands belonging to the joint venture would be selected for privatization.[537]

Similarly, the Berisha speech, which "emphasized to the general public that the government intended to in fact implement its privatization program also regarding agricultural enterprises," did not "change the situation" created by the earlier act, *i.e.*, that certain state farms, but not necessarily claimant's farm, would be selected for

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[533] *Tradex Hellas S.A. v. Republic of Albania*, ICSID No. ARB/94/2, Award (Apr. 29, 1999).

[534] *Id.* ¶ 57.

[535] *Id.* ¶ 152.

[536] *Id.* ¶ 149.

[537] *Id.* ¶ 153.

privatization.[538] The President's speech, considered either in isolation or together with the legislation, was thus found not to be expropriatory. Accordingly, like *Malek* and *Mariposa*, *Tradex* reflects the international law principle that the mere threat of interference with a property right is not expropriatory.

This principle of customary international law is likewise reflected in various national laws. Under United States law, for instance, in evaluating an indirect expropriation claim, the court must consider the economic impact of the action, the extent to which the action interferes with distinct, reasonable investment-backed expectations, and the character of the government action.[539] The economic impact of the measure and the extent of interference with the investor's expectations, however, "simply cannot be evaluated" without a "final, definitive decision" by the relevant agency concerning the application of the challenged measures "to the particular [property] in question."[540] Until such a final decision is reached, the claim is not ripe.[541]

In *Williamson County*, the U.S. Supreme Court reversed, on ripeness grounds, a jury verdict in favor of a land developer who had brought a takings claim against the Williamson County (Tennessee) Regional Planning Commission. Concerning the application of regulations to the particular land in question – a tract of land in a residential subdivision – the Court found that no final decision had been reached because the developer had not sought "variances that would have allowed it to develop the

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[538] *Id.* ¶ 156.

[539] *See Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

[540] *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190-91 (1985).

[541] *Id.* at 187 (citations omitted). Indeed, under U.S. law, "[o]nly when a permit is denied and the effect of the denial is to prevent economically viable use of the land in question can it be said that a taking has occurred." *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 127 (1985) (internal quotations omitted).

property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply" with the applicable zoning ordinance and subdivision regulations.[542] To satisfy ripeness demands, the Court would have required a final decision on "all eight" of the Commission's objections to the proposed plat, without which it was "impossible to tell whether the land retained any reasonable beneficial use or whether respondent's expectation interests had been destroyed."[543]

The same ripeness principle applies under Canadian law. Thus, in *Mariner Real Estate Ltd. v. Nova Scotia*, a Canadian appellate court held that the designation of lands as a beach pursuant to the Beaches Act, without more, did not constitute an expropriation.[544] In *Mariner*, the landowners' application to build single family residences on their lands, required by the Beaches Act, was denied. The landowners then sought a declaration that their lands had been expropriated without compensation under the Expropriation Act. The trial court issued a declaration providing that the designation of the lands pursuant to the Beaches Act constituted an expropriation.[545] The appeals court reversed, finding, for purposes of the expropriation analysis, that it was not "the designation alone that was crucial, but the designation in combination with the refusal of permission to develop the lands by building dwellings."[546]

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[542] *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 188 (1985).

[543] *Id.* at 189 n.11 (emphasis omitted). As discussed below, Glamis's challenge to the 1999 M-Opinion in U.S. court was denied on the same ripeness grounds. *See Glamis Imperial Corp. v. Babbitt*, Case No. 00-CV-1934 W (S.D. Cal. 2000), Order (Oct. 31, 2000), at 5, 7 (granting defendants' motion to dismiss, finding that the 1999 M-Opinion "may harm the Imperial Project's chances of ultimate approval [but] does not mandate the BLM's final decision").

[544] *Mariner Real Estate Ltd. v. Nova Scotia* (Attorney General), 90 A.C.W.S. (3d) 589 (Can.) ¶ 54.

[545] *Id.*

[546] *Id.*

Here, no final decision has been reached on the Imperial Project plan of operations, and the California measures have not been applied to Glamis, notwithstanding its representations that "California . . . retroactively applied [the California measures] to Glamis's long-pending plan of operation."[547] Neither California nor the BLM has applied either of the California measures to Glamis. Indeed, as of the day the emergency backfilling regulations were adopted, December 12, 2002 – which Glamis asserts to be the date of expropriation[548] – Glamis did not even have an active application before Imperial County or the BLM. Three days earlier, on December 9, 2002, Glamis requested that the BLM suspend processing of its plan of operations.[549]

Neither California nor the federal government could have applied SB 22 or the amendments to the SMGB regulations to Glamis before those measures were adopted. And, as detailed below, neither entity had occasion to apply the legislation or regulations in the few months after Glamis declined to reaffirm its request to suspend processing of its plan of operations on March 31, 2003,[550] and before it filed its Notice of Intent to commence arbitration on July 21, 2003 and its Notice of Arbitration in December 2003.

An approved reclamation plan is necessary only if a corresponding mining project will go forward. Accordingly, as a practical matter, given the absence of a final decision by the BLM on the Imperial Project application, Imperial County had no occasion to

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[547] Mem. ¶ 552; *see also id*. ¶¶ 562-63; Behre Dolbear Rpt. ¶¶ 5.1, 5.3, 6.0.

[548] *See*, *e.g*., Mem. ¶ 562 (referring to the "December 12, 2002 expropriation").

[549] *See* Letter from C. Kevin McArthur, President, Glamis Gold Ltd., to Mike Pool, California State Director, BLM (Dec. 9, 2002) (6 FA tab 265) (requesting that DOI suspend "all ongoing efforts to process the Imperial Project Plan of Operations . . . . ").

[550] Letter from Charles A. Jeannes, Senior Vice President, Administration, Glamis Gold Ltd., to Mike Pool, California State Director, BLM (Mar. 31, 2003) (6 FA tab 280).

complete processing of Glamis's proposed reclamation plan or to apply the challenged California reclamation measures to Glamis.

Nor did BLM apply the challenged California measures to Glamis. As detailed above, little more than two months after BLM issued its validity determination in September 2002, Glamis requested that BLM cease processing its plan of operations.[551] Almost four months later, Glamis apprised DOI that it was not "reaffirm[ing] [its] request to the Interior Department to suspend the Glamis plan of operations . . . ."[552] Based on this communication, BLM resumed processing Glamis's plan. A few months later, and notwithstanding BLM's ongoing processing of the Imperial Project plan of operations, Glamis unilaterally ceased cooperating in the process and notified the United States that government actions "have effectively destroyed and expropriated" the company's investment, and that it intended to commence arbitration to recover the amount of its investment.[553] After waiting the requisite time required by the treaty, Glamis commenced arbitration. During the few months between the time Glamis (i) declined to reaffirm its request for the BLM to suspend processing, and (ii) commenced this arbitration, BLM had not applied California's regulations or legislation to Glamis's plan of operations. Nor has BLM applied California's regulations or legislation to Glamis since that time.[554]

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[551] Letter from C. Kevin McArthur, President, Glamis Gold Ltd., to Mike Pool, California State Director, BLM (Dec. 9, 2002) (6 FA tab 265).

[552] Letter from Charles A. Jeannes, Senior Vice President, Administration, Glamis Gold Ltd., to Mike Pool, California State Director, BLM (Mar. 31, 2003) (6 FA tab 280).

[553] NOI at 2.

[554] *See infra* Fact Sec. IV.D.2(b).

Glamis's argument that its Imperial Project plan of operations has been "condemn[ed]" to an "eternal bureaucratic limbo"[555] is belied by the record, and cannot justify Glamis's decision to seek arbitration, rather than await a decision from the DOI on its plan of operations. Glamis's multiple legal challenges and suspension requests have detracted from the efficient processing of the plan of operations.[556] Moreover, Glamis has secured significant advances in the processing of its plan of operations when it has actively engaged DOI and BLM officials.[557] Glamis thus cannot contend that it would have been futile to continue to have DOI process its plan.

Nor can Glamis contend that granting the DOI the opportunity to continue processing its plan of operations would have been futile because California's reclamation measures ultimately would have been applied to it and exacted an expropriation. *First*, even assuming the California measures had been applied to Glamis, the question of whether Glamis's investment was expropriated by those measures would turn on the particular facts surrounding their application. Without a final decision on the Imperial Project plan of operations, it is impossible to assess the economic impact of the challenged California measures and the extent to which those measures allegedly interfere with Glamis's reasonable investment-backed expectations.[558] It was for this very reason that Glamis's challenge to the 1999 M-Opinion filed in federal court was

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[555] Mem. ¶ 511.

[556] *See supra* Fact Sec. IV.D, F.

[557] *See infra* Facts Sec. IV.F, G.

[558] For example, given that the price of gold doubled in value following the December 2002 amendments to the SMGB regulations, the impact of those measures on Glamis's plan of operations would depend on when they were applied. *See supra* Facts Sec. IV. F.

dismissed on ripeness grounds: the opinion did not mandate any specific outcome concerning the Imperial Project plan of operations and thus was not ripe for review.[559]

Similarly, Glamis's ability to meet causation requirements – *i.e.*, demonstrating that the loss in value of its investment was caused by the challenged California measures, rather than by other BLM-imposed requirements – cannot be determined prior to application of the measures at issue to Glamis's proposed Imperial Project.[560] By failing to obtain the BLM's determination on whether, and precisely how, the challenged California measures would be applied, Glamis's expropriation claim "simply cannot be evaluated."[561]

*Second*, Glamis has made detailed arguments to the BLM on several occasions that the California measures are preempted by federal law and, thus, are invalid and should not be applied to the Imperial Project plan of operations.[562] Glamis, however, cannot have it both ways: the California legislation and regulations either are expropriatory (as Glamis asserts when arguing that the California measures are not *bona*

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[559] *See Glamis Imperial Corp. v. Babbitt*, Case No. 00-CV-1934 W (S.D. Cal. 2000), Order (Oct. 31, 2000), at 6-7 (granting defendants' motion to dismiss on grounds that Glamis sought "impermissible judicial interference in an ongoing administrative process," and observing that the 1999 M-Opinion "may alter the legal regime the BLM must employ in its ongoing review of the Imperial Project, and may reduce the Project's chances for ultimate approval, but it does not mandate any specific decision or carry any other direct legal consequences"); *Glamis Imperial Corp. v. Babbitt*, Case No. 00-CV-1934 W (S.D. Cal.), Defendants' Motion to Dismiss (Oct. 6, 2000), at 2 ("only once the agency has made a final decision on Plaintiff's proposed plan of operations for the mine will any resulting controversy be ripe for review").

[560] Many regulatory requirements apart from the California measures could increase the cost of the Imperial Project. *See*, *e.g.*, 43 C.F.R. § 3809.201(b) (2004) ("BLM will inform the State whether Federally proposed or listed threatened or endangered species or their proposed or designated critical habitat may be affected by the proposed activities and any necessary mitigating measures."); 43 C.F.R. § 3809.420(a)(4) (requiring performance of any "mitigation measures specified by BLM to protect public lands"); 43 C.F.R. § 3809.420(b)(3) (requiring reasonable reclamation measures "to prevent or control on-site and off-site damage of the Federal lands").

[561] *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985).

[562] *See*, *e.g.*, Letter from R. Timothy McCrum, Counsel for Glamis Gold Ltd., Crowell & Moring LLP, to Mr. Fred E. Ferguson, Jr., Associate Solicitor, U.S. DOI (Apr. 2, 2003) (7 FA tab 46).

*fide* legislation and regulations enacted in the public interest) or they are not (as Glamis asserts when arguing that the California measures are preempted by federal law and thus barred from application to its plan of operations). In any event, Glamis's own arguments to the BLM undermine any claim of futility.

Glamis has not been refused permission to develop the Imperial Project site, its reclamation plan has not been denied, and the California measures have not been applied to it. Accordingly, Glamis's expropriation claim is not ripe and should be denied.

### B. The California Measures Did Not Interfere With Any Property Right Held By Glamis And, Thus, Are Not Expropriatory

If the Tribunal nevertheless considers Glamis's expropriation claim ripe for review, a threshold inquiry in the analysis of whether a regulation constitutes an expropriation is whether the claimant has established that it holds a compensable property interest.[563] Glamis's claim that the California measures expropriated its investment fails because Glamis has no property right to engage in mining activities free from the reclamation requirements imposed by those measures.

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[563] *See, e.g.*, *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) (denying regulatory takings claim after finding that claimant had no property interest in navigable waters); *United States v. Willow River Power Co.*, 324 U.S. 499 (1945) (dismissing regulatory takings claim on the ground that claimant had no property interest in river runoff for tailwaters); *Karuk Tribe v. United States*, 209 F.3d 1366, 1374 (Fed. Cir. 2000) (insisting that a court must first determine whether plaintiff possessed a "stick in the bundle of property rights" before it can find a taking), *cert. denied,* 532 U.S. 941 (2001); *M & J Coal Co. v. United States*, 47 F.3d 1148, 1153-54 (Fed. Cir. 1995) (describing the need to "determine whether the use interest proscribed by the governmental action was part of the owner's title to begin with" as a threshold inquiry in any takings analysis), *cert. denied*, 516 U.S. 808. International law recognizes the expropriation only of property rights or property interests. *See*, *e.g.*, Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 R.C.A.D.I. 259, 272 (1982) ("Only *property* deprivation will give rise to compensation.") (emphasis in original); Rodolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID Review, For. Investment L.J. 41, 41 (1986) ("[O]nce it is established in an expropriation case that the object in question amounts to 'property,' the second logical step concerns the identification of expropriation."); *Tradex Hellas S.A. v. Republic of Albania*, Case No. ARB/94/2, Award ¶ 177 (Apr. 29, 1999) ("expropriation by definition is a 'compulsory' transfer of property rights") (internal quotations omitted). Although international law governs this arbitration, domestic law may nevertheless be relevant for determining the existence of such property rights or property interests. *See*, *e.g.*, *Tradex* Award ¶ 130 (property right limited by privatization provisions under Albanian land law); *Marvin Roy Feldman Karpa v. United Mexican States*, Case No. ARB(AF)/99/1, Award ¶¶ 118-19 (Dec. 16, 2002) (property right limited by invoice requirement under Mexican excise tax law).

The property rights held by Glamis – unpatented mining claims located on federal lands – are possessory interests subject to wide-ranging federal, state, and local regulations. The unpatented mining claims include no right to have a particular plan of operations or reclamation plan approved by governmental authorities. Furthermore, the unpatented mining claims are subject to pre-existing principles of religious accommodation enshrined in the U.S. and California Constitutions, as well as pre-existing cultural, environmental, and health and safety limitations under California property law. Accordingly, any burden imposed on Glamis by the challenged California measures – which merely specify the implementation of those pre-existing principles in the particular context of surface mining – cannot be deemed expropriatory.

### 1. The Property Interest At Issue: Glamis's Unpatented Mining Claims

The Mining Law gives U.S. citizens the right "to explore, discover, and extract valuable minerals from the public domain and to obtain title to lands containing such discoveries."[564] Any U.S. citizen has the right to explore for minerals on federal public lands that have not already been claimed.[565] This right of exploration is a gratuity from the government that can be withdrawn at any time.[566] The rights in a mining claim on federal public lands are hierarchical: the locator of an "unpatented" mining claim merely

[564] *Freese v. United States*, 221 Cl. Ct. 963 (1979). The Mining Law restricts exploration for minerals on the federal public lands to U.S. citizens. 30 U.S.C. § 22 (2000). To meet the Mining Law's citizenship requirements, Glamis Gold, Inc., a subsidiary of Glamis Gold, Ltd., a Canadian company, is incorporated under the laws of the State of Nevada, and is also headquartered in Nevada. See NOA at 4. In the case of a corporation, such citizenship is established by showing proof of incorporation under the laws of the United States. 30 U.S.C. § 24 (2000).

[565] *See* 30 U.S.C. § 22 (2000).

[566] *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 47 (D.D.C. 2003).

holds a possessory interest in, while the owner of a "patented" mining claim holds title to, the land.

All of the mining claims that comprise the Imperial Project site are unpatented mining claims, located after 1980,[567] on approximately 1,600 acres of land owned by the U.S. federal government.[568] In 1987, Glamis began acquiring the rights to these claims,[569] over which it ultimately obtained sole ownership through a variety of business partnerships, joint ventures, and acquisitions.[570]

The locator of an unpatented mining claim holds only a right of "possession and enjoyment" of the surface of the land and any minerals located within the land.[571] The possessory interest and mineral rights arise when a mining claimant makes a valuable mineral discovery, posts notice at the site of the claim, records these facts with the appropriate land office, and pays the required annual fees.[572] With respect to every unpatented mining claim, the United States maintains the underlying fee title to the land.[573]

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[567] BLM, Mineral Report, Att. I-3 (Sept. 27, 2002) (10 FA tab 98). The Imperial Project is composed of 187 lode mining claims and 277 mill site locations. *Id*.

[568] BLM, Mineral Report, at 13 (Sept. 27, 2002) (6 FA tab 255).

[569] Mem. ¶ 29.

[570] Mem. ¶ 29, McArthur Statement ¶¶ 4-5; Letter from A.D. Rovig, Glamis Gold, Inc., to J.R. Billingsley, Vice President, Admin., Glamis Gold, Ltd. (Feb. 18, 1994) (GLA093196 to 235).

[571] 30 U.S.C. § 26 (2000); *Best v. Humboldt Placer Mining Co*., 371 U.S. 334, 335 (1963).

[572] *See* 30 U.S.C. §§ 26, 29, 30 (2000).

[573] 30 U.S.C. § 26 (2000). It is not until a mining claim is patented that fee simple title to the land is conveyed by the Government to the claimant. After a patent is issued, the Government no longer retains title to the land in question, and the patentee is freed from the limitations of the mining laws and may put the land to uses other than mining. 30 U.S.C. § 29 (2000). The patentee, however, must still comply with the same federal and state environmental, health, and safety regulations that apply to other private land owners. Since 1994, Congress has imposed a moratorium on spending appropriated funds for the acceptance or processing of mineral patent applications. *See* Interior and Related Agencies Appropriations Act for Fiscal Year 2005, Pub. L. No. 108-447, Div. E, tit. I, 118 Stat. 2809, at § 120 (2004).

Congress's authority over the public lands is plenary [574] and one acquires only what has been granted pursuant to that authority.[575] Such grants "are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it."[576]

Unpatented mining claims on federal lands are subject to compliance with federal, state and local environmental and other regulations.[577] Absent an actual conflict between state and federal law, unpatented mining claims are subject to reasonable state environmental regulations applicable to federal lands within a state's borders,[578] and there is no conflict between state and federal law where state mining laws or regulations require "a higher standard of protection for public lands" than federal law.[579] Federal law

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[574] *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

[575] *Andrus v. Charlestone Stone Prods.,* 436 U.S. 604, 617 (1978); *United States v. Union Pac. R. Co.*, 353 U.S. 112, 116 (1957).

[576] *Id.*; *Andrus v. Charlestone Stone Prods.*, 436 U.S. at 617.

[577] 30 U.S.C. § 22 (2000) ("[A]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase . . . under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."); 30 U.S.C. § 26 (2000) (according exclusive right of possession to locaters of mining claims on public lands "so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title"); *see also Best v. Humboldt Placer Mining Co*., 371 U.S. 334, 336 (1963) (mining claims are "valid against the United States if there has been a discovery of [a valuable] mineral within the limits of the claim, if the lands are still mineral, and if other statutory requirements have been met").

[578] *California Coastal Comm'n v. Granite Rock Co*., 480 U.S. 572, 581 (1987) (rejecting pre-emption challenge to state environmental regulation of unpatented mining claims in national forests where the applicable federal regulations "expressly contemplate[d] coincident compliance with state law as well as with federal law").

[579] 43 C.F.R. § 3809.3 (2002) ("Nothing in this subpart shall be construed to effect a preemption of State laws and regulations relating to the conduct of operations or reclamation on federal lands under the mining laws"); *see also* 43 C.F.R. 3809.3-1(a) (1980); *California Coastal Comm'n v. Granite Rock Co*., 480 U.S. 572, 587, 581 (1987) (distinguishing, for pre-emption purposes, land use regulations (which "in essence choose[] particular uses for the land") from environmental regulations (which "require[] only that, however the land is used, damage to the environment is kept within prescribed limits"), and observing that state law is pre-empted "to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress") (internal quotations and citations omitted)).

does not exempt mining claimants from following reasonable federal or state environmental laws or regulations, even where the law or regulation would render certain mining activities on the public lands uneconomic.[580]

Furthermore, Glamis's unpatented mining claims include no right to have a specific project approved by governmental authorities.[581] For example, the Interior Board of Land Appeals ("IBLA"), the administrative body that hears appeals by mining companies against the BLM, ruled in *Great Basin Mine Watch* that "the mere filing of a plan of operations by a holder of a mining claim invests no rights in the claimant to have any plan of operations approved."[582] The IBLA rejected the BLM's characterization of its own authority, finding that the BLM had in fact "understated" its authority to reject a plan of operations.[583] Specifically, the IBLA ruled that "under no circumstances" could regulatory compliance be waived merely because such compliance would render a given project unprofitable.[584]

The recent Montana Supreme Court decision in *Seven-Up Pete Venture v. Montana* further illustrates that a mining company's property interest does not include a right of approval for a particular project, especially where mining in the manner proposed

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[580] *See, e.g., Atlas Corp. v. United States*, 895 F.2d 745, 757-58 (Fed. Cir. 1990) (affirming dismissal of takings claim where reclamation requirements were imposed on mining project "[p]ursuant to Congress' power to protect the general health, safety, and welfare," even if the costs of such reclamation requirements rendered the mining project uneconomic). In addition, the NAFTA Parties were careful to recognize the need to maintain their ability to regulate for the protection of the environment. *See* NAFTA art. 1114 ("Nothing in . . . Chapter [Eleven] shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.").

[581] 43 C.F.R. § 3809.1-6(a)(2) (1980) (BLM will notify the operator "[o]f any changes in or additions to the plan necessary to meet the requirements of these regulations"); 43 C.F.R. § 3809.411(d) (2002) (describing circumstances under which BLM could either approve or disapprove a proposed plan of operations).

[582] *Great Basin Mine Watch*, 146 I.B.L.A. 248, 256, (Interior Bd. of Land Appeals Nov. 9, 1998).

[583] *Id.* at 256.

[584] *Id.*

would cause environmental damage.[585] In 1998, the State of Montana, through voter initiative 137 ("I-137"), banned all open-pit cyanide leaching at new gold and silver mines and mine expansions.[586] Certain mining companies in Montana that held mineral leases on state lands, as well as private mineral leases and fee interests on federal lands that pre-dated I-137 sued, claiming the initiative amounted to an unconstitutional taking of their property.[587]

The plaintiffs in *Seven-Up Pete* had invested more than $70 million in their mining projects.[588] They argued that I-137 destroyed the value of their mineral leases and fee interests, which were terminated as a result of I-137. They also argued that I-137 frustrated their expectations with respect to the manner in which they could mine, because the state knew that plaintiffs intended to use cyanide heap leaching to recover the minerals and there was no other economically viable way to mine the land at issue.[589] Further, the plaintiffs complained that I-137 "changed a century of Montana mining history."[590]

The State of Montana, on the other hand, noted that the leases in question provided that "[t]he lessee shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental

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[585] *Seven Up Pete Venture v. Montana*, 114 P.3d 1009 (2005).

[586] Mont. Code Ann. § 82-4-390 ("Cyanide heap and vat leach open-pit gold and silver mining prohibited. (1) Open-pit mining for gold or silver using heap leaching or vat leaching with cyanide ore-processing reagents is prohibited except as described in subsection (2). (2) A mine described in this section operating on November 3, 1998, may continue operating under its existing operating permit or any amended permit that is necessary for the continued operation of the mine.").

[587] *See Seven Up Pete Venture*, 114 P.3d at 1015.

[588] *Id.* at 1021.

[589] *Id.* at 1016.

[590] *Seven Up Pete Venture v. Montana*, Appellants' Initial Brief (No. 03-154) (June 6, 2003), at 6.

protection, and reclamation."[591] It also argued that the plaintiffs had never been given a guarantee that their mining permits would be approved and, likewise, they did not have a right to mine using the cyanide heap leach process.[592] The state further argued that the heavily regulated nature of the mining industry should have put plaintiffs on notice of the likelihood of future regulations.[593] Finally, Montana noted that I-137 did not prohibit plaintiffs from developing their mineral estate in a manner other than through a cyanide heap leach process and did not deprive them of any right granted by the mineral leases.[594]

The Supreme Court of Montana found that plaintiffs did not have a property interest in the approval of their mining permit.[595] Citing federal law, the court set out the applicable standard for determining whether there is a cognizable property interest in obtaining a permit, which exists "only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured."[596] The court reasoned that the Montana Department of Environmental Quality possessed the statutory discretion to deny a mining permit, and the plaintiffs were required by their mineral leases to obtain a mining permit subject to environmental regulations before commencing mining.[597] Thus, the court concluded that the plaintiffs' opportunity to seek a mining permit did not constitute a property right.[598] Furthermore, the court continued,

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[591] *Seven Up Pete Venture v. Montana*, Brief of Respondent (No. 03-154) (July 7, 2003), at 4.

[592] *Seven Up Pete Venture*, 114 P.3d at 1016.

[593] *See id.* at 1016-17.

[594] *See id.* at 1017.

[595] *See id.* at 1019.

[596] *See id.* at 1018 (quoting *Kiely Const. LLC v. City of Red Lodge*, 57 P.3d 836, ¶ 28 (Mont. 2002) (quoting *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 68 (4th Cir. 1992)) (emphasis in *Seven Up Pete Venture* omitted).

[597] *Id.* at 1017-20.

[598] *Id.* at 1019.

"the [plaintiffs] had not secured an operating permit as required by [statute and the terms of the leases]. Thus, the passage of I-137 did not take away any existing permits or halt any on-going mine operations related to the Venture's projects."[599] Because the plaintiffs lacked a property right in obtaining the permits, the court found that the enactment of I-137 did not constitute an unconstitutional taking.[600]

Similarly, in *Kinross Copper Corp. v. Oregon*, the holder of unpatented mining claims argued that the state's denial of a water discharge permit that was necessary to commence mining constituted a taking of its mining claims under the U.S. and Oregon Constitutions.[601] The court rejected this argument, explaining, "the determinative inquiry is whether *what the government has prohibited* is itself a property right."[602] The court noted that the permit denial did not prohibit the plaintiff from mining.[603] It concluded that the only property that plaintiff held was its unpatented mining claims, and this property did not include water rights. Because the permit denial did not deprive plaintiff of its property interest in its unpatented mining claims, no taking had occurred.[604]

As discussed above, Glamis's unpatented mining claims confer a possessory interest that is subject to wide-ranging federal, state, and local regulations, including state regulations that may require a higher standard of protection for public lands than federal law, and include no right of approval for a specific proposed mining project or

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[599] *Id.* at 1019.

[600] When amending the 3809 Regulations, the DOI acknowledged Montana's ban on cyanide leach mining and noted that "no conflict exists if the State regulation requires a higher level of environmental protection." Mining Claims Under the General Mining Laws; Surface Management, 65 Fed. Reg. 69,998, 70,008 (Nov. 21, 2000) (codified at 43 C.F.R. § 3809.3 (2001)).

[601] *Kinross Copper Corp. v. Oregon,* 160 Or. App. 513, 516 (1999).

[602] *Id.* at 519 (emphasis in original).

[603] *Id.* at 520.

[604] *Id.* at 524-526.

reclamation plan. Moreover, as discussed below, background principles of the U.S. and California Constitutions and California property law serve to further restrict the bundle of property rights Glamis holds in its unpatented mining claims. Given the broad, pre-existing limitations on Glamis's property rights, the specific, later-in-time implementation of those limitations by the challenged California measures cannot be deemed expropriatory.

### 2. Laws And Regulations That Merely Specify Pre-Existing Limitations On Property Rights Are Not Expropriatory

In reviewing regulatory action in takings claims, the U.S. Supreme Court has traditionally resorted to "existing rules or understandings that stem from an independent source such as state law," when determining if a claimant holds an interest that qualifies for protection under the Fifth and Fourteenth Amendments as "property."[605] As such, "[i]f the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with," the government need not compensate a property owner, no matter what the economic impact of the challenged regulations.[606] In such a case, the challenged law or decree "inheres in the title itself, in the restrictions that the background principles of the State's law of property and nuisance already place upon land ownership."[607]

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[605] *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

[606] *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (noting the Court's traditional resort to pre-existing rules or understandings of state property law when defining the range of interests protected by the Constitution); *see also id.* at 1030 (characterizing as "unexceptional" its "recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those 'existing rules or understandings.'"); *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538 (2005) (citing *Lucas* for proposition that the government must pay compensation for "'total regulatory takings,' except to the extent that 'background principles of nuisance and property law' independently restrict the owner's intended use of the property").

[607] *Lucas*, 505 U.S. at 1029; *see also Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (Rehnquist, J., dissenting on other grounds) (recognizing that "short-term delays attendant to

Decisions of both domestic courts and international tribunals illustrate that the specific application of broad, pre-existing limitations on property rights is not expropriatory. In the recent case of *American Pelagic Fishing Co. v. United States*, for instance, the Court of Appeals for the Federal Circuit denied the claimant's takings claim on grounds that a pre-existing federal statute circumscribed the nature of the property right in question.[608] There, the claimant had invested nearly $40 million in a commercial fishing vessel and obtained special permits to fish for mackerel in the U.S. Exclusive Economic Zone ("EEZ") after a federally commissioned study concluded that larger vessels were needed to "improve the competitive position of the U.S. Atlantic mackerel industry with respect to European competitors."[609] After the claimant had made its investment, and in response to concerns regarding the size of the claimant's vessel and its potential environmental effect on the Atlantic mackerel and herring populations, Congress "effectively cancelled American Pelagic's existing permits and authorization letter, and at the same time prevented any further permits from being issued" to the vessel.[610] Congress, through a later appropriations bill, eventually made this permit revocation permanent.[611] It was undisputed that these measures prohibited "all profitable

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zoning and permit regimes are a long-standing feature of state property law and part of a landowner's reasonable investment-backed expectations").

[608] *American Pelagic Fishing Co. v. United States,* 379 F.3d 1363 (Fed. Cir. 2004), *cert. denied*, 125 S.Ct. 2963 (2005).

[609] *Id.* at 1367-68.

[610] *Id.* at 1368-69.

[611] *Id.*

uses of the vessel."[612] Furthermore, the court below conclusively found that "[n]o other vessels were affected by the legislative revocation."[613]

The court dismissed American Pelagic's takings claim. In so doing, it relied on the fact that American Pelagic had made its investment against the backdrop of the 1976 Magnuson-Stevens Fishery Conservation and Management Act.[614] That Act abrogated any common law right to fish in the EEZ.[615] As such, the court found that the Act was a "background principle" of federal law that established the federal government's right to permit or restrict fishing in that zone and enabled the federal government subsequently to alter the bundle of rights American Pelagic could claim to hold pursuant to that statute, without causing an expropriation.[616] Consequently, despite the fact that (i) American Pelagic had made its investment in reliance on a federally funded study which recommended additional fishing in the EEZ and had obtained the requisite fishing permits; (ii) the Congressional measures challenged in the case were enacted after American Pelagic acquired title to its vessel; and (iii) the Congressional measures were directed exclusively at American Pelagic, the court held that the property right that American Pelagic had in its vessel did not include the right to fish in the EEZ and, therefore, denied the takings claim.

Similarly, in *Hunziker v. Iowa*, the Supreme Court of Iowa rejected an action by a group of land developers challenging a denial of a building permit on the basis of a

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[612] *American Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36, 50 (2001).

[613] *Id.* at 42.

[614] *American Pelagic*, 379 F.3d at 1367, n.1 (citing the Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801-1883 (2000)).

[615] *Id.* at 1380.

[616] *Id.* at 1382-83.

previously enacted statute.[617] In that case, the developers sold a plot of land for residential development, which, one year later, the Iowa state archaeologist discovered to contain a Native American burial mound. Pursuant to an Iowa state statute enacted more than a decade prior to the time the developers acquired title to the land, the Iowa state archaeologist prohibited the mound's disinterment and the city refused to issue a building permit to allow residential construction on the lot, which ultimately forced the developers to refund the proceeds from the sale of land and retake possession of the property.[618] The Supreme Court of Iowa found an Iowa statute prohibiting the disinterment of Native American graves to be a "background principle" of Iowa state property law that rendered the municipality's action non-compensable.[619]

Relying on U.S. Supreme Court precedent, the Iowa Supreme Court held that the actions of the Iowa state archaeologist and the subsequent municipal building permit denial did not exact a taking, because the "bundle of rights" the developers acquired with their fee simple title to the land never included the right to "disinter the human remains and build in the area where the remains were located."[620] Accordingly, because Iowa's statutory scheme to protect Native American burial remains was "in existence at least a decade before plaintiff acquired title," from the moment the developers acquired the plot in question the State of Iowa could have prevented the disinterment of these remains.

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[617] *Hunziker v. Iowa*, 519 N.W.2d 367 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995).

[618] *See id.* at 368-69.

[619] *See id.* at 371.

[620] *Id.* The Iowa Supreme Court described Section 305A.9 as part of a complete statutory scheme by the Iowa legislature to prevent the disinterment of ancient Native American remains. The two other provisions of this scheme which it set forth in some detail were Section 305A.7, which provides in relevant part that the Iowa state archaeologist has primary responsibility for "investigating, preserving and reinterring" ancient human remains, and Section 716.5(2) which imposes criminal penalties on persons that intentionally disinter human remains of "state and national significance from an historical or scientific standpoint" without the permission of the state archaeologist. *See Hunziker*, 519 N.W.2d at 370 (quoting Iowa Acts ch. 1158 § 7 (1976) and ch. 1029 § 50 (1978)).

The Court thus found that the plaintiff never had a right to engage in activity that disturbed Native American burial remains, and dismissed the takings claim.[621]

These principles apply equally to mining rights. For example, in *M & J Coal Co. v. United States*,[622] the U.S. Court of Appeals for the Federal Circuit found that the claimant's property rights were limited by pre-existing environmental and health and safety standards, specifically under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), as enforced by the Department of the Interior's Office of Surface Mining ("OSM"). Just as the California SMARA requires the California SMGB to adopt regulations addressing environmental and health and safety concerns arising from mining activity, the federal SMCRA authorizes the OSM "to prohibit mining operations that endanger public health and safety or harm the environment."[623]

In *M & J Coal*, the OSM issued a cessation order requiring M & J to alter the subsidence mining technique it was using, so as to restore the strength of the subsided land above the mine and protect the public from surface cracks on adjacent properties.[624] M & J argued that the order constituted a taking requiring the payment of just compensation under the Fifth Amendment. The Federal Circuit rejected the claim, notwithstanding the fact that the original mining rights were acquired through various mineral severance deeds which included the express right to mine without liability for damage done to the overlying surface of the mine, reasoning:

> [A]t the time M & J acquired its mining rights, whatever they were, it knew or should have known that it could not mine in such

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[621] *Id.* at 371.

[622] *M & J Coal Co. v. United States,* 47 F.3d 1148 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 808.

[623] *Id.* at 1150.

[624] *Id.* at 1151-52.

> a way as to endanger public health and safety and that any state authorization it may have received was subordinate to the national standards that were established by SMCRA and enforced by OSM.[625]

Because the "bundle of property rights" M & J acquired with its mining rights never included a cognizable property right to mine in the manner it proposed, the Federal Circuit held that the OSM's requirement that it modify its plan of operations to protect surface structures did not effect a taking.[626]

Similarly, as noted above, the Court of Appeals of Oregon in *Kinross Copper* determined that the Oregon Department of Environmental Quality's failure to grant Kinross Copper's National Pollutant Discharge Elimination System (NPDES) permit did not effect a taking, because Kinross Copper's unpatented mining claims did not confer upon it "the 'right' to discharge mining wastes into the waters of the state."[627] The court found that the pre-existing principles of federal mining law did not confer upon Kinross Copper any right to have its permit approved, because its property rights "came into existence in 1976, nearly 100 years after the enactment of the Desert Lands Act of 1877, which severed water rights from the grant of an unpatented mining claim."[628] Similarly, because the Oregon legislature had long regulated the nature of water rights within the state, establishing a comprehensive permitting system for appropriating water and expressly providing that no person could discharge waste without obtaining a NPDES permit, the Court of Appeals reasoned that Oregon law did not confer upon Kinross

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[625] *Id.* at 1154.

[626] *Id.* (quoting *Lucas*, 505 U.S. at 1027).

[627] *Kinross Copper v. Oregon*, 160 Or. App. 513, 525 (1999).

[628] *Id.* at 524.

Copper any such right to a water discharge permit.[629] Thus, the Court of Appeals concluded that Kinross Copper's takings claim was "predicated on the loss of a right that it never possessed" under pre-existing federal and state law and dismissed its takings claim.[630]

International tribunals also recognize that the scope of property rights is informed by the legislative and regulatory framework existing at the time such rights are acquired. For example, in the *Tradex* case, described above, the tribunal found that a pre-existing Albanian land law limited the property rights at issue in that case.[631] The tribunal found that certain references to an Albanian land law in the joint-venture agreement established that "the parties to the Agreement, including Tradex, accepted future application of the Land Law and that the investment was subject to future applications of the Land Law, in other words: subject to future privatizations."[632] Such a limitation on Tradex's investment "from the very beginning" would allow Albania to argue that "the actual application of the Land Law at a later stage did not infringe the investment and thus did not constitute an expropriation."[633]

The same principle was applied by the tribunal in *Marvin Roy Feldman Karpa v. United Mexican States* when denying claimant's expropriation claim.[634] The *Feldman* tribunal observed that the claimant had been "stymied by a longstanding requirement"

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[629] *Id.* at 523-24.

[630] *Id.* at 525-26.

[631] *See Tradex Hellas S.A. v. Republic of Albania*, Case No. ARB/94/2, Award ¶ 54 (Apr. 29, 1999).

[632] *Id.* ¶ 130.

[633] *Id.* Because the tribunal ultimately found that Tradex had not demonstrated that any rights had been expropriated, it did not need to reach the issue of whether such rights, in light of the references to the Land Law in the joint venture agreement, were subject to possible privatization measures "from the very beginning of the investment." *Id.* ¶ 131.

[634] *Marvin Roy Feldman Karpa v. United Mexican States*, Case No. ARB(AF)/99/1, Award (Dec. 16, 2002).

under the applicable excise tax law, which required, for tax rebate purposes, the presentation of certain invoices.[635] Because claimant had not been in a position to obtain such invoices "at any relevant time," the tribunal found that the claimant never possessed a "'right'" to obtain tax rebates upon export of cigarettes.[636] Accordingly, the tribunal found, "this is not a situation in which the Claimant can reasonably argue that post investment changes in the law destroyed the Claimant's investment, since the [excise tax] law at all relevant times contained the invoice requirements."[637] Any later-in-time denial of tax rebates based on claimant's failure to meet the pre-existing invoice requirements therefore was not expropriatory.

Likewise, the tribunal in *International Thunderbird Gaming Corporation v. United Mexican States* specifically denied an expropriation claim under NAFTA Article 1110 on the ground that "compensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited."[638] The tribunal in that case found the claimant never had a right to operate gaming machines in Mexico because the operation of such machines was prohibited by Mexican law.[639] Given this pre-existing legal limitation, the *Thunderbird* tribunal held that Mexico could not have expropriated a property interest the claimant never held.

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[635] *Id.* ¶ 118.

[636] *Id.*

[637] *Feldman* Award ¶ 119.

[638] *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 208 (January 26, 2006).

[639] *Id*. ¶ 124.

Thus, the *Tradex*, *Feldman* and *Thunderbird* tribunals recognized the same proposition as was applied in the domestic U.S. cases discussed above: where property rights are, from their inception, subject to a broad restriction, the claimant's property right does not include the right to engage in the activity proscribed by (or the right to be relieved from the requirements imposed by) the subsequent application of that restriction. The subsequent application of that pre-existing limitation on property rights, therefore, is not expropriatory. Glamis's unpatented mining claims are subject to such pre-existing limitations, which were merely implemented by the challenged California measures. Accordingly, those measures interfered with no property right held by Glamis.

As discussed above, the unpatented mining claims that comprise the Imperial Project were located after 1980.[640] Long pre-dating those claims were principles of religious accommodation enshrined in the First Amendment of the United States Constitution[641] and Article I of the California Constitution,[642] as well as the California Legislature's enactment of the Sacred Sites Act in 1976 (prohibiting irreparable damage to Native American sites on public land absent a showing of necessity)[643] and SMARA in

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[640] *See supra* note 140.

[641] The First Amendment of the United States Constitution provides that the United States Congress "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The Fourteenth Amendment prohibits the state legislatures from making or enforcing any law "which shall abridge the privileges and immunities of the citizens of the United States." U.S. CONST. amend. XIV.

[642] Article I of the California Constitution guarantees the free exercise and enjoyment of religion without discrimination or preference to all California citizens and directs that the California legislature make no law respecting an establishment of religion. *See* CAL. CONST. of 1849, art. I, § 4. While the California courts are generally charged with interpreting the provisions of the California Constitution, because there are relatively few cases interpreting its prohibition against the establishment of religion, the California Supreme Court generally looks to federal cases to interpret this provision. *See, e.g., Bennett v. Livermore Unified Sch. Dis.*, 238 Cal. Rptr. 819, 821 (Cal. Ct. App. 1987).

[643] CAL. PUB. RES. CODE § 5097.9 (1976).

1975 (requiring mined lands to be reclaimed to a "usable condition which is readily adaptable for alternate land uses and create no danger to public health and safety").[644]

Glamis's unpatented mining claims, therefore, never included the right to limit California's authority to accommodate Native American religious practices, or to mine in a manner that that irreparably damage[d] Native American cultural and religious sites (in violation of the Sacred Sites Act) or to fail to reclaim mined lands to a usable condition (in violation of SMARA). Senate Bill 22 merely implements, in the specific context of surface mining operations, pre-existing principles of religious accommodation under the U.S. and California Constitutions and pre-existing protections for Native American cultural and religious sites under the Sacred Sites Act, and thus did not expropriate any property right that Glamis ever held. Similarly, the amendments to the SMGB regulations, which merely implement, in the specific context of open-pit metallic mining operations, the pre-existing reclamation standard under SMARA, interfered with no property right held by Glamis.

Accordingly, and as confirmed in the attached expert report of Professor Joseph L. Sax, a renowned expert in U.S. Constitutional takings law, Glamis's unpatented mining claims include no right to limit the authority of the state, pursuant to background principles of constitutional law, to accommodate Native American religious practices.[645] Nor do those claims include any right to mine in a manner that is inconsistent with pre-existing standards under the Sacred Sites Act or SMARA.[646] Accordingly, neither the

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[644] CAL PUB. RES. CODE § 2733 (2001).

[645] Sax Rpt. ¶¶ 13-19.

[646] *Id.* ¶¶ 9(b), 23-24.

reclamation requirements imposed by Senate Bill 22 nor those imposed by the amendments to the SMGB's regulations can be deemed expropriatory.

**a. SB 22 Is A Generally-Applicable Legislative Measure To Implement Pre-Existing Principles of Religious Accommodation Enshrined In The United States And California Constitutions, And Is Therefore Not Expropriatory**

The U.S. Supreme Court has long interpreted the First Amendment as permitting government accommodation of the free exercise of religion.[647] In fact, the U.S. Supreme Court has explained that the "government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."[648] The California Senate introduced Senate Bill 22 on December 2, 2002, as an "urgency statute" necessary "[t]o prevent the imminent destruction of important Native American sacred sites" by requiring that surface mines be "backfilled and graded to achieve the approximate original contours of mined lands prior to mining."[649] By amending SMARA to prevent irreparable damage to such sites, the California Legislature implemented the pre-existing principle of religious accommodation enshrined in the First Amendment of the United States Constitution and Article I of the California Constitution.

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[647] *See Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla*., 480 U.S. 136, 144-45 (1987) ("This Court has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause.")).

[648] *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987)). The line between mandatory and merely permissible government accommodation of religion lies somewhere between the Free Exercise and Establishment Clauses. *See Locke v. Davey*, 540 U.S. 712, 718 (2004) (reaffirming that "there is room for play in the joints between [the Free Exercise and Establishment Clauses]," allowing room for legislative action that is neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause); *see also generally* Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resouces on Public Lands*, 73 U. COLO. L. REV. 413, 475 (2002).

[649] California Senate, Senate Bill 22 (introduced Dec. 2, 2002) (ARC 01084-86) (Cal. 2003) (explaining that SB 22 was "an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution" and as such, it went into immediate effect).

The California Legislature's ability to accommodate Native American religious practice within the CDCA was not restricted by the existence of Glamis's unpatented mining claims. As explained by Professor Sax:

> In light of the extraordinary importance the government of the United States has attached to the accommodation of the free exercise of religion, there is no basis for concluding that it intended, in the administration of the public lands, to disable itself (or states with concurrent jurisdiction) from making such accommodations, by granting to holders of mining claims a property right that could impair government accommodation of religion.[650]

Given that Glamis's unpatented mining claims do not confer upon Glamis a right to impair Native American religious practice, SB 22, which specified longstanding constitutional principles of religious accommodation, did not, and could not have, expropriated Glamis's investment.

Senate Bill 22 prohibits the approval of reclamation plans for metallic surface mines on certain classes of lands within the CDCA, if those mines are located on, or within one mile of any "Native American sacred site," unless such reclamation plans ensure that the land is returned to its approximate original contours through backfilling and regrading.[651] The legislation defines a "Native American sacred site" as an area considered "sacred by virtue of its established historical or cultural significance to, or ceremonial use by, a Native American group, including, but not limited to, any area containing a prayer circle, shrine, petroglyph, or spirit break, or a path or area linking the circle, shrine, petroglyph, or spirit break with another circle, shrine, petroglyph, or spirit break."[652]

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[650] Sax Rpt. ¶ 14.

[651] CAL. PUB. RES. CODE § 2773.3 (2006).

[652] *Id*.

As set forth in detail above, the cultural resource inventories which Glamis and its predecessors in interest funded demonstrated that the proposed Imperial Mine site was

.[653] Moreover, as found by KEA, the ACHP and the California Research Bureau, the proposed Imperial Project

.[654] If Glamis had been allowed to mine without complying with the reclamation measures set forth in SB 22,

.[655] By requiring the complete backfilling and regrading of surface mines in close proximity to Native American sacred sites, the California Legislature sought to alleviate the burden that could be placed upon Native American religious practitioners by the mining activities authorized under the Mining Law. These reclamation requirements were rationally related to the legitimate

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[653] *See supra* Facts Sec.IV.A; *see also* Letter from Courtney Ann Coyle, Attorney for Quechan Tribe, to Douglas Romoli, BLM (Apr. 12, 1998) (AG 002450) (7 FA tab 17) (explaining how the spiritual significance of the Imperial Project is evidenced by the archaeological features identified there: "

[654] *See id.* at 122-23 (AG 002877 to 78) (9 FA tab 83) (explaining that the Quechan regard the proposed Imperial mine site as important because it contains

); *see also* Letter from Cathryn Buford Slater, Chairman, ACHP, to Bruce Babbitt, Secretary of the Interior (ACHP01376 to 79) (5 FA tab 201) (finding that the proposed Imperial Mine site "figures prominently" in the Quechan belief system and "functions as a 'teaching area' where Quechan practitioners are instructed in their religious and cultural traditions"); Memorandum from Kimberly Johnston-Dodds, Policy Analyst, to Senator John L. Burton (Apr. 22, 2002) (ARC 00464 to 71) (7 FA tab 35) (explaining that the Quechan opposed the Imperial Project because (1) it would "jeopardize their present and future ability to travel along" the trails it intersects; (2) the area was a "strong" or final resting place for their fellow tribe members; and (3) the site "represents a critical learning and teaching center for future generations").

[655] *See Where Trails Cross* at 123 (AG 002878) (9 FA tab 83).

governmental purpose of minimizing the impact of surface mining on Native American religious practice.[656]

By enacting SB 22, the California Legislature sought to accommodate Native Americans' free exercise of religion.[657] The Quechan had indicated that reducing the height of the overburden waste rock piles could mitigate the proposed mine's visual intrusion into their sacred landscape.[658] In addition, in the absence of the reclamation requirements contained in SB 22, the Quechan's ability to traverse the Trail of Dreams, both physically and spiritually, would have been encumbered.[659] Finally, the complete backfilling requirements would permit the area to continue to serve as a key "teaching area" for Quechan religious leaders.[660]

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[656] *See Amos*, 483 U.S. at 339 (disposing of claimant's argument that Section 702 of the Civil Rights Act of 1964, 78 Stat. 255, as amended in 42 U.S.C. § 2000e-1, which "exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion," violated the Equal Protection Clause of the Fourteenth Amendment by holding: "that as applied to the nonprofit activities of religious employers, § 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions").

[657] California Senate, Senate Bill 22 (introduced Dec. 2, 2002); CAL. PUB. RES. CODE § 2773.3 (2006).

[658] *See* Letter from Pauline Owl, Chairperson, Quechan Cultural Committee, to Pat Weller, BLM (Feb. 10, 1997) (7 FA tab 10) (stating that any site development greater than forty feet would alter the site's "purpose and destroy its future use forever"). While Glamis had agreed to reduce the height of those waste piles from 400 to 300 feet, this would not have permitted the Quechan to view Indian Pass from the Running Man site. *See Where Trails Cross* at 310 (9 FA tab 83); Memorandum regarding Nov. 6, 1997 meeting between the Quechan Tribe, the California State Historic Preservation Office and BLM (Dec. 16, 1997) (3 FA tab 95) (describing ' ' thought to be affected by the proposed Imperial Project as

[659] *See Where Trails Cross* at 309 (9 FA tab 83); Letter from Pauline Owl, Chairperson, Quechan Cultural Committee, to James H. Cleland, KEA Environmental, Inc. (7 FA tab 18) ("Our principle concern at the present time is by fragmenting these trails and trails of dream would significantly jeopardize present and future ability to travel along the trails.").

[660] *See Where Trails Cross* at 123 (9 FA tab 83); Baksh 1997 at 28 (9 FA tab 82).

The California Assembly passed SB 22 to alleviate the burden on Native American religious exercise that would otherwise be present absent its provisions.[661] Furthermore, the costs that SB 22 imposes on mining companies are not disproportionate to the burden on religious practice that Native American Tribes would suffer if damage to their sacred sites were not mitigated.[662] While mining on the proposed Imperial Project site will irreparably damage archaeological evidence of past Quechan spiritual and religious use, no lesser remedy than backfilling would enable the Quechan to use the area in the future as a center for spiritual practice and the transmission of their cultural traditions. SB 22 is a measured accommodation that balances the right to mine on federal land against Native Americans' interest in using the same land for cultural and religious purposes.[663] Finally, while the California Legislature was specifically concerned with the preservation of Native American sacred sites when passing SB 22, this legislation does not extend to Native Americans any greater protection than that already extended to the sacred places of other religious and ethnic groups.[664]

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[661] *See Cutter*, 544 U.S. at 720 (citing *Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 544 U.S. at 704 (1994) (explaining that the government need not "be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice") and *Amos*, 483 U.S. at 349 (O'Connor, J., concurring in judgment) (removal of government-imposed burdens on religious exercise is more likely to be perceived "as an accommodation of the exercise of religion rather than as a Government endorsement of religion")).

[662] *Cf. Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985). In *Caldor*, the Supreme Court struck down a Connecticut law, which "decreed that those who observe a Sabbath any day of the week as a matter of religious conviction must be relieved of the duty to work on that day, *no matter what burden or inconvenience this imposes* on the employer or fellow workers." *Id*. at 708 (emphasis added). In contrast, the reclamation requirements under SB 22 imposed no legally cognizable burden on Glamis: the broad array of pre-existing cultural, religious, environmental, and health and safety limitations imposed on mining activities under California law were in full view when Glamis staked its unpatented mining claims.

[663] *See Cutter*, 544 U.S. at 722-23 (describing the Religious Land Use and Institutionalized Persons Act, which Congress passed in [1997], as appropriately balancing the interest in religious accommodation against an institution's desire to maintain order and safety).

[664] The California Legislature, for example, has made the knowing commission of an act of vandalism to "a church, synagogue, mosque, temple, building owned and occupied by a religious educational institution, or other place primarily used as a place of worship where religious services are regularly conducted" a crime

Glamis mischaracterizes the U.S. Supreme Court's holding in *Lyng v. Northwest Indian Cemetery Protective Association*[665] as foreclosing state action to protect the Quechan's sacred sites from irreparable harm.[666] To the contrary, in *Lyng*, the Supreme Court held only that the Free Exercise Clause did not prohibit the United States "from permitting timber harvesting in, or constructing a road through," a Native American sacred site in a National Forest.[667] In so doing, it stressed that nothing in that holding should discourage the government from "accommodating religious practices like those engaged in by the Indian respondents" even if the Free Exercise Clause did not *compel* it to do so.[668] Indeed, as recently and unanimously reaffirmed by the Supreme Court, government is allowed "to accommodate religion beyond free exercise requirements."[669] And as confirmed by Professor Sax, such authority is in no way restricted by the property rights at issue here, *i.e*. unpatented mining claims granted pursuant to the federal mining law:

> There is nothing whatever in the mining law under which Glamis holds its claim to suggest that Congress intended to limit governmental authority to accommodate free exercise claims, or to grant to holders of mining claims any right to veto or block such accommodations.[670]

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punishable by imprisonment in a state prison or county jail. *See* CAL. PEN. CODE § 594.3(a) (2005); *see also Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 976 (9th Cir. 2004) ("Native American sacred sites of historical value are entitled to the same protection as the many Judeo-Christian religious sites that are protected on the NRHP, [the National Register of Historic Places] including the National Cathedral in Washington, D.C.; the Touro Synagogue, America's oldest standing synagogue, dedicated in 1763; and numerous churches that played a pivotal role in the Civil Rights Movement, including the Sixteenth Street Baptist Church in Birmingham, Alabama.").

[665] *Lyng v. Northwest Indian Cemetery Protective Association,* 485 U.S. 439 (1988).

[666] Mem. ¶¶ 259-60. *See* Sax Rpt. ¶ 16.

[667] *Lyng*, 485 U.S. at 441, 458.

[668] *Id.* at 454 (citing *Sherbert v. Verner*, 374 U.S. 398, 422-23 (1963) (Harlan, J., dissenting)).

[669] *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

[670] Sax Rpt. ¶ 14.

Various state and federal agencies have taken measures more restrictive than those contained in SB 22 to accommodate Native American religious practices, even though they could not have been compelled to do so under the Free Exercise Clause of the First Amendment. The U.S. Forest Service (USFS), for instance, exercised its discretion under the National Forest Management Act[671] to foreclose offering particular lands for oil and gas leasing, in part because of concern that Native Americans used the land for religious practice.[672] Similarly, the USFS entered into a long-term Historic Preservation Plan ("HPP") for the Medicine Wheel National Historic Landmark and nearby Medicine Mountain, an area deemed sacred by numerous Native American tribes.[673] The purpose of that plan was "to establish a process for integrating the preservation and traditional uses of historic properties within the multiple use mission of the Forest Service." Pursuant to its provisions, the USFS cancelled a planned timber sale because of concerns about the failure to adequately consult with parties to the HPP.[674] Likewise, the Arizona Department of Transportation refused to reissue a commercial source number to a company whose mine adversely affected a Native American sacred site that was eligible for listing on the National Register, and thus deprived the corporation of the ability to sell its aggregate materials for state highway construction projects.[675]

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[671] 16 U.S.C. §§ 1600, 1611-14 (1994).

[672] *See Indep. Petroleum Assoc. of Amer. v. U.S. Forest Service*, 12 Fed. Appx. 498, 500 (9th Cir. 2001), *cert. denied*, 534 U.S. 1018.

[673] *See Wyo. Sawmills, Inc. v. U.S. Forest Service*, 179 F.Supp.2d 1279, 1287 (D. Wyo. 2001).

[674] *Id.* at 1288.

[675] *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 972-73 (9th Cir. 2004), *cert. denied*, 544 U.S. 974 (2005).

The "logically antecedent inquiry into" the nature of Glamis's mining claims demonstrates that those claims were always subject to the government's authority to accommodate religious practice on federal land.[676] The California Legislature exercised that authority when passing SB 22. This reasonable accommodation did not violate the Establishment Clause, because the California Legislature acted to protect the unique interests of Native American communities whose cultural sites were valuable not just to the tribes,[677] but to the citizens of California as a whole.[678] Because Glamis located its mining claims subject to the government's right to accommodate the free exercise of religion on federal land, SB 22, which does no more than implement this pre-existing limitation on Glamis's property right, took nothing from Glamis and, therefore, cannot be deemed expropriatory.

**b. Senate Bill 22 Specifies Pre-Existing Statutory Obligations to Protect Native American Sacred Sites and Thus Is Not Expropriatory**

As discussed above, Glamis's property rights in its mining claims did not include the right to mine in a manner that irreparably damaged Native American sacred sites. By enacting SB 22, the California Legislature merely implemented principles of California property law that inhered in the title Glamis acquired in its mining claims. As such, SB 22 cannot be considered expropriatory.

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[676] *Lucas*, 505 U.S. at 1027.

[677] *Surface Mining and Reclamation: Third Reading of SB 22 before the S. Natural Res. & Wildlife Comm. and the S. Appropriations Comm.*, S., 2003-04 Sess. (2003) (ARC 01113-17) (6_FA tab 273) (describing the Quechan as the "third largest land-based tribe in California," which "currently continues to use the site for religious, cultural and educational purposes").

[678] *See Cholla*, 382 F.3d at 976 ("Because of the unique status of Native American societies in North American history, protecting Native American shrines and other culturally-important sites has historical value for the nation as a whole . . . .").

Years before Glamis or its predecessors in interest located the mining claims in the Imperial Project, California enacted the Sacred Sites Act, which created and empowered the California Native American Heritage Commission to prohibit public agencies and private parties from causing severe or irreparable damage to Native American sacred sites on public property.[679] In relevant part, the Sacred Sites Act provides:

> No public agency, and no private party using or occupying public property, or operating on public property, under a public license, permit, grant, lease, or contract made on or after July 1, 1977, shall in any manner whatsoever . . . cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require.[680]

The Sacred Sites Act grants the Native American Heritage Commission the power to conduct investigations and hold public hearings whenever it learns that a proposed action by a public agency could cause "severe or irreparable" damage to a Native American sacred site.[681] In such instances, the statute empowers the Native American Heritage Commission "to recommend mitigation measures for consideration by the public agency proposing to take such action" and, if the public agency fails to accept such measures, the statute authorizes the Commission to ask the California Attorney General to initiate legal proceedings to enjoin the damage.[682] In any such proceeding, the Act provides that a court "shall issue an injunction" if it finds "that severe and irreparable

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[679] *See* CAL. PUB. RES. CODE § 5097.9 (1976).

[680] *Id*.

[681] CAL. PUB. RES. CODE § 5097.97 (1976).

[682] *Id.*; *see also* CAL. GOV. CODE §§ 12600-612 (1971) (enabling the California Attorney General to intervene in any judicial or administrative proceeding concerning adverse effects on the environment, as well as to maintain an action for equitable relief against any person for the protection of natural resources including historic sites within the state).

damage will occur or that appropriate access will be denied, and appropriate mitigation measures are not available" unless it finds on clear and convincing evidence that "public interest and necessity" require otherwise.[683]

Like the Iowa statute at issue in *Hunziker*, California's Sacred Sites Act limited the bundle of rights Glamis took when it located its unpatented mining claims.[684] California's Sacred Sites Act is one part of California's comprehensive statutory scheme to protect Native American cultural resources.[685] The scope of the Sacred Sites Act is broad; it prohibits irreparable damage to Native American sacred sites on public land absent a showing of necessity, and it empowers the Native American Heritage Commission to initiate injunction proceedings against public authorities that do not act to prevent or mitigate damage to Native American sacred sites. Had Imperial County approved a reclamation plan that caused severe and irreparable damage to sacred sites in

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[683] CAL. PUB. RES. CODE § 5097.94(g). The Act provides that in any such proceeding, the Native American Heritage Commission "shall introduce evidence showing that such cemetery, place, site, or shrine has been historically regarded as a sacred or sanctified place by Native American people and represents a place of unique historical or cultural significance to an Indian tribe or community." *Id.*

[684] Notably, the concern raised in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), does not apply here. In *Palazzolo*, the Supreme Court held that a takings claim could not be defeated merely by demonstrating that the *current* property owner had notice of the regulatory scheme to which it was being subjected before it acquired the property. *Id*. at 631. In support of its ruling, the Court highlighted that notice to a subsequent purchaser alone does not take into account the potential prejudice suffered by private owners who held a property interest at the time the regulatory scheme was adopted. *Id*. at 627. Here, however, the Imperial Project mining claims were located after enactment of the Sacred Sites Act and SMARA, and thus, no prior owners were prejudiced by the property right limitations inherent in these statutes.

[685] The California Legislature amended the Sacred Sites Act in 1982 to extend the powers and duties of the Commission to private lands, as well as to empower it to facilitate the respectful treatment of human remains and associated grave goods by private land owners. *See People v. Van Horn*, 267 Cal. Rptr. 804, 811 (Cal. Ct. App. 1990). California further amended the statute in 1991 to make it the policy of the state that Native American remains and associated grave artifacts are repatriated. CAL. PUB. RES. CODE § 5079.99 (1991); *see also* CAL. PUB. RES. CODE § 5097.95 (1976) (requiring state and local agencies to cooperate with the Commission when preparing environmental impact reports relating to property containing sacred sites); CAL. PUB. RES. CODE § 5097.993-994 (2002) (imposing criminal penalties on anyone who unlawfully and maliciously "excavates upon, removes, destroys, injures or defaces a Native American historic, cultural, or sacred site"); CAL. PUB. RES. CODE § 21084.1 (1992) (providing that a project which may cause a significant adverse change on a historical resource is a project that may have a significant effect on the environment and exempting from disclosure public records regarding Native American sacred sites maintained by the Native American Heritage Commission).

the Imperial Project area,[686] the Native American Heritage Commission could have sought an injunction pursuant to the Act's provisions.

The Quechan have consistently maintained, and the archaeological surveys have demonstrated, that the proposed mine site would disturb the *Xam Kwatcam* trail: a complex network of trail systems encompassing the *Keruk* Trail and the Trail of Dreams.[687] The Quechan regard the area as a "strong" place because of its relationship to this trail system – they believe that this trail system was laid out for them by their creator, and it is on this trail system that they commemorated their most sacred ritual.[688] The numerous shaman's hearths, spirit breaks, quartz reduction stations and geoglyphs documented within the proposed mine site confirm that the area was used for ceremonial purposes.[689] In accordance with the Sacred Sites Act, Glamis never had the right to mine in a way that irreparably damaged such a site.

Broad legislative standards are often applied to specific cases through litigation, by statute, or by regulation. By requiring that Glamis reclaim the land to its approximate original contours, SB 22 merely specifies what could otherwise have been developed through litigation by the California Native American Heritage Commission: a mitigation plan that ensured the proposed mine area could be used by future generations of Quechan. Because SB 22 did not take away any right that Glamis ever had, that bill cannot be considered expropriatory.

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[686] *See Where Trails Cross* at 123 (AG 002878) (9 FA tab 83); *see also* Letter from Cathryn Buford Slater, Chairman, ACHP, to Bruce Babbitt, Secretary of the Interior (ACHP01376 to 79) (5 FA tab 201); Memorandum from Kimberly Johnston-Dodds, Policy Analyst, to Senator John L. Burton (Apr. 22, 2002) (ARC 00464 to 71) (7 FA tab 35).

[687] *See supra* Facts Sec. IV.A.

[688] *See Where Trails Cross*, at 284, 283 (AG 003038, 37) (9 FA tab 83).

[689] *See supra* Facts Sec. IV.A.1.

### c. The Amendments To The SMGB Regulations Specify Pre-Existing Environmental And Health and Safety Requirements Under California Law And Thus Are Not Expropriatory

As noted above, years before the unpatented mining claims that comprise the Imperial Project site were located, the California Legislature enacted SMARA, which created a comprehensive surface mining and reclamation policy in order to ensure that mined lands are "reclaimed to a usable condition which is readily adaptable for alternative land uses," that adverse environmental effects are prevented or minimized, and that "[r]esidual hazards to the public health and safety" are eliminated.[690] SMARA specifically requires the SMGB to adopt statewide policy and regulations governing the conduct of surface mining operations, and statewide standards for reclamation of surface mines, including requirements for backfilling, regrading, slope stability, and recontouring.[691] SMARA also provides that the SMGB must continuously review, and may revise, these regulations.[692] These mining standards were an outgrowth of California's long history, dating to the nineteenth century, of requiring the mining industry to abstain from practices that would cause environmental harm to state or private property or threaten public health and safety.

The amendments to the SMGB's regulations merely specified how the pre-existing reclamation standard under SMARA applied to open-pit metallic mine sites. Specifically, the SMGB found that reclaiming open-pit metallic mine lands to a usable condition as required by SMARA necessitates backfilling and recontouring of those lands. As stated by the SMGB, the amendments "clarif[y] and make specific the

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[690] CAL PUB. RES. CODE §§ 2712(a) & (c) (enacted in 1975).

[691] CAL PUB. RES. CODE §§ 2733, 2756, 2773(b)(2) (2001).

[692] *Id*. § 2759.

conditions under which the backfilling of open pit excavations for metallic surface mines must be undertaken" to meet SMARA reclamation requirements.[693] More generally, the amendments reflect a longstanding principle of California property law dating back to the 1880's: mining rights, in whatever form, are subject to environmental and health and safety limitations.

Accordingly, the bundle of property rights that attached to Glamis' unpatented mining claims – which were located years after the enactment of SMARA in 1975 – never included the right to conduct mining activities in violation of SMARA's reclamation requirements or, more generally, in a manner that failed to minimize harm to the environment or threatened public health and safety. Therefore, any limitations on such activities imposed by the amendments to the SMGB regulations are not expropriatory. As confirmed by Professor Sax, "[s]ince Glamis located no claim until well after the enactment of [SMARA] in 1975 . . . regulations . . . requiring compliance with the standards set forth in [SMARA] do not take any property right that Glamis ever had."[694]

The broad principle reflected in the SMARA statute, that mining rights are subject to environmental and public health and safety limitations, in fact traces back well over 100 years under California law. In the 1880's, California courts began issuing injunctions to stop hydraulic mining practices.[695] Hydraulic mining, common in the late nineteenth century, involved blasting the land with high-pressure water sprays. The large quantities of debris from this technique were often washed into the surrounding

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[693] Final Statement of Reasons on CAL. CODE REGS. tit. 14, § 3704.1, at 1 (6 FA tab 304).

[694] Sax Rpt. ¶ 21.

[695] *See*, *e.g.*, *People v. Gold Run Ditch & Mining Co*., 66 Cal. 138, 145, 151-52 (1884); *Woodruff v. N. Bloomfield Gravel Mining Co*., 18 F. 753, 772-75 (C.C.D. Cal. 1884).

waterways, which resulted in water contamination, blocked waterways, and severe flooding downstream.[696] For many years, mining companies operated under the assumption that their rights under the Mining Law permitted this, even if the harmed land was owned by the state or private parties.

In *Woodruff v. North Bloomfield Gravel Mining Co.*, the mining companies, opposing a motion to enjoin their hydraulic mining practices, argued that the U.S. Congress and California Legislature implicitly authorized such mining practices, through legislation "recognizing mining as a proper and lawful employment, and encouraging this industry."[697] Notwithstanding the significance of hard rock mining to the state, the court held that the California Legislature neither had enacted, nor could enact, any statute authorizing the defendants to mine in a way that violated California's common law and statutory definitions of nuisance.[698] The court concluded that Congress never authorized such destructive activity as hydraulic mining when it enacted the Mining Law. Resoundingly rejecting the miners' claims that their mining rights were "paramount to all rights and interest of a different character," the court enjoined the defendants from mining, finding that no mitigation measures existed that were sufficiently inexpensive as to be feasible.[699] Later, the Supreme Court of California considered virtually the same question, and confirmed that the practice of hydraulic mining constituted a nuisance.[700]

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[696] *See Gold Run Ditch & Mining Co*., 66 Cal. at 144-45.

[697] *Woodruff v. North Bloomfield Gravel Mining Co*., 18 F. 753, 770 (C.C.D. Cal. 1884).

[698] *Id.*

[699] *Woodruff*, 18 F. at 807, 804 (citations omitted). Two years later, the circuit court refused to lift that injunction after another mining company constructed a new dam to contain the debris, noting concerns about the effectiveness of that dam to prevent additional flooding and emphasizing its obligation to "scrutinize with jealous care" any proposed mitigation measure offered by the mining company. *Hardt v. Liberty Hill Consol. Min. & Water Co.*, 27 F. 788, 792 (C.C.D. Cal. 1886).

[700] *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1155 (Cal. 1884).

To protect further against the harms caused by hydraulic mining, in 1893 Congress created the California Debris Commission, which regulated hydraulic mining by permit.[701] The purpose of the permitting structure was to ensure that miners employing hydraulic extraction techniques did not do so at the expense of the surrounding waterways or private property. The courts recognized that although hardrock mining served an important public interest, that interest was not superior to the interests of the public with respect to other environmental issues.[702] Although the Commission issued hundreds of permits, the restrictions the permits placed on mining operations made the practice uneconomical, and the gold mining industry soon abandoned hydraulic mining.[703]

At the time, these restrictions on mining were novel and unprecedented, and, miners argued, unfairly interfered with the rights they believed they had under the Mining Law. The court decisions that followed, however, made it clear that the grant of authority under the Mining Law was subject to restrictions to protect the environment and public health and safety.

Building on that principle, the California Legislature enacted SMARA in 1975. SMARA reflects the express intent of the California Legislature to adopt "an effective

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[701] 27 Stat. 507 (codified at 33 U.S.C. § 661 (repealed 1986)).

[702] *See, e.g., County of Sutter v. Nichols*, 93 P. 872, 875 (Cal. 1908) ("The production of sufficient gold to maintain the gold standard may be a matter of public importance . . . . It cannot be admitted, however, that the mining of gold to be applied wholly to the private use of the miner, to whatever extent it may increase the general output, is a public purpose in behalf of which the power of eminent domain may be resorted to, or for which the private property of others may be taken, or its injury lawfully authorized.").

[703] *See* JOHN D. LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION 185-86 (1987).

and comprehensive surface mining and reclamation policy."[704] Pursuant to that policy, surface mining operations are to be regulated to assure that:

> (a) Adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition, which is readily adaptable for alternative land uses.
>
> (b) The production and conservation of minerals are encouraged, while giving consideration to values relating to recreation, watershed, wildlife, range and forage, and aesthetic enjoyment.
>
> (c) Residual hazards to the public health and safety are eliminated.[705]

In enacting SMARA, the California Legislature further declared that "the reclamation of mined lands as provided in this chapter will permit the continued mining of minerals and will provide for the protection and subsequent beneficial use of the mined and reclaimed land."[706] The definition of "reclamation" under SMARA requires that "mined lands are reclaimed to a usable condition which is readily adaptable for alternate land uses and create no danger to public health and safety."[707] SMARA specifically provides that such reclamation "may require backfilling . . . or other measures."[708]

In order to implement the policy goals and legislative intent of SMARA, the California Legislature required the SMGB to "adopt regulations which establish state policy for the reclamation of mined lands in accordance with" SMARA,[709] and provided that such state policy "shall include, but shall not be limited to, measures to be employed by lead agencies in specifying . . . backfilling . . . and other reclamation

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[704] CAL PUB. RES. CODE § 2712 (2001).

[705] *Id*.

[706] *Id*. § 2711(b) (2001).

[707] *Id*. § 2733.

[708] *Id*.; *see also id*. § 2773(b)(2).

[709] *Id*. § 2755.

requirements[.]"[710] Furthermore, the SMGB's implementation of SMARA standards "shall be continuously reviewed and may be revised."[711]

Consistent with these provisions, the SMGB adopted regulations as early as 1985 that require all reclamation plans to meet the objectives of SMARA set out above.[712] Additional SMGB regulations, which took effect in 1993, established performance standards for reclamation pursuant to SMARA, including standards for backfilling.[713] The standards provide, where backfilling is required for resource conservation purposes, fill material must be backfilled "to the standards required for the resource conservation use involved."[714]

The 2002 amendments to the SMGB's regulations merely specified these broad, pre-existing requirements in the particular context of open-pit metallic mining. The amendments were prompted by a request from the California Resources Agency, which had "become increasingly concerned with the impact that large metallic mining projects, particularly those involving the cyanide heap leach extraction process, have on the environment in California."[715] As noted by the SMGB, open-pit surface mine reclamation plans that did not provide for backfilling often had been approved on grounds that open pits remaining on mined lands qualified as usable "open space."[716]

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[710] *Id*. § 2756.

[711] *Id*. § 2759.

[712] CAL. CODE REGS. tit. 14, § 3502(a) (2002) (providing that all reclamation plans "shall be developed to attain the objectives of Public Resources Code Section 2712(a) – (c)").

[713] CAL. CODE REGS. tit. 14, § 3704 (2000).

[714] *Id*.

[715] Letter from Mary D. Nichols, Secretary for Resources, to Allen M. Jones, Chairman, State Mining and Geology Board (Oct. 17, 2002) (7 FA tab 38).

[716] Final Statement of Reasons on CAL. CODE REGS. tit. 14, § 3704.1, at 3 (6 FA tab 304); CAL PUB. RES. CODE §§ 2711(b), 2712(a), 2733 (2001).

The SMGB also considered additional examples of commonly identified "alternate end uses" under the then-existing regulations, including use of open pits as landfills and recreational lakes. The SMGB found, however, that there was no factual support in the record "of post-SMARA open pit metallic mine excavations being backfilled by landfill operations [or] of these pits successfully being converted to recreational lakes."[717] The SMGB observed that "where open pit excavations remain on the landscape, it often is difficult to envision how the remaining open pit is readily adaptable for a beneficial alternate use, or how the 'open space' itself is usable."[718] The SMGB later illustrated the point in greater detail:

> SMARA requires that surface mined lands be reclaimed to a useful and beneficial purpose upon the completion of mining activities. Leaving large, open pits in the surface surrounded by millions of cubic yards of waste rock does not leave the site in a useful condition, and clearly leaves the site in a less useful and beneficial condition than it was in before it was mined . . . it is the intent of SMARA that completed mine sites present no additional dangers to the public health and safety . . . and that the mined lands are returned to an alternate, useful condition. To date, no large, open pit metallic mines in California have been returned to the conditions contemplated in SMARA, and these sites remain demonstrably dangerous to both human and animal health and safety.[719]

Accordingly, the purpose of the amendments was "to ensure that these large [open pit metallic mine] excavations are backfilled so as to avoid adverse environmental impacts on the land" and to enable the site to be converted to an alternate use following

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[717] Final Statement of Reasons at 9 (6 FA tab 304); Addendum to the Final Statement of Reasons on CAL. CODE REGS. tit. 14, § 3704.1, at 2 (10 FA tab 95); *see also* State Mining and Geology Board, Executive Officer's Report (Apr. 10, 2003), Agenda Item 3 at 6 (6 FA tab 287).

[718] Final Statement of Reasons on CAL. CODE REGS. tit. 14, § 3704.1, at 3 (6 FA tab 304).

[719] Addendum to the Final Statement of Reasons on CAL. CODE REGS. tit. 14, § 3704.1, at 1-2 (10 FA tab 95).

such backfilling, as required by SMARA.[720] The amendments also implement the SMARA reclamation requirement that mined lands "create no danger to public health or safety"[721] by ensuring that large, open pits do not continue to accumulate on metallic mine sites. Such open pits can become an attractive nuisance for outdoor enthusiasts (such as hikers and rock climbers) and off-road vehicles.[722]

For backfilling, the amendments require that any "open pit excavation created by surface mining activities for the production of metallic minerals" be backfilled "to achieve not less than the original surface elevation," unless there is an insufficient volume of waste materials on the mined lands to completely backfill the excavation to the surface.[723] This requirement "is to prevent open pits from being left as environmental hazards on the landscape."[724]

For recontouring, the amendments require, for excavated materials remaining on the mine site that were not used in the backfilling process, that such materials be "graded

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[720] State Mining and Geology Board, Executive Officer's Report (Apr. 10, 2003), Agenda Item 3, at 6 (6 FA tab 287).

[721] CAL PUB. RES. CODE § 2733 (2001).

[722] Parrish Declaration ¶ 10; Letter from Jason Marshall, Assistant Director, Department of Conservation, to John Morrison, Assistant Planning Director, Imperial County Planning/Building Department, and Douglas Romoli, BLM (Feb. 26, 1998), at 2 (7 FA tab 15) ("[a]s OMR stated in their December letter, the use of large boulders around the excavation probably will not sufficiently deter hikers or off-highway vehicle enthusiasts"); Letter from James S. Pompy, Manager, Office of Mine Reclamation, to Jesse Soriano, Imperial County Planning/Building Department (Feb. 21, 1997), at 2 (same); Letter from Jason Marshall, Assistant Director, Department of Conservation, to Jesse Soriano, Imperial County Planning/Building Department, and Keith Shone, BLM (Dec. 16, 1996), at 2 (7 FA tab 8) (same); *see also* MARGARET M. LYNOIS, DAVID L. WELDE & ELIZABETH VON TILL WARREN, IMPACTS: DAMAGE TO CULTURAL RESOURCES IN THE CALIFORNIA DESERT 14 (1980) (noting the "increased recreational use of the California Desert during the past 10 years," with campers and off-road vehicles bringing "large numbers of recreationists into the desert").

[723] CAL. CODE REGS. tit. 14, § 3704.1(a), (h) (2003). When initially adopted as emergency regulations, the corresponding language for Section 3704.1(a) stated that "[a]n open pit excavation created by surface mining activities for the production of metallic minerals shall be backfilled to the original surface elevation." *See* State Mining and Geology Board, Executive Officer's Report (Dec. 12, 2002), Agenda Item 2 at 7 (6 FA tab 267).

[724] State Mining and Geology Board, Executive Officer's Report (Apr. 10, 2003), Agenda Item 3, Description of Regulatory Language for subsection (a), at 4 (6 FA tab 287).

and contoured to create a final surface that is consistent with the original topography of the area."[725] As stated by the SMGB, "[t]he purpose of this subsection [is] to prevent large, unnatural mounds and piles of overburden and waste rock material from imposing on the natural landscape and creating undesirable environmental conditions."[726] Under the amendments, the recontoured surface elevations cannot exceed pre-mining elevations by more than twenty-five feet.[727]

The backfilling and recontouring requirements summarized above fall squarely within the SMGB's mandate to "adopt regulations which establish state policy for the reclamation of mined lands in accordance with" SMARA,[728] where such state policy "shall include, but shall not be limited to, measures to be employed by lead agencies in specifying . . . backfilling . . . and other reclamation requirements,"[729] and where the very definition of "reclamation" under SMARA requires that "mined lands are reclaimed to a usable condition which is readily adaptable for alternate land uses and create no danger to public health or safety,"[730] which in turn "may require backfilling . . . or other measures."[731]

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[725] CAL. CODE REGS. tit. 14, § 3704.1(c). When initially adopted as emergency regulations, corresponding language was set out in Section 3704.1(b), which stated that all waste materials "not used in the backfilling process shall be graded and contoured to achieve the approximate original contours of the mined lands prior to mining activities." *See* State Mining and Geology Board, Executive Officer's Report (Dec. 12, 2002), Agenda Item 2, at 7 (6 FA tab 267).

[726] State Mining and Geology Board, Executive Officer's Report (Apr. 10, 2003), Agenda Item 3, Description of Regulatory Language for subsection (c), at 4 (6 FA tab 287).

[727] CAL. CODE REGS. tit. 14, § 3704.1(e) (2003).

[728] CAL PUB. RES. CODE § 2755 (2001).

[729] *Id*. § 2756.

[730] *Id*. § 2733.

[731] *Id*.

Accordingly, at least since the 1880's, and through the enactment of SMARA in 1975 and the subsequent adoption of its implementing regulations, one principle of California law has been clear: mining rights are subject to environmental and public health and safety limitations. This principle defines the boundary of Glamis's property rights. The 2002 amendments to the SMGB regulations reflected this broad principle when implementing the SMARA reclamation standard as that standard applies to open-pit metallic mines.

The SMGB's specific application of broad, pre-existing reclamation requirements under SMARA mirrors, in *American Pelagic*, Congress's specific application of broad, pre-existing fishing restrictions under the Magnuson-Stevens Act. The Magnuson-Stevens Act, which pre-dated the investor's acquisition of fishing rights, abrogated any common law right to fish in the EEZ, and thus established the federal government's right to permit or restrict fishing in that zone.[732]

SMARA similarly pre-dated the location of Glamis's unpatented mining claims, and precluded any right Glamis might otherwise have had to mine without reclaiming mined lands to a usable condition. As illustrated in *American Pelagic*, where a broad, pre-existing principle limited the scope of certain property rights, the specific, later-in-time application of that principle was not, and could not be, expropriatory.[733]

Similarly, as found in *M & J Coal*, "there can be no compensable interference [with a land use] if such land use was not permitted at the time the owner took title to the property."[734] Just as the OSM found, in *M & J Coal*, that compliance with existing

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[732] *See American Pelagic*, 379 F.3d at 1382-83.

[733] *See id.*

[734] *M & J Coal*, 47 F.3d at 1153.

SMCRA standards required M & J to adopt particular reclamation measures (restoration of the subsided lands pre-subsidence capacity "to support structures and previous uses"),[735] the SMGB likewise found that compliance with existing SMARA standards required, for open-pit metallic mines, the adoption of particular reclamation measures (backfilling of open pits, recontouring of mounds of waste materials). In each case, the specific application of pre-existing statutory limitations, enacted to ensure that mining activities do not harm the environment or threaten public health and safety, cannot be considered expropriatory.

Like the company holding unpatented mining claims in *Kinross Copper*, Glamis's expropriation claim is "predicated on the loss of a right that it never possessed."[736] In *Kinross Copper*, the company's unpatented mining claims long post-dated the Desert Lands Act of 1877, which "severed water rights from the grant of an unpatented mining claim";[737] here, Glamis's unpatented mining claims long post-dated SMARA, which required mined lands to be reclaimed to a usable condition. Kinross Copper's unpatented mining claims conferred no water rights; Glamis's unpatented mining claims confer no right to mine free from SMARA's reclamation requirements. The later-in-time application of such pre-existing limitations on property rights does not "effect an uncompensated taking of property."[738]

Glamis's unpatented mining claims confer only a limited right of use and possession, which is subject to regulation and oversight of federal, state, and local authorities and includes no right of approval of a particular plan of operations. Glamis

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[735] *Id.* at 1151.

[736] *Kinross Copper Corp. v. Oregon,* 160 Or. App. 513, 525 (1999).

[737] *Id.* at 524.

[738] *Id*. at 526.

holds no right to mine in a manner that violates SMARA reclamation requirements or, more generally, that fails to minimize harm to the environment or threatens public health and safety. Thus, any restriction on such activities imposed by the amendments to the SMGB regulations, which merely specified how the pre-existing SMARA reclamation standard applies to open-pit metallic mines, cannot be deemed expropriatory.

* * *

In conclusion, because Glamis holds no property right to engage in mining activities free from the reclamation requirements imposed by the California measures, Glamis's expropriation claim as to those measures must fail. Laws and regulations that merely specify pre-existing limitations on property rights are not expropriatory. Here, Glamis's unpatented mining claims were subject to pre-existing principles of religious accommodation under the U.S. and California Constitutions, as well as cultural, environmental, and health and safety limitations under, among other sources, SMARA and the Sacred Sites Act. Accordingly, the subsequent, specific implementation of those principles by SB 22 and the SMGB's regulations was not expropriatory.

## III. Even If Glamis Did Have A Property Interest In A Particular Reclamation Plan, Glamis's Investment Was Not Indirectly Expropriated By SB 22 Or The SMGB's Amended Regulations

Even assuming *arguendo* that the Tribunal were to find that Glamis does have a property interest in having its reclamation plan approved and in mining in a manner that destroys Native American sacred sites and causes environmental harm, Glamis's expropriation claim still fails. Glamis's claim is one for indirect expropriation.[739] The

[739] Glamis's suggestion that the phrase "tantamount to expropriation" in Article 1110 broadens the article's protection beyond that encompassed by the customary international law of expropriation is meritless. *See* Mem. ¶¶ 412-13. All three NAFTA Parties concur that the phrase is a reference to indirect expropriation and does not create a new category of expropriation. *See Metalclad Corp. v. United Mexican States*, Case

determination of whether an expropriation in violation of international law occurred is made through a factual inquiry into the circumstances of a particular case, which involves considering: (1) the economic effect of the action on the claimant's property; (2) the extent to which the government action interferes with the claimant's reasonable investment-backed expectations; and (3) the character of the government action.[740]

### A. The Reclamation Requirements Do Not Deprive Glamis Of All Economic Use Of Its Investment

As illustrated above, Glamis's expropriation claim under Article 1110 fails because Glamis was not divested of any "fundamental rights of ownership."[741] Even assuming Glamis had a property right to engage in the proscribed activities, however,

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No. ARB(AF)/97/1, Submission of the United States of America ¶¶ 9-14 (Nov. 9, 1999); *S.D. Myers, Inc. v. Canada,* Submission of the United Mexican States ¶ 39 (Jan. 14, 2000); *S.D. Myers, Inc. v. Canada,* Supplementary Memorial of the Government of Canada ¶ 97 (Dec. 15, 1999). Such an agreement among all of the Parties to a treaty "shall be taken into account" by the Tribunal in interpreting the treaty's provisions. Vienna Convention on the Law of Treaties, art. 31(3)(a), May 23, 1969, 1155 UNTS 332. In addition, NAFTA tribunals have uniformly rejected the interpretation proposed by Glamis. *See S.D. Myers, Inc. v. Government of Canada,* NAFTA/UNCITRAL, First Partial Award ¶¶ 285-86 (Nov. 12, 2000), *reprinted in* 40 I.L.M. 1408 (2001) (finding that the NAFTA Parties "intended the word 'tantamount' to embrace the concept of so-called 'creeping expropriation,' rather than to expand the internationally accepted scope of the term expropriation"); *Pope & Talbot v. Government of Canada*, NAFTA/UNCITRAL, Interim Award ¶¶ 87-88 (June 26, 2000) (noting that "tantamount" means "equivalent to" and concluding that term "tantamount to expropriation" was not intended to expand Article 1110's scope beyond the customary international law of expropriation); *Marvin Roy Feldman Karpa v. United Mexican States,* Case No. ARB(AF)/99/1, 7 ICSID REP. 341, Award ¶ 100 (Dec. 16, 2002), *reprinted in* 42 I.L.M. 625 (2003) ("Article 1110 deals not only with direct takings, but indirect expropriation and measures 'tantamount to expropriation,' . . . . The Tribunal deems the scope of both expressions to be functionally equivalent.").

[740] *See* United State-Singapore Free Trade Agreement, Exchange of Letters of May 6, 2003, State Dept. No. 04-36 ¶ 4(a); 2004 U.S. Model Bilateral Investment Treaty, ann. B ¶ 4; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

[741] *Tippetts, Abett, McCarthey, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, 6 IRAN-U.S. CL. TRIB. REP. 219 (1984); *see also Phelps Dodge Corp. v. Islamic Republic of Iran,* 10 IRAN-U.S. CL. TRIB. REP. 121 (1986); *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 208 (Jan. 26, 2006) ("[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited."); *Marvin Roy Feldman Karpa v. United Mexican States,* Case No. ARB(AF)/99/1, 118 ICSID REP. 341, Award ¶ 111 (Dec. 16, 2002), *reprinted in* 42 I.L.M. 625 (2003) (rejecting expropriation claim on basis that claimant did not have "a 'right' to export cigarettes" or "to obtain tax rebates"); *Tradex Hellas S.A. v. Republic of Albania*, ICSID No. ARB/94/2, Award ¶ 144 (Apr. 29, 1999) ("[T]he Tribunal sees no indication . . . by Decision No. 364 that Torovista lost its ownership in any land or the Joint Venture lost the right and the factual possibility to use its land.").

its claim fails because the reclamation requirements merely *reduced* Glamis's anticipated profits, but did not render its mining claims valueless.

It is a fundamental principle of international law that, for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as "to support a conclusion that the property has been 'taken' from the owner."[742] "[T]he affected property must be impaired to such an extent that it must been seen as taken."[743] "The essential question," noted the tribunal in *CMS Gas Transmission Co. v. Argentina*, is "to establish whether the enjoyment of the property has been effectively neutralized."[744] Only where the State "interfere[s] with property rights to such an extent that these rights are rendered . . . *useless*" may the measures be deemed expropriatory.[745]

In *GAMI Investments, Inc. v. United Mexican States*, for example, the tribunal held that the claimant "has not proved that its investment was expropriated for the purposes of Article 1110" because it failed to address the possibility that the investment might retain some value as a result of the potential remedies open to the investment (a

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[742] *Pope & Talbot v. Government of Canada,* Interim Award (June 26, 2000) ¶ 102.

[743] *GAMI Invs., Inc. v. United Mexican States*, Final Award (Nov. 15, 2004) ¶ 126 (emphasis removed).

[744] *CMS Gas Transmission Co. v. Argentine Republic*, (Award) ¶ 262, 44 I.L.M. 1205 (May 12, 2005); *Lauder v. Czech Republic*, (Award) ¶ 200, 2001 WL 34786000, (Sept. 3, 2001).

[745] *Starrett Hous. Corp. v. Islamic Republic of Iran,* 4 Iran-U.S. Cl. Trib. Rep. 122 (1983) (emphasis added); *see also Lucas*, 505 U.S. at 1019 n.8 ("It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. . . . . Takings law is full of these 'all or nothing' situations."); Alan W.H. Gourley, What Every Government Procurement Lawyer Should Know About NAFTA (and Other Free Trade Agreements), (May 8, 2003) presentation for A.B.A. May 2003 Spring Program) A.B.A. Section on Int'l Law & Practice, *available at* http://www.crowell.com/pdf/ABASILP.pdf (last visited Sep. 15, 2006) ("[NAFTA Article 1110] address the standard concern with host country measures that destroy the value of an investment").

Mexican corporation) in the courts of Mexico.[746] Here, Glamis does not allege that it has lost ownership rights in, or control of, its mining claims. To the contrary, it retains full ownership and control over those mining claims. Rather, as in *GAMI*, Glamis "has staked its case on the proposition that the wrong done to it did in fact destroy the whole value of its investment."[747] As set forth below, however, Glamis's mining claims were not "taken" or rendered "useless" as a result of the California reclamation requirements. To the contrary, they without question retain substantial value, even if the reclamation requirements apply to them. Glamis's expropriation claim therefore fails as a matter of law.

In support of its expropriation claim, Glamis contends that the California reclamation requirements, had they been applied to the Imperial Project mining claims, would have deprived those claims of all economic value.[748] Glamis, however, utterly fails to prove this necessary element of its expropriation claim, and its assertion is flatly contradicted by its own internal documents. Glamis neglects to inform the Tribunal that it conducted an internal valuation shortly after the emergency regulations were adopted. Glamis concluded that the Imperial Project would still be quite profitable, and thus retain substantial value, despite California's reclamation requirements. Moreover, its contention in this arbitration is based on a valuation by its expert, Behre Dolbear & Company, Inc. ("Behre Dolbear"), that is so methodologically unsound and riddled with material errors, and is so fundamentally at odds with Glamis's own assumptions about the economics of mining and reclaiming the project site, that it has no probative value

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[746] *GAMI Invs., Inc. v. United Mexican States*, Final Award (Nov. 15, 2004) ¶ 133.

[747] *Id.*

[748] Mem. ¶ 482.

whatsoever. The net effect of these errors is to grossly exaggerate the adverse impact of the reclamation requirements by both artificially inflating the original value of the mining claims and artificially reducing the value of those claims after adoption of the reclamation requirements.

The United States retained a finance expert, Navigant Consulting, Inc. ("Navigant"), and a mine engineering expert, Norwest Corporation ("Norwest"), to assess Behre Dolbear's report and to independently value the Imperial Project mining claims, (i) before the reclamation requirements were adopted, and (ii) assuming the requirements were applied to the Imperial Project.[749]

A reasonable mine operator, had it purchased the Imperial Project mining claims after the reclamation requirements were adopted, would have redesigned the mining plan, including redesigning the pits and reconfiguring and repositioning the leach pads and waste piles, instead of simply adopting the pre-existing, outdated mining plan.[750] Doing so would almost certainly have reduced the reclamation costs and improved the mine's economics.[751] Behre Dolbear did not, however, redesign the mine plan, and thus its analysis, for that and other reasons set forth below, does not accurately capture the fair market value of the Imperial Project mining claims. Because Norwest and Navigant have accepted Glamis's plan of operations for the Imperial Project as it existed prior to the reclamation requirements, and have not redesigned the plan, their fair market valuations of Glamis's mining claims are conservative.[752]

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[749] *See* Expert Report of Norwest Corporation (Sept. 19, 2006) ("Norwest Rpt."); Expert Report of Navigant Consulting, Inc. (Sept. 19, 2006) ("Navigant Rpt.").

[750] Norwest Rpt. ¶ 11.

[751] *Id.* ¶ 11.

[752] *Id.*

As demonstrated below, Norwest performed a detailed, "bottom-up" engineering analysis of the cost of reclaiming the mine in accordance with the reclamation requirements, by, among other things, calculating the volumes and tonnages of the material to be moved, estimating haul distances, fuel costs, labor costs, equipment maintenance, volumetrics and swell factors.[753] Navigant, in turn, incorporated the relevant results of Norwest's engineering study into its own rigorous and detailed valuation of the Imperial Project mining claims, and valued the claims both before and after the reclamation requirements were adopted. Navigant used multiple methods to derive and verify its valuations, including a discounted cash flow analysis, a comparable transaction analysis, and an analysis of prior transactions involving the same mining claims.[754] All of the methodologies produced consistent results, providing a high degree of confidence in Navigant's conclusions.

Based on this comprehensive analysis, Navigant concludes that the mining claims had a value of approximately **$32.7 million** immediately before the December 12, 2002 emergency regulations were adopted,[755] and a value of approximately **$21.5 million** immediately after the regulations were enacted.[756] The reclamation requirements thus in no way destroyed the value of Glamis's investment. In fact, given the price of gold, today Glamis's mining claims would be worth over **$159 million**.[757] Because the mining claims retain substantial value, they were not effectively expropriated by the California measures, as Glamis contends.

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[753] *Id.* ¶¶ 13-29.

[754] Navigant Rpt. ¶ 64.

[755] *Id.* ¶ 17.

[756] *Id.* ¶ 26.

[757] *Id.* ¶ 32.

Below, before presenting the results of the Navigant and Norwest analyses, we review Glamis's contemporaneous internal valuations of its mining claims. We then highlight some of the critical flaws in Behre Dolbear's valuation and quantify the impact of those flaws. We demonstrate that Behre Dolbear's valuation of **$49.1 million** prior to the reclamation requirements grossly inflates the value of the mining claims, and that its post-reclamation valuation of ***negative*** **$11.6 million** grossly overstates the economic impact of the reclamation requirements. Finally, we address Behre Dolbear's incredible assertion that, since December 2002, the Imperial Project mining claims have actually *decreased* in value, and are currently worth ***negative*** **$23.5 million,** even in today's high gold price environment.

### 1. Glamis's Internal Valuations Demonstrate That The Imperial Project

Glamis conducted two internal valuations of the Imperial Project mining claims, both shortly before, and shortly after, the emergency regulations were adopted. The valuations severely undermine Behre Dolbear's report, and Glamis's arguments in this arbitration, by confirming that the reclamation requirements, had they been applied,

. As demonstrated below, Navigant has made an adjustment to account for the "additional exploration value," reflecting additional gold that Behre Dolbear presumes Glamis would be able to extract from the area of the Singer pit claims and within the East and West pits (referred to herein as the "Singer pit claims").[758] With that adjustment, Glamis's internal valuations are strikingly similar in key respects to Navigant's independent valuation,

[758] Behre Dolbear, "Valuation of Glamis Gold Ltd.'s Imperial Gold Project, Imperial County, California (Apr. 2006) ("Behre Dolbear Rpt.") at 17.

which values the mining claims based on a three-pit model. Notably, neither Glamis nor Behre Dolbear mentions, let alone addresses, these internal contemporaneous valuations.

In April 2002, approximately eight months before the emergency regulations were adopted, Glamis prepared a valuation of its mining claims comprising the East and West pits. Glamis used a computer model to estimate the value of the mining claims.[759]

.[760] Taking into account Behre Dolbear's $6.4 million valuation of the Singer pit claims, Glamis's three-pit valuation of the mining claims comprising the Imperial Project would be

In January 2003, shortly after the December 12, 2002 emergency regulations went into effect, Glamis conducted a detailed estimate of what it would cost to comply with those regulations. Glamis again used a computer model to estimate the value of the mining claims.[761] Glamis memorialized its conclusions in a January 9, 2003 memorandum entitled "Imperial Valuation – Backfilling" prepared by the company's Chief Operating Officer, James Voorhees, and sent to Glamis's President and Chief Executive Officer, C. Kevin McArthur, and Glamis's General Counsel, Charles Jeannes.[762]

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[759] Confidential Memorandum from C. Kevin McArthur, President, Glamis Gold Ltc., to Charles Jeannes, Senior Vice President and General Counsel, Glamis Gold Ltd. (Apr. 28, 2002) (Appendix to Navigant Rpt., tab 11).

[760] *Id.*

[761] Memorandum from Jim Voorhees, Chief Operating Officer, Glamis Gold Ltd., to Charles Jeannes, Senior Vice President and General Counsel, and C. Kevin McArthur, President and Chief Executive Officer, Glamis Gold Ltd. (Jan. 9, 2003) (Vol. 7 FA tab 43); Norwest Rpt. ¶ 12.

[762] Memorandum from Jim Voorhees, Chief Operating Officer, Glamis Gold Ltd., to Charles Jeannes, Senior Vice President and General Counsel, and C. Kevin McArthur, President and Chief Executive Officer, Glamis Gold Ltd. (Jan. 9, 2003) (Vol. 7 FA tab 43) (explaining that

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Glamis estimated that it would cost to backfill the open pits and regrade any additional material, amounting to additional reclamation costs of .[763] It estimated that after complying with the reclamation requirements, , the value of the Imperial Project mining claims would be . Adjusting for the Singer Pit claims, Glamis's internal post-reclamation requirement valuation was approximately [764] , even in the low gold price environment prevailing at that time.

### 2. Behre Dolbear's Valuation Of The Imperial Project Mining Claims Before The Reclamation Requirements Is Seriously Flawed

Below, the United States highlights some of the methodological flaws that led to Behre Dolbear's mistaken estimate that Glamis's mining claims were worth $49.1 million immediately before the reclamation requirements.[765]

*First*, Behre Dolbear improperly mixes valuation methodologies, valuing the East and West pit claims using a discounted cash flow analysis, but simply assigning an average valuation multiple of $25.71 per ounce of gold to the remaining Singer pit claims.[766] Using inconsistent valuation methodologies for different parts of the mining claims produced an inaccurate and unreliable valuation. Behre Dolbear's analysis also

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[763] *Id.*

[764] Navigant Rpt. ¶ 27. The Singer claims enhance the net present value of the mining claims because of the additional gold produced and as a result of deferring by nearly two years the cash outflows associated with the mine reclamation and closure activities. This effect is more pronounced assuming the regulations apply than if they do not apply, given the higher reclamation costs associated with the former.

[765] Behre Dolbear Rpt. at 4.

[766] *Id.* at 17-19.

suffers from its reliance on only a single valuation method for each type of claims, instead of using every reasonable valuation method to check its work, as Navigant did. That these shortcomings led directly to an incorrect valuation result can be illustrated in two ways, as the Navigant Report demonstrates in detail: (i) applying a discounted cash flow analysis to *all* of the mining claims yields a value of **$35.3 million**;[767] and (ii) applying the average valuation multiple used by Behre Dolbear to the total project reserves of 1,424,903 ounces yields a similar value of **$36.6 million**.[768] Thus, by mixing these two methodologies without justification, and by failing to use more than one type of analysis for any given portion of the mining claims, Behre Dolbear produced a highly inaccurate and inflated valuation of the mining claims before the reclamation requirements.

Nor did Behre Dolbear reveal the basis on which it derived its comparative valuation of $25.71 per ounce of gold. Navigant conducted an independent valuation considering six contemporaneous gold mine transactions, and sorting and weighting those transactions according to their similarity to the Imperial Project.[769] Navigant concluded that $19.98 per ounce was a fair comparable transaction price.[770] Applying that multiple to the total project reserves yields a value of **$28.5 million** – considerably below Behre Dolbear's valuation of $49.1 million.

*Second*, Behre Dolbear ignores other important valuation methodologies that likewise would have alerted it to the fact that its mixed-method estimate of $49.1 million

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[767] Navigant Rpt. ¶ 14.

[768] *Id.* ¶ 11.

[769] *Id.* ¶¶ 75-80.

[770] *Id.* ¶ 83.

was highly inaccurate. In contrast, Navigant considered prior transactions involving the mining claims comprising the Imperial Project. The most recent transaction was Glamis's repurchase of a thirty-five percent stake in the mining claims from its joint venture partner in 1994.[771] Glamis purchased that interest for approximately $4.1 million, implying a total value of the Imperial Project mining claims of $11.7 million. This transaction took place when the recoverable reserves estimate was 712,241 ounces.[772] Adjusting for the additional gold reserves of 712,662 ounces that were identified after that time and applying Behre Dolbear's valuation multiple of $25.71 per ounce, the 1994 adjusted valuation of the Imperial Project would be **$30.1** million – again, far short of Behre Dolbear's valuation of $49.1 million.

*Third*, Behre Dolbear makes a critical error in applying a discount rate of only 6.5 percent.[773] It first derives a discount rate of 9.28 percent – very similar to the 9.2 percent rate independently calculated by Navigant[774] – but then reduces that rate to adjust for taxes.[775] A discount rate accounts for the risks of certain future events turning out less favorably than anticipated, such as ending up with a less favorable gold recovery rate. It is nonsensical, however, to incorporate income taxes into a discount rate. Behre Dolbear's mistake can be traced to its misinterpretation of an academic article discussing tax adjustments for an entirely different purpose.[776] Had Behre Dolbear used its non-tax

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[771] Purchase Agreement between Imperial Gold Corporation and Glamis Gold Exploration Inc. (Feb. 18, 1994) (Annex to Navigant Rpt. tab 6).

[772] Preliminary Reserve Estimation of the Indian Rose and Ocotillo Gold Projects, Mine Reserves Associates (Mar. 2, 1994) (Annex to Navigant Rpt. tab 9); Internal Feasibility Study, Western States Engineering (Apr. 6, 1995) (Annex to Navigant Rpt. tab 10).

[773] Behre Dolbear Rpt. at A6-7.

[774] Navigant Rpt. ¶ 116.

[775] Behre Dolbear Rpt. at A6, 3-7.

[776] *Id.* at A6, 3-7.

adjusted discount rate of 9.28 percent in its discounted cash flow valuation, it would have concluded that Glamis's mining claims comprising the East and West pit areas were worth $31.9 million, instead of $42.7 million.[777]

Table 1 summarizes all of the valuation methods used by Navigant to arrive at the value of the Imperial Project mining claims immediately before December 12, 2002. As shown, Navigant used a discounted cash flow analysis; the comparable transaction analysis, using both Behre Dolbear's transaction multiple of $25.71 and Navigant's estimated multiple of $19.98; a prior transaction analysis based on a 1994 purchase of the shares of the Imperial Project mining claims; and an analysis based on Glamis's own internal contemporaneous valuation, with an adjustment to add the Singer pit claims. The results of those analyses corroborate one another, and provide a very high degree of confidence that the value of the mining claims was likely between 29 million and 36 million.

[777] *See id.* at 4 (estimating that Glamis's mining claims were worth $42.69 million exclusive of the Singer pit claims).

Table 1: Comparative Valuations of the Imperial Project Mining **Claims Before the Reclamation Requirements Were Adopted**[778]

| *(in US$ Millions)* **Valuation Method** | **Value** |
|---|---|
| **Navigant** | |
| Discounted Cash Flow | 35.3 |
| Comparable Transaction at $25.71 per oz. | 36.6 |
| Comparable Transaction at $19.98 per oz. | 28.5 |
| Adjusted 1994 Imperial Project Transaction | 30.1 |
| Three-Pit Adjusted Glamis Valuation | |
| **Behre Dolbear** | |
| Mixed Approach | 49.1 |

Navigant arrived at a final value by assigning appropriate weights to the results of the discounted cash flow analysis, its comparable transaction analysis using a variable of $19.98 per ounce, and its prior transaction approach, to produce a weighted average valuation of **$32.7 million**.[779]

### 3. Behre Dolbear's Valuation Of The Mining Claims Taking Into Account The Reclamation Requirements Is Also Seriously Flawed

Behre Dolbear compounds the methodological flaws and errors in its pre-reclamation requirement valuation with additional flaws and errors in its valuation of the claims under the assumption that the reclamation requirements were applied. Below, we highlight some of those additional flaws and errors.

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[778] This table is taken from Table 1 to the Navigant Report. Navigant Rpt. ¶ 16.

[779] For example, Navigant assigned the highest weight to its discounted cash flow valuation because of the quality and depth of the data that supports that valuation and the robust nature of the analysis that allowed for the modeling of a detailed plan of operations for the Imperial Project. *Id.* ¶ 132. In contrast, Navigant assigned a relatively lower weight to the prior transaction valuation because the transaction at issue was somewhat remote in time. *Id.* ¶ 132.

*First*, Behre Dolbear's estimate that, under a two-pit plan, an additional 227.2 million tons of material would have to be moved in the reclamation process[780] is significantly over-inflated for two reasons. As an initial matter, it is based on an unsupportable "swell factor" (the amount by which material expands when removed from the pits) of thirty-five percent.[781] As noted above, on at least three occasions, Glamis itself estimated the average swell factor for the Imperial Project to be .[782] In 2002, BLM similarly estimated a swell factor of twenty-three percent,[783] and Norwest has independently calculated a swell factor of twenty-three percent.[784] By using a highly inflated swell factor, Behre Dolbear has grossly overestimated the amount of material that would need to be moved in the reclamation process.

Furthermore, Behre Dolbear makes a critical error in assuming that the material on the waste piles must be spread to the level of the original contour of the land, *i.e.*, reduced to *zero* feet, instead of merely to a level of twenty-five feet, as allowed for under the reclamation requirements. Leaving waste piles of twenty-five, rather than zero, feet significantly reduces the amount of material on the piles that has to be spread. After correcting for these two errors, complying with the reclamation requirements would entail handling an additional 187 million tons under a two-pit mining plan (as opposed to

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[780] Behre Dolbear Rpt. at A4, 11-14.

[781] *Id.* at A4-9.

[782] Norwest Rpt. Table 3 (citing to 1995 internal memo to Glamis CEO and President C. Kevin McArthur; 1996 letter from Glamis's Project Geologist to its consultant, Mine Reserves Assoc. Inc.; and 1999 internal Glamis spreadsheet titled "Base Case at 339 Au.xls").

[783] *Id.* (relying on Appendix A, page 2 to the BLM Mineral Report (Sept. 27, 2002)).

[784] *Id.* ¶¶ 17-18.

Behre Dolbear's 227.2 million ton estimate), and 206 million tons under a three-pit plan (which Behre Dolbear did not calculate).[785]

*Second*, Behre Dolbear's estimate that backfilling and spreading the excess material would costs 35.3 cents per ton is significantly inflated.[786] As set forth in the Norwest Report, Behre Dolbear derives its unit cost by starting with Glamis's estimated cost per ton of material mined and then simply subtracting the costs of the drilling and blasting involved in the excavation process.[787] As Norwest explains, however, this overly-simplistic calculation ignores the substantial efficiencies present during the reclamation phase that are not enjoyed in the excavation process.[788] For example, during the reclamation process, the loaded trucks would be running *downhill,* which is much quicker, much more fuel efficient, and causes less wear and tear on the equipment, than running loaded trucks uphill as during the excavation phase.[789] Additionally, during the reclamation phase, trucks have a shorter distance to cover, going only to the perimeter of the pit and dumping the material, instead of all the way to the bottom of the pit.[790]

Unlike Behre Dolbear, Norwest conducted a detailed, "bottom-up" analysis of the cost of handling the material. The Norwest calculation included all pertinent costs, including determination of equipment operating and maintenance costs, labor costs, taxes

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[785] *Id.*

[786] Behre Dolbear Rpt. at A4-10.

[787] *Id.* (stating that ":

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[788] Norwest Rpt. ¶ 24.

[789] *Id.* The uphill trip is from the bottom of the pit, which eventually reaches 880 feet deep, to the top of the waste pads or leach dumps, which reach heights of up to 300 feet. *Id.*

[790] *Id.*

and overhead, among other things.[791] Norwest tested each assumption in Glamis's plan of operations, and made adjustments to account for ancillary support equipment, supervisory and technical staff, haul profiles (length and grade of haul routes), hourly equipment costs and major repairs (based on Western Mine Engineering's equipment costs guide), fuel and electricity and contract services.[792] Based on its detailed analysis, Norwest concludes that the unit cost of backfilling and re-contouring would be **25.5 cents per ton.**[793]

comply with the California reclamation requirements would be :

Likewise, Norwest's estimate is corroborated by Glamis's operating cost data. Glamis's plan of operations shows the productivity of haul truck fleet during the excavation process to be 1,166 tons per operating hour.[794] Norwest's productivity number for backfilling (which involves downhill hauls of shorter distance) is 1,545 tons per operating hour, suggesting that the productivity is on average nearly twenty-five percent greater during the reclamation process than during the mining phase.[795] Reducing the Behre Dolbear backfilling unit cost estimate of 35.3 cents by twenty-five percent for the productivity adjustment alone results in a unit cost of **26.6 cents per ton**. The confluence of these three estimates further corroborates the results of Norwest's robust cost analysis. By contrast, Behre Dolbear's overly-simplistic "top-down" estimate of 35.3 cents, based

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[791] Norwest Rpt. ¶¶ 25-26.

[792] *Id.*

[793] *Id.* ¶ 25.

[794] *Id.* ¶ 27.

[795] *Id.* ¶ 27.

on the mistaken assumption that reclamation is simply mining in reverse, lacks any probative value whatsoever.

*Third*, as Norwest demonstrates, Behre Dolbear has further inflated the estimated reclamation costs by unnecessarily adding $15.4 million for equipment and refurbishment costs. Behre Dolbear adds a cost of $7.7 million at the start of backfilling activities and then a second cost of $7.7 million only four years later. This second refurbishment is pointless because, as Norwest and Navigant demonstrate, the entire reclamation process could be completed in four years.[796] Even if that were not the case, however, Norwest has conducted a detailed analysis of each piece of major equipment involved in the reclamation showing that the equipment would, on a weighted average basis, be only forty-seven percent "used up" at the time of the supposed second refurbishment, rendering that refurbishment premature and unnecessary.

Behre Dolbear's first refurbishment of $7.7 million is likewise redundant, and should not be included in the cost of reclaiming the Imperial Project site. As detailed in Norwest's Report, that refurbishment cost has already been included as part of the hourly operating costs for equipment that was included in Glamis's detailed mining plan, and Norwest's cost-per-ton estimate of 25.5 cents.[797] For example, Glamis projects in its mining plan that it would cost $140.23 per hour to operate the P&H 4100 shovel during the backfilling phase.[798] Norwest conducted its own independent estimate of those costs – which *included* a major refurbishment of the shovel – and derived a slightly lower estimate of $135.73 per hour. This exercise was repeated for each piece of major

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[796] *Id.* n.27.

[797] *Id.* ¶ 28.

[798] *Id.* Table 8.

equipment used in the backfilling phase, with a similar result.[799] These results confirm that Glamis's hourly cost estimates must have included refurbishment costs. Adding $7.7 million – let alone the $15.4 million that Behre Dolbear proposes – is thus redundant, and only serves to artificially inflate the cost of reclaiming the Imperial Project site. Further confirmation of this conclusion is provided by the fact that, in its January 2003 analysis of the cost of complying with the California regulations,

[800]

Norwest and Navigant have nonetheless, in the interest of producing an exceedingly conservative valuation of Glamis's mining claims, accounted for one additional equipment overhaul at a cost of $7.7 million during the reclamation phase, on top of the refurbishment costs already included in Norwest's 25.5-cent estimate of the cost-per-ton of backfilling.[801]

The result of the above three errors – the swell factor inflation, the cost-per-ton overestimate, and the addition of redundant refurbishment costs – is that Behre Dolbear's total reclamation cost estimate of $95.5 million is grossly inflated. As shown in Table 2, below, that estimate is , completed contemporaneously with the adoption of the emergency regulations, and is significantly higher than the United States' independent estimate.

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[799] *Id.*

[800] Memorandum from Jim Voorhees, Chief Operating Officer, Glamis Gold Ltd., to Charles Jeannes, Senior Vice President and General Counsel, and C. Kevin McArthur, President and Chief Executive Officer, Glamis Gold Ltd. (Jan. 9, 2003) (Vol. 7 FA tab 43); Norwest Rpt ¶ 28. Because Glamis projected that the East and West pit mining claims would have a residual value of about $;

[801] Norwest Rpt. ¶ 9; Navigant Rpt. ¶ 179.

**Table 2: Comparative Additional Reclamation Costs**[802]

| | Navigant | Glamis | Behre Dolbear |
|---|---|---|---|
| Backfilling and Spreading | $52,414,589 | | $80,100,000 |
| Equipment Refurbishment | $7,660,000 | | $15,400,000 |
| **Total Cost of Reclamation Requirements** | **$60,074,589** | | **$95,500,000** |

For the reasons set forth above, and further detailed in the United States' expert reports, Behre Dolbear's reclamation estimate is highly flawed and should be rejected.

*Fourth*, the most significant single error by Behre Dolbear in terms of economic impact is its assumption that Glamis would have to post a cash bond in the amount of $61.1 million at the beginning of the operating life of the Imperial Project to comply with SMARA's requirement that miners provide financial assurances to cover the cost of reclamation.[803] By failing to account for the fact that Glamis is permitted under SMARA to provide the required financial assurance using a letter of credit,[804] and the fact that providing financial assurances with letters of credit is a common practice among mining companies and would have been available to Glamis, Behre Dolbear has significantly inflated the cost of complying with California's reclamation requirements. Behre Dolbear has inflated the reclamation cost by nearly **$12 million** simply by selecting the most uneconomical means of providing financial assurances for the reclamation.[805] The ramifications of this error can hardly be overstated: even accepting all of Behre

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[802] This table is taken from Table 2 to the Navigant Report. Navigant Rpt. ¶ 23.

[803] Behre Dolbear Rpt. at A5-9. Under this theory, by the time reclamation commences, the principal amount of the bond, plus accumulated interest, would be sufficient to fund Behre Dolbear's estimated reclamation liability of $83.1 million. *Id.*

[804] CAL. CODE REGS. tit. 14, § 3803(a)(1)-(3) (1994) (allowing miners to provide financial assurance in "the form of . . . [s]urety bonds [and] [i]rrevocable letters of credit").

[805] Navigant Rpt. ¶ 196.

Dolbear's other mistaken assumptions and errors, correcting for this single error would still leave the Imperial Project mining claims with a *positive* net present value after complying with the reclamation requirements.[806]

*Fifth*, Behre Dolbear commits a manifest error by assuming that the value of additional reserves from the Singer pit claims should be added to a pre-reclamation requirement analysis, but not to a post-reclamation requirement analysis.[807] Its sole rationale for doing so is that "no prospective purchaser would consider acquiring . . . the exploration potential."[808] In other words, Behre Dolbear reasons that, because the mining claims were rendered valueless by the reclamation requirements, there was no sense in adding in the Singer pit reserves to its valuation of the Imperial Project mining claims. Behre Dolbear's assumption is not supported by any rational financial theory, and only serves to further exaggerate the impact of the reclamation requirements. Correcting for this error adds nearly **$10 million** to the value of the mining claims after complying with the reclamation requirements.[809]

*Sixth*, Behre Dolbear double counts an additional cost by incorrectly assuming mining operating costs after the mining production had been completed.[810] Correcting for this error eliminates mining costs of approximately $4.8 million.[811]

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[806] *Id.*

[807] Behre Dolbear Rpt. at 19.

[808] *Id.*

[809] This amount is derived by adding the value of the additional reserves and the present value benefit of deferring, by nearly two years, the cash outflows associated with the reclamation process. Navigant Rpt. ¶¶ 27, 172.

[810] *Id.* ¶ 198.

[811] *Id.*

*Finally*, Behre Dolbear's contention that the Imperial Project would not be profitable today – and indeed would be worth negative $23.5 million – defies accepted economic theory.[812] Behre Dolbear reaches this conclusion by using the average gold price over the last ten years of $337 per ounce, and factors in "escalated capital and operating costs."[813] Markets, however, are forward looking. The mining claims should be valued either at the current spot price as of mid-September 2006, which was approximately $635 per ounce, which would yield a current value of $159 million, or based on the futures market, which would likely yield a substantially higher valuation.[814] For example, accessing the futures market, Glamis could secure the right to sell gold in 2009 for over $750 per ounce, or to sell gold in 2011 for over $800 per ounce.[815] The market clearly expects the price of gold to rise significantly in the future, as does Glamis's CEO, who was recently quoted as stating such in the context of Glamis's recent announcement of a planned corporate merger.[816] It defies all theories of market valuation to value the Imperial Project claims retrospectively, based on the average gold price over the past ten years.

Table 3 summarizes the post-reclamation requirement valuations, both immediately after the emergency regulations went into effect, and as of today. Based on recent gold prices, the California regulations – far from effectively expropriating

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[812] Behre Dolbear Rpt. at 20.

[813] *Id.*

[814] Navigant Rpt. ¶¶ 211-221.

[815] *Id.* ¶ 217.

[816] Christopher J. Chipello, *Goldcorp to Aquire Glamis for $8 Billion*, WALL STREET JOURNAL, Aug. 31, 2006.

Glamis's mining claims – would reduce their value by only *seven percent*, even under the conservative valuation assumptions adopted by Navigant and Norwest.

**Table 3: Post-Reclamation Requirement Comparative Valuations of the Imperial Project Mining Claims**

| *(in US $ Millions)* | **United States** | **Glamis** | **Behre Dolbear** |
|---|---|---|---|
| Pre-reclamation requirement value | 32.7 | | 49.1 |
| Present value impact of the reclamation requirements | 11.2 | | 60.7 |
| Value as of December 12, 2002 | **21.5** | | **(11.6)** |
| Value as of today | **159.1** | | **(23.5)** |

In sum, Glamis's attempt to ignore its own contemporaneous internal valuations, and rely instead on a valuation prepared in the context of this arbitration that is rife with methodological flaws and gross errors – and which rejects many of Glamis's fundamental assumptions concerning its own project – should not be countenanced. Glamis's Imperial Project mining claims retained substantial value, both as of December 12, 2002, and as of today. Glamis's expropriation claim thus fails as a matter of law on this basis alone.

### B. Glamis Could Have Had No Reasonable Expectation That It Could Conduct Mining Operations Free From California's Reclamation Requirements

Glamis could not reasonably have expected that California would never impose more specific reclamation requirements for open-pit metallic mines in the state. Glamis's expectations should have been shaped by, among other things, the fact that: (i) Glamis

received no specific assurances from the government that the reclamation requirements would not be specified before Glamis obtained approval of a plan of operations or reclamation plan; (ii) the mining claims Glamis acquired were located in an area it knew or should have known contained significant historic and cultural resources that were protected by an array of laws; and (iii) mining is a highly regulated industry in the United States – particularly in California – and regulations continually evolve as sovereign entities seek to better protect the public welfare and public resources.

### 1. Glamis Received No Specific Assurances That The Legislative And Regulatory Environments In California Would Not Change

Tribunals applying international law have held that, in the absence of specific assurances by the host State, an investor can have no reasonable expectation that the State will not regulate or legislate in the public interest in a manner that may affect the value of its investment. Where an investor conducts business in a highly regulated industry, and where its investment could negatively impact important resources – such as environmental, or cultural and historic resources – it is unreasonable for that investor to expect that its investment would not be subject to further regulation to protect those valued resources absent specific assurances to the contrary.

Glamis received no specific assurances that measures protecting Native American sacred sites, or implementing SMARA's reclamation requirements, would not be applied to its proposed Imperial Project. Glamis has not cited a single international law authority in which a *bona fide* regulation in the public interest, such as California's reclamation measures, has been deemed expropriatory in the absence of specific assurances to the investor that were abrogated by later regulation.

In *Methanex Corp. v. United States of America*, the claimant, a Canadian methanol producer, alleged that a ban on the use and sale in California of the gasoline additive MTBE had the effect of expropriating its investments.[817] The tribunal noted that Methanex entered the United States market fully aware that the regulations concerning gasoline content were subject to regulatory change, and "did not enter the United States market because of *special representations* made to it."[818] The tribunal contrasted the facts of the case with those in *Revere Copper & Brass, Inc. v. Overseas Private Investment Corporation*, "where specific commitments respecting restraints on certain future regulatory actions were made to induce investors to enter a market and then those commitments were not honoured."[819] The *Methanex* tribunal noted that:

> as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless *specific commitments* had been given by the regulating government to the then putative investor contemplating investment that the government would refrain from such regulation.[820]

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[817] *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award, pt. IV, ch. D ¶ 2 (Aug. 3, 2005).

[818] *Id.*, pt. IV, ch. D ¶ 10 (emphasis added).

[819] *Id*. In *Revere,* the Government of Jamaica had provided specific assurances to the investor through a contract which provided, among other things, that "[n]o further taxes . . . burdens, levies . . . will be imposed on bauxite, bauxite reserves, bauxite operations." *Revere Copper & Brass, Inc. v. Overseas Private Invest. Corp.*, 17 I.L.M. 1321, 1332 (1978). The contractual provisions on which the investor relied in making its investment were later rescinded by legislation. *Id.* at 1322, 1331, 1350. The *Ponderosa* decision on which Glamis relies is also distinguishable on this ground, among others. *See Expropriation Claim of Ponderosa Assets, L.P. Argentina – Contract of Insurance No. d733*, Memorandum of Determinations, at 1, 3, 5 (Aug. 2, 2005) ("[T]he main expropriatory action, and the action on which the claim is based, consists of the enactment of the Emergency Law, which resulted in a change in tariff treatment *in violation of the GOA's contractual obligations* under the License to allow tariff payments in dollars and with a PPI-indexed adjustment.") (emphasis added).

[820] *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award, pt. IV, ch. D ¶ 7 (Aug. 3, 2005) (emphasis added). The non-fulfillment or breach of specific commitments to an investor alone, however, does not establish an expropriation. *See, e.g.*, *CMS Gas Transmission Co. v. Argentina,* 44 I.L.M. 1205, Award ¶¶ 263, 277 (May 12, 2005) (finding that Argentina had repudiated "specific commitments" on which the claimant relied in making its investment, but dismissing expropriation claim because "the investor [was] still in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment," and the impact of the

The tribunal dismissed the claim under NAFTA Article 1110, noting that Methanex had not received any specific commitments that California would not further regulate the contents of its gasoline.[821]

Likewise, in *Feldman v. Mexico*, the NAFTA tribunal rejected the claimant's expropriation claim largely because the claimant failed to prove that he made his investment in reliance on specific commitments by the Mexican government that allegedly were breached by Mexico. Notably, the tribunal found that the actions of the Mexican taxing authority with respect to Feldman's investment were "arbitrary,"[822] "inconsistent,"[823] "ambiguous and misleading, perhaps intentionally so in some instances,"[824] "[un]reasonable,"[825] and "without doubt . . . lack[ed] transparency."[826]

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actions was not severe enough); *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/03, 41 I.L.M. 1315, Award ¶¶ 98, 178, (Apr. 30, 2004) (dismissing expropriation claim, but finding that Mexico had "breach[ed] … representations … which were reasonably relied on by the claimant").

[821] *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award, pt. IV, ch. D ¶ 10 (Aug. 3, 2005). Glamis seeks to refute the *Methanex* tribunal's decision, alleging that it constitutes "a departure from established comparative constitutional and international investment law," is "*obiter dictum*," and contradicts the 2004 U.S. Model BIT. Glamis's criticism is misguided. *First*, Glamis has not produced a single international legal authority that refutes the *Methanex* decision, let alone demonstrates that *Methanex* represents a departure from established law. *Second*, the *Methanex* tribunal's holding is not *obiter dictum*; rather, it goes to the heart of the issue presented by Methanex's expropriation claim – whether *bona fide* regulation, in the absence of specific commitments to the investor, can constitute an expropriation. The Methanex tribunal dismissed the expropriation claim noting that "[n]o such commitments were given to Methanex." Finally, the *Methanex* holding is entirely consistent with the 2004 U.S. Model BIT. The Model BIT provides that non-discriminatory regulation intended to protect legitimate public welfare objectives is not expropriatory "*[e]xcept in rare circumstances*." A host government's repudiation of specific commitments to the investor that it would refrain from imposing certain regulations on the investor's investment might be a "rare circumstance" in which *bona fide* regulation may be deemed expropriatory.

[822] *Marvin Roy Feldman Karpa v. United Mexican States,* Case No. ARB(AF)/99/1, 118 ICSID REP. 341, Award ¶ 143 (Dec. 16, 2002), *reprinted in* 42 I.L.M. 625 (2003) ("[T]he actions by the Mexican government against the Claimant [were] in some instances inconsistent and arbitrary.").

[823] *Id.* ¶ 109 ("SHCP followed an inconsistent and non-transparent course of action."); *see also id.* ¶ 43; *id.* n.30 ("SHCP communications and other actions after the 1993 *Amparo* decision were inconsistent and ambiguous, and difficult for the Claimant to assess.").

[824] *Id.* ¶ 132 ("The various written and oral communications from SHCP officials to the Claimants are at best ambiguous and misleading, perhaps intentionally so in some instances."); *see also id.* n.30.

The tribunal also found that "the Claimant, through the respondent's actions, [was] deprived completely and permanently of any potential economic benefits from that particular activity."[827] The tribunal nonetheless dismissed Feldman's expropriation claim for lack of evidence of clear and specific assurances that Feldman would receive the tax treatment to which he claimed entitlement.

The *Feldman* tribunal contrasted its decision with that in *Metalclad*, where "the tribunal, in reaching its finding of indirect expropriation, . . . found it important that Metalclad had relied on the representations of the Mexican federal government of its exclusive authority to issue permits for hazardous waste disposal facilities."[828] The tribunal further observed that "the assurances received by the investor from the Mexican government in *Metalclad* were definitive, unambiguous and repeated, in stating that the federal government had the authority to authorize construction and operation of hazardous waste landfills."[829] "In contrast," noted the tribunal, "in the present case the assurances allegedly relied on by the Claimant (which assurances are disputed by Mexico) were at best ambiguous and largely informal."[830] Finally, the tribunal noted that neither Mexican tax laws, nor the NAFTA, nor customary international law accorded

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[825] *Id*. ¶ 113 ("[I]t is undeniable that the Claimant has experienced great difficulties in dealing with SHCP officials, and in some respects has been treated in a less than reasonable manner.").

[826] *Id*. n.30 ("Here, as in *Metalclad*, there was without a doubt a lack of transparency with regard to some actions by Mexican government officials."); *see also id.* ¶ 109 ("SHCP followed an inconsistent and non-transparent course of action"); *id*. ¶ 133 ("[T]he transparency in some of the actions of SHCP may be questioned.").

[827] *Id.* ¶ 109

[828] *Id* ¶ 146.

[829] *Id.* ¶ 148. This portion of the *Metalclad* decision was set aside by the Supreme Court of British Columbia, which found that the tribunal had exceeded its authority when relying on Mexico's actions concerning the municipal permit as a basis for finding an expropriation. *United Mexican States v. Metalclad Corp.,* 5 ICSID REP. 236, ¶ 133 (Sup. Ct. B.C. May 2, 2001).

[830] *Marvin Roy Feldman Karpa v. United Mexican States,* Case No. ARB(AF)/99/1, 118 ICSID REP. 341, Award ¶ 149 (Dec. 16, 2002), *reprinted in* 42 I.L.M. 625 (2003).

Feldman "a 'right' to export cigarettes" or "a 'right' to obtain tax rebates upon exportation of cigarettes."[831]

Unlike the claimant in *Feldman,* Glamis did not receive *any* assurances – informal or otherwise – from the State of California that the reclamation requirements for open-pit metallic mines would never be made specific, or that any changes would not affect Glamis's proposed Imperial Project. Moreover, the federal regulations made clear that Glamis's mining claims would be subject to California laws and regulations.[832]

Nor did the exclusion from the CDPA of buffer zones surrounding wilderness areas near the proposed Imperial Project constitute a specific assurance, as Glamis suggests.[833] Congress passed the California Desert Protection Act ("CDPA") in 1994, and in so doing it withdrew from development the Indian Pass and Picacho Peak Wilderness Areas.[834] In the CDPA, Congress provided that it did not intend to create "buffer zones" around the wilderness areas created by the Act.[835] Specifically, the CDPA states:

> The Congress does not intend for the designation of wilderness areas in section 102 of this title to lead to the creation of protective perimeters or buffer zones around any such wilderness area. The fact that

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[831] *Id.* ¶ 111 ("NAFTA and principles of customary international law do not *require* a state to permit 'gray market' exports of cigarettes; . . . at no relevant time has the IEPS law, as written, afforded Mexican cigarette resellers such as CEMSA a 'right' to export cigarettes[.]") (emphasis in original); *id.* ¶ 118 ("[T]he Claimant never really possessed a 'right' to obtain tax rebates upon exportation of cigarettes[.]").

[832] 30 U.S.C. § 26 (a claimant's possessory rights are contingent on compliance "with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title); 43 C.F.R. § 3809.3-1(a) (1980) ("Nothing in the subpart shall be construed to effect a preemption of State laws and regulations relating to the conduct of operations or reclamation on Federal lands under the mining laws.").

[833] *See generally* California Desert Protection Act of 1994 ("CDPA"), Pub. L. No. 103-433, 108 Stat. 4471 (codified as amended in scattered sections of 16 U.S.C.).

[834] *6* CDPA §§ 101(2), 102(27), 102(34), 301(3), 401(3). It also created, *inter alia*, the Death Valley and Joshua Tree National Parks.

[835] CDPA § 103(d).

> nonwilderness activities or uses can be seen or heard from areas within a wilderness area shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area.[836]

Glamis repeatedly misstates both the meaning and the purpose of this passage and argues that the "no buffer zone" language provided it with reasonable expectations that the Imperial Project would not be subject to any future regulatory requirements.[837]

The plain language of the Act is clear: the fact that non-wilderness activities (such as mining) can be seen or heard from areas within the wilderness "shall not, *of itself*" preclude those activities. The legislative history of the Act confirms its meaning:

> The Committee intends by the inclusion of the phrase ["of itself"] that, *standing alone,* the designation of wilderness areas by section 102 should not be construed to extend restrictions on non-wilderness sights and sounds to land outside the boundary of the wilderness area. *Such non-wilderness sight and sounds would be subject to regulation, if any, flowing only from the application of other law*. For example, the fact that a mining operation can be seen or heard from a point within a wilderness area is not sufficient to impose restrictions on that mining operation *that are not the result of provisions in other applicable law*.[838]

Glamis concludes from this language that the Imperial Project area was "to remain open to multiple-use development including mining."[839] The plain language of the Act, confirmed by the legislative history, however, makes clear that the "buffer zone" language in the Act does not prevent regulation of uses such as mining on non-wilderness land for other reasons "flowing from the application of other law," such as California's legitimately enacted regulations and legislation.

In this respect, this case is similar to *Reeves v. United States.* Plaintiffs in that case staked their mining claims on land that had been designated a Wilderness Study

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[836] *Id*.

[837] *See, e.g.,* Mem. ¶¶ 114-15, 167, 262, 326, 445, 447, 479 & 555.

[838] H.R. REP. NO. 103-498, at 55 (1994) (emphasis added).

[839] Mem. ¶ 115.

Area ("WSA").[840] Under FLPMA, once an area is designated a WSA, it undergoes further review to determine whether the lands should be permanently designated as a wilderness area. DOI recommended to President Clinton that the WSA *not* be preserved as a wilderness area. The President adopted this recommendation and forwarded it to Congress, which took no action. President Clinton later withdrew the area, which included plaintiffs' mining claims, from the operation of the Mining Law, designating the area as the Grand Staircase-Escalante National Monument. The withdrawal was made subject to valid existing rights.[841]

BLM nevertheless denied plaintiffs' plan of operations to develop their valid unpatented claims, applying FLPMA's "nonimpairment standard" for WSAs. The court concluded that BLM's denial was not a regulatory taking, because the area was a designated WSA before plaintiffs staked their claims, notwithstanding the fact that DOI and the President had recommended to Congress that the area not be designated a wilderness area.[842]

The *Reeves* plaintiffs staked their mining claims after the area had been designated a WSA, and thus the statutory "nonimpairment standand" applied, and the government's denial of their mining plan of operations was not a taking of their property interests. Similarly, Glamis knew that its claims were in the CDCA, and that because of the sensitivity of the area their claims could be restricted by federal or state regulations in the future. Glamis had no reason to conclude from the fact that Congress had not

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[840] *Reeves v. United States*, 54 Fed. Cl. 652 (2002).

[841] *See id*. at 653-55.

[842] *See id*. at 673-74.

specifically withdrawn the land on which the Imperial Project was located that the lands would be free from regulation in perpetuity.

Glamis President (then Chemgold General Manager) C. Kevin McArthur, in fact, acknowledged in 1995 and again in his statement in this proceeding that he "was uncomfortable with the proximity" of the wilderness areas to the Imperial Project. Nevertheless, he contends that he was reassured because the CDPA precluded the establishment of buffer zones.[843]

As explained above, however, the CDPA should not have been the source of any comfort to Glamis, as it did nothing to preclude restrictions placed on non-wilderness lands. The "no buffer zone" provision does not divest the federal or state governments of their legislative power to regulate the lands surrounding a protected area for purposes other than the creation of a buffer zone to protect the wilderness area. The regulations at issue in this case do not create "buffer zones." They were not enacted to prevent non-wilderness activities from being seen or heard from within a wilderness area. Glamis's contention that it received a "promise" from Congress' statement that it did not intend to create buffer zones around the wilderness areas[844] is based on a misapprehension of the CDPA and cannot form the basis for any reasonable investment-backed expectations. In the absence of any specific assurances given to Glamis, Glamis could not have had any expectation that California would not legislate to accommodate Native Americans' free exercise of religion or legislate or regulate to protect the environment and Native American cultural resources.

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[843] McArthur Statement ¶ 11; *see also* Letter from C. Kevin McArthur, General Manager, Chemgold, Inc., to Robert Anderson, BLM, at 1 (July 24, 1995) (3 FA tab 68).

[844] Mem. ¶ 479.

### 2. A Reasonable Investor Should Have Known That The Imperial Project Area Contained Significant Prehistoric Resources Protected By Long-Existing Laws

Just as it was not reasonable for Methanex to assume that California would never change its oxygenate requirements for unleaded gasoline, and as it was not reasonable for Feldman to assume that Mexico would never change its tax laws, Glamis was not reasonable to assume that California would not legislate to accommodate Native American religious practices, to protect Native American cultural and historic resources, and to ameliorate environmental damage, as well as threats to public health and safety. As described above, SB 22 implements principles under the U.S. and California Constitutions, and California legislation.[845] SB 22 accommodates the exercise of Native American religion , providing protection that already existed for other religions. SB 22 also specifies pre-existing statutory obligations – including California's Sacred Sites Act – to protect Native American sacred sites from damage caused by open-pit metallic mining. These legal principles were all in force when Glamis made its investment in the Imperial Project in the late 1980's and early 1990's, and foreclosed any reasonable expectations by Glamis that California would not legislate to protect Native American sacred sites.

Additionally, when Glamis began acquiring its interests in the Imperial Project in 1987, the area that would become the proposed mine and process site was well known as being rich in historic and cultural resources.[846] Furthermore, by 1987 – before an intensive survey of the Imperial Project area had even been conducted – twenty-eight

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[845] *See supra* Arg. Sec. II.B.2(a).

[846] Michael R. Waters, *The Lowland Patayan Ceramic Typology, in* HOHOKAM AND PATAYAN PREHISTORY OF SOUTHWESTERN ARIZONA 537-70 (Randall H. McGuire & Michael B. schiffer, eds., 1982) (9 FA tab 70).

archaeological sites had already been documented within a mile radius of the project site.[847]

[848] The subsequent cultural surveys served to reinforce the earliest discoveries at the site and confirmed that the Imperial Project site is an area of critical importance to the Quechan tribe.[849]

Before making an investment in mining claims in this area, a reasonable investor's expectations would have been informed by the history of extensive legislation to protect Native American cultural and historical resources, particularly by the State of California (including its Sacred Sites Act), and the knowledge that the government may legislate to accommodate the free exercise of religion. The fact that a high concentration of archaeological evidence had been discovered in the area where the mining claims are located (and in the immediate vicinity of that area) evidenced the historical, cultural and religious use of the area by the Quechan. Accordingly, Glamis could have had no reasonable expectation that California would not legislate to require reclamation measures to mitigate damage to Native American sacred sites.

### 3. Because Mining Is A Highly Regulated Industry, A Reasonable Investor Would Have Anticipated The Possibility Of Regulatory Changes

Glamis could not have had any reasonable expectations that California would not regulate to ensure compliance with SMARA's reclamation standard. An investor's

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[847] Dennis Gallegos & Andrew Pigniolo, *Cultural Resource Inventory and Avoidance Program for Fifteen Drill Sites within the AMIR Indian Rose Area Lease* 8 (July 1987) (9 FA tab 74). By contrast, the cultural surveys conducted in association with the 1982 expansion of the Picacho mine, which Glamis points to as having influenced its decision to invest in the Imperial Project, identified no prehistoric sites. *See supra* Facts Sec. IV.A.6.

[848] Quillen 1982, at 7 (9 FA tab 69).

[849] *See supra* Facts Sec. IV.A.

expectations must take into account the possibility of potential changes in the regulatory landscape in light of the historic level of regulation present in its industry, and in the locale where it wishes to make the investment. As the *Methanex* tribunal observed in dismissing Methanex's expropriation claim, "Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level . . . monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons."[850]

That an investment is adversely affected – or even rendered unprofitable – as a result of a State's exercise of its regulatory authority cannot alone establish a basis for finding an expropriation. As the NAFTA tribunal in *Marvin Feldman v. Mexico* held:

> not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular line of business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation under Article 1110. Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue.[851]

The SMGB regulations are a reasonably foreseeable development in the context of California's regulation of mining. In the late 1800's California courts effectively banned the use of hydraulic mining, which rendered it uneconomic to mine certain

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[850] *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award, pt. IV, ch. D ¶ 9 (Aug. 3, 2005). The *Methanex* tribunal also noted that "the very market for MTBE in the United States was the result of precisely this regulatory process." *Id.*

[851] *Marvin Roy Feldman Karpa v. United Mexican States,* Case No. ARB(AF)/99/1, 118 ICSID REP. 341, Award ¶ 112 (Dec. 16, 2002), *reprinted in* 42 I.L.M. 625 (2003).

mineral deposits.[852] In the years after hydraulic mining was restricted, mining projects were subject to ever-increasing regulation to protect the environment and public health and welfare.[853]

In 1976, California passed SMARA, which required mined lands to be reclaimed "to a usable condition which is readily adaptable for alternative land uses" and that "residual hazards to the public health and safety are eliminated."[854] In empowering the SMGB to promulgate regulations, SMARA made it clear that backfilling and recontouring could be necessary, and that state reclamation regulations that implement the SMARA's standard could change "continuously" in order to ensure that SMARA's mandate is carried out.[855] The amendments to the SMGB regulations were promulgated pursuant to this authority, and specified the reclamation requirement under SMARA, which pre-dated the location of the Imperial Project mining claims. The SMGB regulations cannot have violated Glamis's reasonable expectations.

Moreover, the requirement that all open pits be backfilled to meet SMARA's requirement that the lands be reclaimed to a usable condition was one that California regulatory authorities contemplated years before the SMGB's amendments made the backfilling requirement explicit. As early as 1996, for example, the California Department of Conservation specifically notified Glamis that it would consider requiring Glamis to backfill all three pits in the proposed Imperial Project.[856]

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[852] *See supra* Arg. Sec. II.B.1.

[853] *See supra* Facts Sec. I.D.

[854] CAL. PUB. RES. CODE §§ 2712(a), (c) (2001).

[855] *See supra* Facts Sec. V.B.

[856] *See, e.g.,* Letter from James S. Pompy, Manager, Office of Mine Reclamation, to Jesse Soriano, Imperial County Planning/Building Department (Feb. 21, 1997), at 2 (7 FA tab 11) ("The issue of site safety around the excavated pits still remains to be addressed to the satisfaction of the county. *One possible solution to*

Glamis acknowledges the "emergence of policies favoring increased protection of environmental and cultural resources[.]"[857] Glamis was well aware of the "significant risks" posed by regulatory changes pertaining to mining operations in the United States.[858] In its 1997 10-K, the company warned that "[f]uture health, safety and environmental legislation, regulations and actions could cause additional expense, capital expenditures, restrictions and delays in the activities of the Company, the extent of which cannot be predicted."[859] One risk cited was that:

> [l]egislation has been introduced in prior and current sessions of the U.S. Congress to make significant revisions to the U.S. Mining Laws including strict new environmental protection standards and conditions, additional reclamation requirements and extensive new procedural steps which would likely result in delays in permitting and which could have a material adverse effect on the Company's ability to develop minerals on federal lands.[860]

Glamis chose to locate its claims in California, a state that has for decades been at the forefront of environmental and health and safety regulation.[861] Glamis's own

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*this issue would be to backfill all excavated pits* …. Another positive aspect of backfilling the pits is that they could be reclaimed to a beneficial end use.") (emphasis added); Letter from Jason Marshall, Assistant Director, Department of Conservation, to John Morrison, Assistant Planning Director, Imperial County Planning/Building Department, and Douglas Romoli, BLM (Feb. 26, 1998), at 2 (7 FA tab 15) ("The reclamation plan does not demonstrate that the East Pit will be reclaimed to a beneficial end use. . . . *A possible solution could be to backfill all excavated pits*.") (emphasis added).

[857] Mem. ¶ 39.

[858] *See* Glamis Gold Ltd., Annual Report (Form 10-K), at 57 (Mar. 28, 1997) (10 FA tab 105) ("1997 Glamis 10-K") ("The Company's mineral development and mining activities and profitability involve significant risks due to numerous factors outside of its control, including the price of gold, risks inherent in mining, foreign exchange fluctuations and the above-described regulatory matters.").

[859] *Id*. at 56.

[860] *Id*. at 20; *see also id.* (expressing confidence that it was in compliance with current environmental requirements, but revealing that its U.S. mines had had four reportable instances of cyanide leaks during the prior year).

[861] *See, e.g.,* RICHARD P. THOMPSON & CHRISTOPHER A. DICUS, THE IMPACT OF CALIFORNIA'S CHANGING ENVIRONMENTAL REGULATIONS ON TIMBER HARVEST PLANNING COSTS 1 (2005) ("A popular refrain throughout the United States is that California has the most restrictive environmental regulations of any state, and perhaps the entire world …." (citing YEE 2003, MORGAN, et al. 2004, DISCUS & DELFINO 2003)); Darren Bush & Carrie Mayne, *In (Reluctant) Defense of Enron: Why Bad Regulation Is to Blame for California's Power Woes (Or Why Antitrust Law Fails to Protect Against Market Power When the Market*

valuation expert recognized that "environmental regulation" and other factors make California a riskier jurisdiction for mining than other states in the U.S.: "If the Mine were in Nevada, Behre Dolbear would probably use a zero risk increment; on the other hand, the Project is in California, which requires Behre Dolbear to use a higher risk increment" to account for the "general political climate that mining faces, including environmental regulations and the public's attitude toward mining."[862]

In light of the pre-existing legal framework governing mining on federal lands in California and Glamis's own acknowledgement of the possibility of changes in legal standards governing mining, Glamis could not have had reasonable, investment-backed expectations that California would not have promulgated regulations implementing SMARA's reclamation requirements.

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*Rules Encourage Its Use)*, 83 OR. L. REV. 207, 240 (2004) (California "is at the forefront of environmental regulation."); Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 246 (2000) ("[I]n the area of air quality, California is on the forefront of pollution control by setting standards that have been followed by the nation as a whole."); Melinda Harm Benson, *The* Tulare *Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. REV. 551, 566 (2002) ("California is unique among Western states in its application of the rule of reasonable use and the public trust doctrine to reallocate water rights to address environmental concerns."); Alexandra E. Viscusi, *Conflicting Directives: Water Quality and Appropriative Water Rights in the West*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 121, 141 (1995) ("California is unique among western states in requiring that the [State Water Resources Control Board] take into account the public interest when determining whether to grant water rights.") (quoting CAL. WATER CODE §174 (West 1971)); Grace Soderberg, *A New Legal Frontier in the Fight Against Global Warming*, 16 FORDHAM ENVTL. L. REV. 303, 309 (2005) (symposium) (California "on the forefront" of climate change legislation); Richard J. Lazarus, *A Different Kind of "Republican Moment" in Environmental Law*, 87 MINN. L. REV. 999, 1033 (2003) ("California seems now to be resurrecting the leadership role that it took in environmental law in the 1960s."); Ann Carlson, *California's AB 1493: Trendsetting or Setting Ourselves Up to Fail*, 21 UCLA J. ENVTL. L. & POL'Y 97, 102 (2002-2003) (symposium) ("[California has] led the country for almost forty years in regulating what comes out of automobile tailpipes."); Jan Stevens, *Air Pollution and the Federal System: Responses to Felt Necessities*, 22 HASTINGS L.J. 661, 684 (1971) (California has made "pioneering efforts" in vehicle emission control); Rachel L. Chanin, *California's Authority to Regulate Mobile Source Greenhouse Gas Emissions*, 58 N.Y.U. ANN. SURV. AM. L. 699, 699 (2003) (noting that California was the first state to regulate greenhouse gas emissions from motor vehicles); Press Release, State of California, Westly Announces Plan to Protect Coast From Destructive Organisms (Jan. 26, 2006) (10 FA tab 110) (California is "at the forefront of coastal protection.").

[862] Behre Dolbear Rpt. at A6-6.

California provided Glamis with no specific assurances that the proposed Imperial Project would be exempt from any changes to California's laws and regulations. In the absence of such assurances, Glamis could not have had any reasonable expectations that California would not have adopted the challenged reclamation requirements. In any event, a reasonable investor's expectations would have been informed by the longstanding protections of Native American sacred sites by California, combined with the discovery that pre-dated Glamis's mining claims of a high concentration of prehistoric and cultural sites on the Imperial Project site. Finally, given the history of extensive regulation of the mining industry, particularly by the state of California, and the numerous indications by California that the proposed Imperial Project could be subject to backfilling requirements, a reasonable investor in Glamis's position would have had no reasonable, investment-backed expectations that California's reclamation requirements would remain static.

### C. The Regulatory Nature of the Challenged California Measures Supports a Finding of No Expropriation

The character of the government's action is the third factor in determining whether an expropriation has occurred.[863] This factor involves the consideration of whether the government action constituted a physical invasion, or whether it merely impacted property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good," such as, for example, a regulation.[864]

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[863] *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 (1987); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award, pt. IV, ch. D ¶ 7 (Aug. 3, 2005).

[864] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

As the title holder to the underlying land on which an unpatented mining claim is located, the United States exercises "substantial regulatory power over those interests."[865] Even in the case of a vested property right, the government may "impose new regulatory constraints on the way in which those rights are used, or . . . condition their continued retention on performance of certain affirmative duties."[866] Indeed, "[t]his power to qualify existing property rights is *particularly broad* with respect to the 'character' of the property rights at issue here [unpatented mining claims]."[867] Regulation of unpatented mining claims is valid, even when it reduces a mining company's anticipated economic return with respect to those claims.[868] As the NAFTA Chapter Eleven *Feldman* tribunal recognized:

> Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations.

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[865] *United States v. Locke,* 471 U.S. 84, 105 (1985); *see also Reeves v. United States*, 54 Fed. Cl. 652, 672 (2002); *Kunkes v. United States*, 78 F.3d 1549, 1553 (Fed. Cir. 1996) (finding "that the Government, as owner of the underlying fee title, maintains broad regulatory powers of the use of the public lands on which unpatented mining claims are located"); *Skaw v. United States*, 13 Cl. Ct. 7, 28 (1987), *aff'd*, 847 F.2d 842, (Fed. Cir. 1988), *cert. denied*, 488 U.S. 854 (1988) ("Until a patent issues, the United States as a fee owner, retains paramount rights and interest in the Federal lands under claim, and maintains the authority to regulate the uses of those lands."); *Freese v. United States*, 6 Cl. Ct. 1, 11 (1984), *aff'd*, 770 F.2d 177 (Fed. Cir. 1985) ("With regard to unpatented mining claims, therefore, the Government retains the right to regulate disturbance of surface resources, as well as the right to permit uses of the surface area of the claim for purposes other than mining.").

[866] *United States v. Locke,* 471 U.S. 84, 104 (1985); *see also Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 16 (1976) ("[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.").

[867] *United States v. Locke,* 471 U.S. 84, 105 (1985) (emphasis added).

[868] *See* 30 U.S.C. § 28i (Supp. 1993); *United States v. Locke*, 471 U.S. 84 (1985) (establishing that Congress clearly has regulatory authority to require filing requirements under threat of forfeiture); *Freese v. United States*, 6 Cl. Ct. 1 (1984), *aff'd,* 770 F.2d 177 (Fed. Cir. 1985) (holding that regulation of unpatented mining claims by U.S. Forest Service does not constitute a taking by inverse condemnation); *see also Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351 (Fed. Cir. 2004) (rejecting expropriation claim where plaintiff held coal mining leases and owned land surrounding the mining claims and federal government declared plaintiff's land unsuitable for coal mining, finding that the action was of the type that "has typically been regarded as not requiring compensation for the burdens it imposes on private parties who are affected by the regulations").

> Those changes may well make certain activities less profitable or even uneconomic to continue.[869]

That, however, does not entitle the claimant to compensation. Under international law, where the action is a non-discriminatory regulation, it will not be deemed expropriatory under ordinary circumstances.[870]

> As the tribunal in *Saluka Investments BV v. Czech Republic* recently stated:
>
> It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.[871]

Abundant international arbitral decisions are to the same effect: the tribunal in *Lauder v. Czech Republic*, for instance, observed that "Parties to the Treaty are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State";[872] the *Tecmed* tribunal recognized as "undisputable" that "the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever";[873] and the *S.D. Myers* tribunal observed that

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[869] *Marvin Roy Feldman Karpa v. United Mexican States,* Case No. ARB(AF)/99/1, 118 ICSID REP. 341, Award ¶ 112 (Dec. 16, 2002), *reprinted in* 42 I.L.M. 625 (2003).

[870] *See, e.g.*, *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award, pt. IV, ch. D ¶ 7 (Aug. 3, 2005); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 385 (2d ed. 2004) ("The starting point must always be that the regulatory interference is presumptively non-compensable.").

[871] *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award ¶ 255 (Mar. 17, 2006); *see also id.* ¶ 262 (favorably citing *Methanex* for the proposition that "[i]t is a principle of customary international law that, where economic injury results from a *bona fide* regulation within the police powers of a State, compensation is not required") (citation omitted); *id.* ¶ 256.

[872] *Lauder (USA) v. Czech Republic*, UNCITRAL, Final Award ¶ 198 (Sept. 3, 2001); *see also CME Czech Republic B.V. v. Czech Republic*, Partial Award ¶ 603 (Sept. 13, 2001) ("Of course, deprivation of property and/or rights must be distinguished from ordinary measures of the State and its agencies in proper execution of the law. Regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the (host) State.").

[873] *Technicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, 43 I.L.M. 133, Award ¶ 119 (May 29, 2003).

"[t]he general body of precedent usually does not treat regulatory action as amounting to expropriation."[874]

These decisions are in accord with respected secondary authorities, such as the *Harvard Convention on the International Responsibility of States for Injuries to Aliens*, drafted in 1961 by Professors Sohn and Baxter, which provides:

> An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results . . . from the action of the competent authorities of the State in the maintenance of public order, health, or morality; . . . [or] otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful, provided . . . it is not a clear and discriminatory violation of the law of the State concerned, [and] it is not an unreasonable departure from the principles of justice recognized by the principle legal systems of the world . . . .[875]

The Third Restatement of the Law of Foreign Relations likewise provides that *bona fide* regulations that are not discriminatory are non-compensable;[876] so, too, does the 1967 OECD Draft Convention on the Protection of Foreign Property, which provides that measures taken in the pursuit of a State's "political, social or economic ends" do not constitute a compensable expropriation.[877] This view is shared by respected

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[874] *S.D. Myers, Inc. v. Government of Canada,* NAFTA/UNCITRAL, First Partial Award ¶ 281 (Nov. 12, 2000), *reprinted in* 40 I.L.M. 1408 (2001); *see also Too v. Greater Modesto Insur. Assoc.*, 23 IRAN-U.S. CL. TRIB. REP. 378 ¶ 26 (1989) ("[A] State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price.").

[875] Louis B. Sohn and R.R. Baxter, *Convention on the International Responsibility of States for Injuries to Aliens, Final Draft with Explanatory Notes*, art. 10(5) (1961), *reprinted in* F.V. GARCÍA-AMADOR ET AL., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1974).

[876] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 (Comment *g*) (1987) ("A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory . . .").

[877] OECD Draft Convention on the Protection of Foreign Property (Oct. 12, 1967), 71 I.L.M. 117.

commentators as well.[878] In its 2004 Model BIT, on which Glamis relies, the United States stressed that:

> [e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.[879]

Glamis has failed to demonstrate that its claim presents the "rare circumstances" where a regulatory expropriation claim might succeed. Indeed, it has failed to identify a single international law authority where a tribunal has found that a *bona fide* non-discriminatory regulation of general application has constituted an expropriation. In each case where a tribunal applying international law has been faced with this issue, it has rejected the expropriation claim. In *Saluka*, for example, the tribunal dismissed the expropriation claim because it found that the assumption of administration over the investor's bank was "a lawful and permissible regulatory action by the Czech Republic aimed at the general welfare of the State."[880] The tribunal consequently found that "in

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[878] *See, e.g.,* B.A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 50 (1959) ("Whatever may be the remedy of foreigners caught by general changes in the law, if those changes do not in fact dispossess them but merely lessen the value of their holdings or expectations, in the general interest, then bona fide changes in the public interest will not be confiscations, since the owners are left in possession of their property."); S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 50-51 (1953) (noting that "State practice contains numerous examples of the suppression of particular activities which may be carried out . . . . In the first place, the activity may be regarded as harmful at a given time although it was perfectly legal hitherto and may indeed become so again. . . . In all these cases where a particular activity was suppressed, with a resulting destruction of important corporeal and incorporeal property rights, no compensation was paid to those suffering damage in consequence of the measures taken"); G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L. 307, 335 (1962) ("It would seem, on balance, that in cases of . . . 'partial prohibition' the difficulties are so great that the only practicable solution is to resolve all doubts against the alien claimant."); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 535 (1998) ("State measures, prima facie a lawful exercise of powers of government, may affect foreign interest considerably without amounting to expropriation."); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 283 (1994) ("[E]nvironmental protection . . . legislation [is a] non-compensable taking[]. These regulations are regarded as essential to the efficient functioning of the state.").

[879] 2004 U.S. MODEL BILATERAL INVESTMENT TREATY ann. B, ¶ 4(b).

[880] *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award ¶ 275 (Mar. 17, 2006).

imposing the forced administration . . . the Czech Republic adopted a measure which was valid and permissible as within its regulatory powers, notwithstanding that the measure had the effect of eviscerating [claimant's] investment . . . ."[881] Similarly, in *Feldman*, the tribunal dismissed claimant's expropriation claim, finding that the failure to grant tax rebates on exported cigarettes was within Mexico's power to regulate tax law and policy, notwithstanding the fact that, as a result of this policy, claimant was no longer able to engage in his business.[882]

The sole NAFTA Chapter Eleven tribunal to have found an expropriation is *Metalclad Corp. v. United Mexican States*. The only portion of that decision to survive *vacatur* was the tribunal's finding that an ecological decree that designated an area including claimant's existing landfill as a cacti preserve, and that effectively "barr[ed] forever the operation of the landfill" constituted an expropriation.[883] The ecological decree in that case, however, is fundamentally different from the reclamation measures at issue here. A decree of that nature is undeniably not a measure of general applicability, as it applies only to a specific parcel of land. The decree, for example, did not set forth a

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[881] *Id.* ¶ 276.

[882] *Marvin Roy Feldman Karpa v. United Mexican States,* Case No. ARB(AF)/99/1, 118 ICSID REP. 341, Award ¶¶ 109, 113, 116 (Dec. 16, 2002), *reprinted in* 42 I.L.M. 625 (2003); *see also Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Final Award, pt. IV, ch. D ¶ 9 (Aug. 3, 2005).

[883] *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/91/1, Award ¶ 109 (Aug. 30, 2000). The arbitral tribunal also based its finding of an expropriation on municipal officials' refusal to grant Metalclad a permit to operate the landfill after finding that Metalclad had invested in reliance on the federal government's representations that it had exclusive authority to issue permits for hazardous waste disposal facilities. That portion of the decision, however, was vacated. *See United Mexican States v. Metalclad Corp.,* 5 ICSID REP. 236, ¶ 133 (Sup. Ct. B.C. May 2, 2001); *see also Marvin Roy Feldman Karpa v. United Mexican States,* Case No. ARB(AF)/99/1, 118 ICSID REP. 341, Award ¶ 107 (Dec. 16, 2002), *reprinted in* 42 I.L.M. 625 (2003) (noting that "the principal rationale for th[e] [*Metalclad*] decision was substantially overruled by the reviewing court, the Supreme Court of British Columbia"). The *Metalclad* tribunal's statement as to what constitutes an expropriation has also been widely criticized as inaccurate and far-reaching. *See United Mexican States v. Metalclad Corp.,* 5 ICSID REP. 236, ¶ 99 (Sup. Ct. B.C. May 2, 2001) (noting that the tribunal had applied "an extremely broad definition of expropriation" which exceeded the "conventional notion of expropriation" by encompassing "legitimate rezoning of property by a municipal or other zoning authority").

standard applicable to an entire industry. By contrast, the reclamation requirements at issue here are generally applicable to all similarly situated mines.

Similarly, although concerning a regulation, *Whitney Benefits Inc. v. United States*, cited by Glamis, also concerned a measure that had the effect of barring forever all types of mining on a particular type of property.[884] This is in stark contrast to the measures at issue here. Neither SB 22 nor the SMGB's amendments to its regulations prohibit mining on the land at issue. The measures merely govern the manner in which the land needs to be reclaimed; they do not affect Glamis's mining claims.[885]

*United Nuclear Corp. v. United States*, which Glamis also cites, is similarly inapposite.[886] In *United Nuclear,* a mining company had obtained a uranium lease from a Native American tribe.[887] Before beginning any mining, the mining company was required to get approval from the Secretary of the Interior.[888] DOI officials stated that they would not approve the mine plan until the tribe gave its approval, thus effectively giving the tribe mine veto power.[889] The tribe would not give its approval, and the lease ultimately expired because of the mining company's failure to begin operations.[890] The court concluded that the Secretary's refusal to approve the mining plan was a taking of the leasehold interest.[891] Here, neither of the California measures gives Native American

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[884] *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394, 397 (1989).

[885] *See, e.g., S.D. Myers, Inc. v. Government of Canada,* NAFTA/UNCITRAL, First Partial Award ¶ 282 (Nov. 12, 2000), *reprinted in* 40 I.L.M. 1408, 1440 (2001) ("Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference.").

[886] *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990).

[887] *Id*. at 1433.

[888] *Id.* at 1434.

[889] *Id.*

[890] *Id.* at 1435.

[891] *Id.* at 1437.

tribes the ability to veto a mining project. And, as noted above, neither measure has yet been applied to Glamis's plan of operations.[892] Therefore, *United Nuclear* does not support Glamis's argument.

The legislation and regulations at issue here are non-discriminatory, of general applicability, and were enacted for the public welfare. Under international law, there is a "necessary presumption that States are 'regulating' when they say they are 'regulating,' and they are especially to be honored when they are explicit in this regard."[893]

> [I]f the facts are such that the reasons actually given [for an alleged expropriatory measure] are plausible, search for the unexpressed 'real' reasons is chimerical. No such search is permitted in municipal law, and the extreme deference paid to the honour of States by international tribunals excludes the possibility of supposing that the rule is different in international law.[894]

Glamis has not come close to overcoming this presumption.

SB 22 was enacted to accommodate Native Americans' religious freedoms granted under both the U.S. and California Constitutions. It was also enacted to preserve sites of historic and cultural significance – an objective reflected in California's Sacred Sites Act, as well as in various other federal and state laws.[895] SB 22's reclamation requirements better enable the Quechan Tribe to use the area as a spiritual and cultural teaching area; to traverse its sacred Trail of Dreams, both physically and spiritually; and

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[892] *See supra* Arg. Sec. II.A.

[893] Burns H. Weston, *Constructive Takings Under International Law: A Modest Foray Into the Problem of "Creeping Expropriation,"* 16 VA. J. INT'L L. 103, 121 (1975); *see also* G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L. 307, 338 (1962) ("A State's declaration that a particular interference with an alien's enjoyment of his property is justified by the so-called 'police power' does not preclude an international tribunal from making its own independent determination of this issue. But, if the reasons given are valid and bear some plausible relationship to the action taken, no attempt may be made to search deeper to see whether the State was activated by some illicit motive.").

[894] G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT'L L. 307, 338 (1962) at 332.

[895] *See supra* Facts Sec. II.A.

to preserve important views of the horizon, including Picacho Peak and the Indian Pass area.

Glamis relies heavily on various statements made by California government officials, indicating that the Imperial Project was the impetus for SB 483 and SB 22, including Governor Davis's statement that SB 22 would effectively stop Glamis's proposed Imperial Project. The inference that Glamis seeks, however – that SB 22 is not of general application – cannot be drawn. Glamis's proposed Imperial Project was merely the most prominent and immediate example of the harm that open-pit metallic mining would cause to cultural resources and sites of significant religious, cultural and historic importance. Preventing the injury that would be caused by Glamis's proposed Imperial Project, and other projects like it, was the purpose of the bill. That Glamis's proposed Imperial Project might have been the mining project most immediately affected by SB 22 does not make the bill discriminatory or provide a basis for finding an expropriation.

In rejecting an argument similar to Glamis's, the U.S. Supreme Court in *Penn Central* stated:

> It is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that itself does not mean that the law effects a "taking." Legislation designed to promote the general welfare commonly burdens some more than others. The owners of the brickyard in *Hadacheck*, of the cedar trees in *Miller v. Schoene*, and of the gravel and sand mine in *Goldblatt v. Hempstead*, were uniquely burdened by the legislation sustained in those cases.[896]

Commenting on the restrictions in the above cases that were found not to be expropriatory, the Court noted that rather than preventing actions traditionally considered

[896] *Penn Central Transp.Co. v. City of New York*, 438 U.S. 104, 133-34 (1978) (citations omitted).

to be nuisances, the "restrictions were reasonably related to the implementation of a policy – not unlike historic preservation – expected to produce a widespread public benefit and applicable to all similarly situated property."[897] It then determined that the restrictions placed on the property owners in *Penn Central* – which declared their property to be a historic landmark and thus prevented the addition of a tower to that building – were not expropriatory. The same is true of SB 22.

Glamis's suggestion that California admitted that SB 22 constituted a taking of Glamis's property is without merit.[898] Glamis cites a statement made in an Enrolled Bill Memorandum sent to the Governor, that SB 22 "[c]reates a mandate; however, because this bill would only affect one mine, the proposed Glamis Gold mine in Imperial County, any reimbursable costs are estimated to be minor." Glamis interprets this statement as constituting an admission by California that it would have to reimburse *Glamis's* costs.[899] This is incorrect.

The California Constitution requires that, when the California Legislature mandates certain programs that impose costs on local governments, it must reimburse the *local government* for the costs incurred.[900] SB 22 imposes minimal costs on the local lead agencies that would have to implement its provisions. As mentioned above, at the time, the only identified proposed open-pit mining project located in the vicinity of Native American sacred sites was Glamis's Imperial Project. As such, the reimbursable

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[897] *Id.* at 134 n.30.

[898] Mem. ¶ 374.

[899] *Id.* (citing Enrolled Bill Memorandum to Governor (Apr. 4, 2003) (6 FA tab 283)).

[900] CAL. CONST. of 1849, art. XIII B, § 6 ("Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service."); *see also* California Mandates Commission website at http://www.csm.ca.gov/.

costs to the local lead agency, the Imperial County Planning Department, would be minor. The term "reimbursable costs" does not refer to payments to be made to Glamis.

The amendments to the SMGB's regulations are likewise non-discriminatory measures of general applicability adopted in the public interest. As explained in the Notice of Emergency Rulemaking for the amendments, California was concerned about the harm to the environment and public health and safety hazards caused by open-pit cyanide heap leach mining, including the massive open pits that remain unreclaimed after completion of the mining process, as well as the fact that "the surrounding landscape will be additionally marred and the environment threatened by a waste rock pile or piles which will contain residual harmful solutions."[901]

Glamis builds a straw man in claiming that the "purpose" of the regulations was to "permanently prevent the approval of the Glamis Gold Mine" and that the regulations thus did not have a legitimate public purpose.[902] As discussed above, the regulations were intended to stop Glamis's proposed Imperial Project and others like it from going forward *in the manner in which they were proposed*. They were intended to ensure that future mines would be reclaimed in compliance with the requirements of SMARA, and not left in an unreclaimed or partially reclaimed state that would prevent alternate future uses of the land, as Glamis's plan of operations proposes to do.[903] The Board's adoption of emergency regulations was tied not only to the pending approval of the Imperial Project, but also to any other similar projects of which the Board was unaware.[904] The

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[901] Title 14, Natural Resources, Notice of Emergency Rulemaking: Backfilling at 5 (Dec. 12, 2002).

[902] Mem. ¶¶ 488-89.

[903] Parrish Declaration ¶ 15.

[904] Title 14, Natural Resources, Notice of Emergency Rulemaking: Backfilling at 4-5 (Dec. 12, 2002).

emergency regulation and the permanent regulations that followed were applicable to all open-pit mines in California for which a reclamation plan and financial assurance had not been approved as of December 18, 2002.[905]

In other words, SMGB enacted the regulations because of the damage projects such as the proposed Imperial Project would cause to the environment absent the regulations, and not for any reason particular to Glamis.[906] Glamis has offered no reason why California would want solely to stop the Imperial Project rather than to regulate all mining projects of a similar nature in California, other than providing a vague reference to an unspecified "political purpose."[907] It has not offered a more substantial explanation because it cannot.

The SMGB regulations do not arbitrarily single out a particular parcel of land for less favorable treatment than other parcels of land. The regulations apply equally to all open-pit metallic mines in California. As described above, the SMGB recently refused to exempt the Soledad Mountain mine in Kern County from the backfilling and recontouring regulations, notwithstanding the fact that Soledad had obtained an approved reclamation plan and had a financial cost estimate in place as of December 18, 2002, because Soledad did not have its financial assurance by that date.[908] Similarly, prior to the adoption of the emergency regulations, the Executive Officer to the SMGB advised

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[905] *See* CAL. CODE REGS. tit. 14, § 3704.1; Parrish Declaration ¶¶ 16, 21; Craig Declaration ¶ 10.

[906] *See* Parrish Declaration ¶ 15 (Emergency regulations would establish "environmental protection standards for reclamation of the proposed Imperial Project, [and] also for any other proposed mine operation of which the Board was then unaware.").

[907] Mem. ¶ 496.

[908] *See* Recording of July 13, 2006 SMGB meeting (10 FA tab 112); Craig Declaration ¶¶ 11-13; *see also supra* Facts Sec. V.B.

the owners of the Briggs mine that a proposed expansion that was not contiguous to the existing site would be subject to the regulations.[909]

Furthermore, contrary to Glamis's suggestions, the fact that the SMGB regulations apply only to open-pit metallic mines and not to industrial mineral or aggregate (non-metallic) mining operations is unremarkable.[910] The purpose of the backfilling regulations is, in part, to reduce the potential harmful effects from the "overburden" materials that are removed from the land in metallic mines, and which have been leached with cyanide.[911] In the case of non-metallic mines, such as gravel, the vast majority of the mined material is extracted and removed for use.[912] Therefore, little material remains on the surface to place back into the pits. Glamis's claims that the regulations are discriminatory are thus unfounded.

For the foregoing reasons, it is clear that SB 22 and the amendments to the SMGB regulations are non-discriminatory legislation and regulations of general application enacted for the public welfare, and are thus not expropriatory.

### D. The Federal Government's Actions Did Not Expropriate Glamis's Investment

Neither of the primary federal government actions (or inactions) of which Glamis complains – the decision denying the plan of operations in January 2001 or the fact that its plan was not approved prior to submission of its claim to arbitration[913] – supports an

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[909] Parrish Declaration ¶ 21; *see also supra* Facts Sec. V.B.

[910] Mem. ¶ 504.

[911] State Mining and Geology Board, Executive Officer's Report (Apr. 10, 2003), Agenda Item 3, Description of Regulatory Language for subsection (c), at 4 (6 FA tab 287).

[912] Parrish Declaration ¶ 13.

[913] *See* Mem. ¶ 511 (arguing that the federal government expropriated its property when DOI denied its plan of operations based on the allegedly "legally unsupportable veto authority" created by the 1999 M-Opinion and then "condemn[ed] the plan to eternal bureaucratic limbo").

expropriation claim. Glamis has failed to explain how, much less provide any evidence that, the federal government's actions expropriated its mining claims.

As an initial matter, Glamis's own allegations belie its expropriation claim. Glamis asserts that its mining claims were expropriated on December 12, 2002 – the day that California's SMGB enacted the emergency amendments to its regulations.[914] If, as Glamis alleges, California's reclamation requirements had the effect of expropriating its mining claims, then the federal government's actions taken in relation to Glamis's plan of operations cannot have expropriated that same property.

Glamis's argument that its plan would have been grandfathered under SB 22 and the SMGB's amended regulations had the federal government only approved its plan at an earlier date also fails on both factual and legal grounds.[915] Glamis has repeatedly asserted that the California Legislature and the SMGB enacted the legislation and amended regulations, respectively, *in response to* DOI's rescission of the ROD.[916] Glamis has not – and cannot – demonstrate that the California Legislature or the SMGB would not have acted earlier to enact the challenged California measures had the federal government approved its plan at an earlier date. Thus, even assuming *arguendo* that Glamis's complaints about the federal processing of its plan of operations had merit, such action or inaction cannot have been the cause of any alleged expropriation.

Glamis contends that the federal actions caused it to become subject to a different, future expropriatory measure by the state of California.[917] Even assuming *arguendo* that

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[914] *Id*. ¶¶ 393-94, 437, 562, 565, 570; Behre Dolbear Rpt. at 1.2.

[915] Mem. ¶ 514.

[916] *Id*. ¶ 552; NOA ¶ 18.

[917] Mem. ¶ 514.

this was the case, such a contention does not make the federal actions expropriatory. The *Hauer v. Land Rheinland-Pfalz* case before the European Court of Justice is instructive on this point.[918] There, the plaintiff's permit to plant vines was initially denied. The government later conceded that the denial had been mistaken.[919] In the interim, however, the European Community enacted a regulation prohibiting the planting of new vines for three years. The plaintiff challenged the regulation as an expropriation arguing, among other things, that he would not have been subject to the ban had his permit not been unlawfully denied. In dismissing plaintiff's expropriation claim, the Court determined that the claimant was subject to the ban, and that it would be inappropriate to consider when his application was submitted or the fact that it had been initially inappropriately denied.[920]

Similarly, in *Tabb Lakes v. United States*, a U.S. Court rejected a takings claim where the plaintiff argued that the subsequent alleged delay in issuing its permit converted an earlier unlawfully issued cease and desist order into a taking.[921] In rejecting that claim, the court held that, "[b]ecause the order of October 8, 1986, did not effect a taking when issued, subsequent acts do not change its nontaking character."[922]

The same is true here. Because, by Glamis's own admission, the federal actions themselves were not expropriatory, subsequent acts taken by California cannot have the effect of changing the character of the federal actions into an expropriation.

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[918] *Hauer v. Land Rheinland-Pfalz*, Case 44/79, 1979 E.C.R. 3727.

[919] *Id*. ¶ 3.

[920] *Id*. ¶¶ 2, 6-9, 29-30.

[921] *Tabb Lakes Ltd. v. United States,* 10 F.3d 796, 803 (Fed. Cir 1993).

[922] *Id.*

Glamis's complaints about the ROD, which denied its plan of operations, fail for two additional reasons. *First*, the case law demonstrates – and Glamis itself acknowledges – that, to constitute an expropriation a deprivation must be more than merely "ephemeral."[923] The ROD for DOI's denial of Glamis's plan of operations was in effect for approximately ten months before the DOI rescinded it.[924] Such a short deprivation is merely ephemeral, and does not give rise to an expropriation.[925]

*Second,* Glamis's complaint that the 1999 M-Opinion was procedurally defective does not convert the ROD, which was based in part on that opinion, into an expropriatory action.[926] The United States court decision in *Tabb Lakes* is instructive on this point as well. There, the United States Army Corps of Engineers issued a cease and desist order. A court later found that the alleged basis for the Army Corps' jurisdiction, which the court described as a "far-reaching Memorandum," should have undergone appropriate notice and comment under the Administrative Procedures Act ("APA").[927] The court also expressed "grave doubts" that the Army Corps had jurisdiction over the property in question, even had it complied with the APA.[928] Another court, in a later, related case dismissed plaintiff's takings claim, finding that the fact that "plaintiff successfully

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[923] Mem. ¶ 438.

[924] Rescission of Record of Decision for the Imperial Project Gold Mine Proposal (Nov. 23, 2001) (Glamis D-00218-0004) (5 FA tab 219).

[925] *See, e.g., S.D. Myers, Inc. v. Government of Canada,* NAFTA/UNCITRAL, First Partial Award ¶¶ 284, 287-88 (Nov. 12, 2000), *reprinted in* 40 I.L.M. 1408, 1440 (2001) (finding no expropriation where Canada closed its border to exports of PCB waste for eighteen months); *Tabb Lakes, Ltd. v. United States*, 26 Cl. Ct. 1334, 1354, *aff'd*, 10 F.3d 796 (1993) (holding that a delay of more than three years, during which plaintiff was subject to the cease and desist order that had been invalidly imposed, was "analogous to 'the case of normal delay in obtaining building permits, changes in zoning ordinances, variances, and the like' which do not give rise to a taking the constitutional sense") (citations omitted).

[926] Mem. ¶ 463.

[927] *Tabb Lakes, Ltd. v. United States of America*, 715 F. Supp. 726, 729 (E.D. Va 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989) (unpublished).

[928] *Id.*

challenged the Corps' jurisdiction renders the initial assertion of jurisdiction neither unreasonable nor extraordinary."[929] In affirming that decision, the appellate court rejected "Tabb Lakes' theory that compensation for a taking must be paid where a mistake is made in the Corps' permit process."[930]

The same is true here. As was the case with the memorandum at issue in *Tabb Lakes*, Solicitor Myers found that the definition of FLPMA's "undue impairment" standard, as analyzed in the 1999 M-Opinion should have been prescribed by regulation.[931] That alone, however, does not render the 1999 M-Opinion either "unreasonable or extraordinary." Unlike the plaintiff in *Tabb Lakes*, moreover, Glamis had an opportunity to comment upon the subject matter of the 1999 M-Opinion before it was issued.[932] In addition, far from expressing "grave doubts" regarding the substance of the 1999 M-Opinion, Solicitor Myers implied that DOI could define the "undue impairment" standard just as Solicitor Leshy had if it did so through rulemaking.[933] Furthermore, the only court to have opined on the substance of the 1999 M-Opinion agreed with its conclusions insofar as it held that FLPMA's "undue or unnecessary degradation" standard gave BLM statutory authority to deny a plan of operations for causing undue degradation, even where that degradation was necessary for the project to be economical under current mining practices.[934]

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[929] *Tabb Lakes*, 26 Cl. Ct. at 1354.

[930] *Tabb Lakes,* 10 F.3d at 803.

[931] 2001 M-Opinion at 18 (5 FA tab 216).

[932] Letter from Charles Jeannes, Senior Vice President and General Counsel, Glamis Gold, Inc., and Gary Boyle, General Manager, Glamis Imperial Corp., to Bruce Babbitt, Secretary of Interior, Department of the Interior (Nov. 10, 1999) (7 FA tab 31); *see infra* Facts Sec. IV.D.

[933] 2001 M-Opinion at 19-20 (5 FA tab 216).

[934] *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 42 (2003).

In addition, the fact that the DOI had not approved Glamis's plan of operations by the time Glamis filed its claim in arbitration does not amount to an expropriation of Glamis's mining claims. This is so for several reasons. *First,* as demonstrated above, Glamis's property rights are limited to those in its unpatented mining claims, and do not include the right to have a particular plan of operations approved.[935] Glamis thus was not divested of any property rights.[936]

*Second*, while a failure to act may, under certain circumstances, give rise to an expropriation, there was no failure to act in this case. During all relevant times, both before the plan denial and after the rescission, the government was either drafting the EIS/EIR, responding to comments, conducting the validity examination, or resolving legal questions arising from the mine's impact on cultural resources and Native American sacred sites.[937] In short, DOI was continuing to process Glamis's plan of operations at the time Glamis provided notice of its intent to commence these proceedings.

Glamis could not have fairly expected that its plan of operations would be rubber-stamped by DOI.[938] A reasonable investor in Glamis's situation would have foreseen the possibility that a mining plan within an area of the CDCA rich in Native American cultural resources would be subject to close and potentially lengthy scrutiny. In fact, in 1990, before Glamis completed its plan of operations for the Imperial Project, BLM denied a plan of operations for a mine located in the CDCA, near the Indian Pass Wilderness Area, on the grounds that it would cause undue impairment of lands within

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[935] *See supra Arg.* Sec. II.B.

[936] *Id.*

[937] *See supra Facts* Sec. IV.

[938] Mem. ¶ 456-64.

the CDCA.[939] In that case, the Interior Board of Land Appeals affirmed the California State BLM Director's determination that the proposed plan of operations "would cause substantial visual impacts from mining, road building, and related activity due to removal of vegetation, disturbance of topsoil, and disruption of the natural contours of the land."[940]

Glamis's suggestion that its plan of operations should have been processed as quickly as those of some other mines in the CDCA ignores crucial differences between the proposed Imperial Project and those other mines. None of the other mines referenced by Glamis was located on a site that had not previously been mined,[941] or presented such a grave threat to Native American sacred sites of such importance.[942]

In any event, Glamis has failed to cite a single international law case where a mere delay in the processing of a permit has been found to constitute an expropriation of the claimant's property rights. Nor do normal delays in obtaining government actions constitute takings under U.S. law.[943] Particularly where the regulatory issues are

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[939] *Eric L. Price, James C. Thomas* (I.B.L.A. 88-373), 116 I.B.L.A. 210 (1990). The denial of the plan of operations in *Price* took place before the enactment of the CDPA. That fact, however, does not diminish the relevance of *Price* to the present case. The IBLA concluded that BLM's rejection of the plan of operations was supported by the record because the proposed operations would result in undue impairment of the lands directly involved in the proposed operations, and not solely on the nearby wilderness area. *Id*. at 219-20.

[940] *Id*.; *see also supra* Arg. Sec. III.B.1 (discussing *Reeves* case).

[941] *See supra* Facts Sec. III.B

[942] *See supra* Facts Sec. IV.A.6

[943] *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 335 (2002) (finding that a taking did not arise from a thirty-two-month delay in the use of property resulting from government regulation, even where the delay resulted in economic harm); *First English Wyatt v. United States*, 271 F.3d 1090, 1098 (Fed. Cir. 2001) (finding no taking despite a total permitting process of ten years); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1352 (Fed. Cir. 2004) (finding no taking despite an eighteen-month delay beyond the prescribed statutory one-year time frame for taking action); *Bass Ent. Prod. Co. v. United States*, 381 F.3d 1360, 1366 (Fed. Cir. 2004) (holding a forty-five-month delay in processing permits to drill for oil on federal lands was not extraordinary, and finding no taking).

complex, the government must be afforded considerable leeway in conducting permit review processes.

> The nature of the regulatory scheme is especially critical when the permitting process requires detailed technical information necessary to determine environmental impacts. Governmental agencies that implement complex permitting schemes should be afforded significant deference in determining what additional information is required to satisfy statutorily imposed obligations."[944]

In this respect, when evaluating claims of delay, United States courts grant significant deference to government agencies, acknowledging the complexity that processing permit applications for mining operations, which can involve myriad environmental and other concerns, entails.[945]

*Finally*, Glamis's failure to make a reasonable effort to seek domestic relief with respect to the federal measures further weakens its expropriation claim.[946] In *Generation Ukraine v. Ukraine*, for example, the tribunal observed that "the very reality of conduct tantamount to expropriation is doubtful in the absence of a reasonable – not necessarily exhaustive – effort by the investor to obtain correction."[947] In that case, the investor claimed that certain government actions, including the city's cancellation of the claimants' forty-nine year lease rights and its failure to issue new land lease agreements, constituted an expropriation.[948] The tribunal rejected that claim on the basis that "the

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[944] *Wyatt v. United States*, 271 F.3d 1090, 1098 (Fed. Cir. 2001).

[945] *Id*.

[946] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 109 n.28 (2005).

[947] *Generation Ukraine Inc. v. Ukraine*, 44 I.L.M. 404, Award ¶ 20.30 (Sept. 16, 2003).

[948] *Id.*¶¶ 18.23, 20.30.

conduct cited by the Claimant was never challenged before the domestic courts of Ukraine."[949]

Likewise, in *Feldman v. Mexico*, the tribunal relied in part on the claimant's failure to pursue local remedies in rejecting the expropriation claim. The tribunal noted that "the Claimant could have availed himself early on of the procedures available under Mexican law to obtain a formal, binding ruling" on the issue of its entitlement to certain tax rebates, "but apparently chose not to do so."[950] That failure, observed the tribunal, was done "at [claimant's] peril, particularly given that he was dealing with tax laws and tax authorities, which are subject to extensive formalities in Mexico and in most other countries of the world."[951]

Similarly, in *EnCana Corporation v. Republic of Ecuador*, the tribunal relied in part on the claimant's failure to pursue domestic remedies in denying the expropriation claim.[952] In that case, the claimant, a Canadian oil company, alleged an expropriation based on the denial of value-added tax refunds by the Ecuadorian tax authorities. The tribunal rejected the claim, finding that "even if [Ecuador] may have been looking for reasons to deny VAT recovery to oil companies," such conduct was "tempered" by, among other things, the claimant's failure to challenge the denial in court.[953]

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[949] *Id.* ¶¶ 20.33, 20.38.

[950] *Id.* ¶ 114.

[951] *Id*.

[952] *EnCana Corp. v. Republic of Ecuador*, London Ct. Int'l Arb., Award ¶ 196 (Feb. 3, 2006).

[953] *Id*. ¶ 196*; see also Tabb Lakes,* 26 Cl. Ct. at 1354 (in dismissing temporary expropriation claim, relying on fact that plaintiff failed to seek a "formal jurisdictional determination during the ten-month period following its application for a permit following issuance of the Cease and Desist Order"). Consistent with *Generation Ukraine*, *Feldman*, and *EnCana*, the unavailability of – as opposed to a claimant's lack of interest in – domestic remedies may constitute a factor *supporting* a finding of expropriation. *See, e.g., Oil Field of Texas, Inc. v. Islamic Republic of Iran*, 12 IRAN-U.S. CL. TRIB. REP. 308, ¶ 43 (1986) (finding an expropriation and expressly "taking into account the Claimant's impossibility to challenge" in Iran a court

Here, Glamis chose not to wait for a decision from the DOI on its plan of operations. Neither did it challenge DOI's or BLM's actions – or alleged inaction – in court. In this respect, Glamis resembles the hypothetical claimant described in *Generation Ukraine*, who "abandon[s] his investment without any effort at overturning the administrative fault; and thus claims an international delict on the theory that there had been an uncompensated virtual expropriation."[954]

Under well-established principles of international law, Glamis's claim that the federal government's actions expropriated its investment should be rejected.

## IV. Glamis Has Failed To Demonstrate A Violation Of Article 1105(1)

Glamis's claim that the United States breached Article 1105(1) of the NAFTA should be dismissed. Glamis's claim is based on the mistaken premise that the measures at issue, taken separately or together, violate what Glamis contends are customary international law obligations on all States to manage their regulatory and legislative affairs in a transparent and predictable manner, to refrain from upsetting foreign investors' legitimate, investment-backed expectations, and to refrain from acting in an arbitrary or unjust manner.[955] Glamis, however, fails to demonstrate general and consistent State practice followed from a sense of legal obligation, as is necessary to prove a rule of customary international law. Even if Glamis had shown the existence of such rules – which it has not – none of the measures at issue, alone or in combination, lacked transparency, undermined Glamis's legitimate expectations, was arbitrary, or

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order prohibiting further rental payments by the National Iranian Oil Company (NOIC) to claimant for petroleum exploration and drilling equipment held by the NIOC).

[954] *Generation Ukraine Inc. v. Ukraine*, 44 I.L.M. 404, Award ¶ 20.30 (Sept. 16, 2003).

[955] Mem. ¶¶ 523-39.

constituted anything other than the normal exercise of regulatory and legislative decision-making in the face of complex and conflicting public interests.

Not only was the relevant government decision-making conducted in a regular and transparent manner, but also Glamis itself was one of the most active public participants in that process at every level of state and federal government. That Glamis's lobbying efforts evidently did not succeed, or that it may dislike the decisions ultimately reached by the State of California and the federal government, does not establish a breach of the NAFTA. As the *S.D. Myers* Chapter Eleven tribunal explained:

> When interpreting and applying the 'minimum standard' a Chapter Eleven tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potential controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.[956]

Glamis effectively requests that this Tribunal second-guess California's democratically established means of addressing the public interest in protecting the environment and irreplaceable, sacred Native American resources from the threat posed by open-pit cyanide heap leach mining, and the federal government's interpretation of its own regulations – a request this Tribunal lacks authority to grant. Glamis's Article 1105(1) claim should therefore be dismissed.

Below, we first demonstrate that NAFTA Article 1105(1) prescribes the minimum standard of treatment under customary international law. Second, we describe the content of that standard, and demonstrate that the measures at issue do not violate this

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[956] *S.D. Myers, Inc. v. Canada*, 232 I.L.M. 408, First Partial Award ¶ 261 (Nov. 13, 2000).

standard. Finally, we demonstrate that the California and federal measures at issue fully comply even with the standards Glamis advances, but which it fails to show are part of customary international law.

### A. An Article 1105(1) Claim Can Only Be Sustained When A Violation Of The Customary International Law Minimum Standard Of Treatment Has Been Demonstrated

The disputing parties agree that Article 1105(1) requires treatment in accordance with customary international law.[957] Article 1105 is captioned "Minimum Standard of Treatment." Paragraph One of that Article provides that "Each Party shall accord to investments of investors of another Party treatment in *accordance with international law*, including fair and equitable treatment and full protection and security."[958] In July 2001, the NAFTA Free Trade Commission, which is composed of the trade ministers of the three NAFTA Parties, issued the following Note of Interpretation:

> Minimum Standard of Treatment in Accordance with International Law
>
> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

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[957] Mem. ¶¶ 517-18 ("[T]he international minimum standard of treatment," including the "'fair and equitable treatment' standard," "is comprised of customary international law."). Given the parties' agreement that Article 1105(1) prescribes the customary international law minimum standard of treatment, Glamis's argument that Article 1105(1) must be interpreted in good faith is irrelevant. *See id*. ¶ 517. Rather, the pertinent issue is the *content* of the customary international law minimum standard of treatment.

[958] NAFTA art. 1105(1) (emphasis added).

This interpretation is binding on all Chapter Eleven tribunals.[959]

Thus, the minimum standard of treatment required by Article 1105 is that set by rules of customary international law. As Glamis itself recognizes,[960] a rule only crystallizes into customary international law over time through a general and consistent practice of States that is adhered to from a sense of legal obligation.[961] Establishment of such a rule thus requires two elements: "a concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)."[962]

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[959] *See id*. art. 1131(2) ("An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this section."). Glamis's suggestion that the Parties' interpretation amounts to a "re-interpretation" is unfounded. Mem. ¶ 517. Numerous NAFTA Chapter Eleven tribunals, the Supreme Court of British Columbia, and secondary authorities relied on by Glamis all recognize the interpretation's validity. *See, e.g., International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award ¶¶ 192-93 (Jan 26, 2006); *Methanex Corp. v. United States of America*, UNCITRAL, Award, Pt. IV, Ch. C ¶¶ 20-24 (Aug. 3, 2005) (noting that even if the interpretation had altered the meaning of Article 1105(1) – which it did not – it would nonetheless be "entirely legal and binding on a tribunal seized with a Chapter Eleven case" under the terms of the Vienna Convention on the Law of Treaties); *Waste Mgmt., Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, 43 I.L.M. 967, Award ¶¶ 90-91 (Apr. 30, 2004); *Loewen Group, Inc. v. United States of America*, 7 ICSID REP. 442, Award ¶¶ 124-28 (June 26, 2003); *ADF Group, Inc. v. United States of America*, 6 ICSID REP. 470, Award ¶¶ 175-78 (Jan. 9, 2003); *United Parcel Serv. of Am., Inc. v. Canada*, 7 ICSID REP. 288, Award ¶ 97 (Nov. 22, 2002); *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, 42 I.L.M. 85, Award ¶¶ 100-125 (Oct. 11, 2002); *United Mexican States v. Metalclad Corp.,* 5 ICSID REP. 236 ¶¶ 61-65 (Sup. Ct. B.C.) (May 2, 2001); Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, J. WORLD INVEST. & TRADE 357, 362-63 (noting, *inter alia*, that Article 1105(1)'s text "suggest[s] that . . . fair and equitable treatment is part of international law, specifically of its rules on the minimum standard of treatment").

[960] Mem. ¶ 518.

[961] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); *see also* United States-Chile Free Trade Agreement, ann. 10-A, June 6, 2003, State Dept. No. 04-35 ("The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Articles 10.4 and 10.9 results from a general and consistent practice of States that they follow from a sense of legal obligation."); United States – Singapore Free Trade Agreement, Exchange of letters of May 6, 2003, State Dept. No. 04-36 (same); Dominican Republic – Central America – United States Free Trade Agreement, ann. 10-B, Aug. 5, 2004, State Dept. No. 06-63 (same).

[962] CLIVE PARRY, JOHN P. GRANT, ANTHONY PARRY & ARTHUR D. WATTS, ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 82 (1986); Statute of the International Court of Justice art. 38(1) (customary international law is "international custom, as evidence of a general practice accepted as law"); *Case of Nicaragua v. United States* (Merits), I.C.J. REP. 14 (1986) ("[F]or a new customary rule to be formed, not only must the acts concerned 'amount to settled practice,' but they must be accompanied by the *opinion juris sive necessitates*. Either the States taking such action or the other States in a position to react to it,

The customary international law minimum standard of treatment does not impose a duty on States to compensate any party who complains that a particular regulation or legislation is "unfair."[963] The exercise of regulatory or legislative powers in the context of shifting governmental policies and public interests will inevitably result in outcomes that may appear unfair to some. Rather, the minimum standard sets an absolute minimum *floor* of treatment, ensuring that States' treatment of aliens does not "fall[] below a civilized standard."[964]

Such a minimum standard of treatment is necessary where protections under treaty-based national treatment obligations do not adequately protect aliens because the host State treats it own nationals unjustly or egregiously, and accords aliens like treatment. As the *S.D. Myers* tribunal observed:

> The minimum standard of treatment provision of the NAFTA is similar to clauses contained in [bilateral investment treaties]. The inclusion of a 'minimum standard' provision is necessary to avoid what might otherwise be a gap. A government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals. The 'minimum standard' is a *floor below which treatment of foreign investors must not fall*.[965]

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must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.'").

[963] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, ¶ B(1) (July 31, 2001).

[964] Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L. PROC. 51, 58 (1939). Likewise, Glamis's contention that the minimum standard of treatment is a *relative* standard that varies according to the "levels of development of the host state" must be rejected. *See* Mem. ¶ 519. The OECD Working Paper, on which Glamis itself relies, explicitly provides that the international minimum standard under customary international law "is an 'absolute,' 'noncontingent' standard of treatment, . . . as opposed to the 'relative' standards embodied in 'national treatment' …." OECD Working Paper on Fair and Equitable Treatment (2004) 2 & 8 n.32. It "provid[es] for a minimum set of principles which States, *regardless of their domestic legislation and practices*, must respect when dealing with foreign nationals and their property." *Id.* at n.32 (emphasis added).

[965] *S.D. Myers, Inc. v. Canada*, 232 I.L.M. 408, First Partial Award ¶ 259 (Nov. 13, 2000) (emphasis added); *see also* J.C. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17 ICSID REVIEW – FOR. INVEST. L.J. 21, 22-23 (2002) (citing E. Root, *The Basis for Protection to Citizens Residing Abroad*, 4 AM. J. INT'L L. 517 (1910)).

Sufficiently broad State practice and *opinio juris* have thus far coincided to establish minimum standards of State conduct in only a few areas. Article 1105(1) embodies, for example, the requirement to provide a minimum level of internal security and law and order, referred to as the customary international law obligation of full protection and security.[966] Similarly, Article 1105 recognizes that a State may incur international responsibility for a "denial of justice" where its judiciary administers justice to aliens in a "notoriously unjust"[967] or "egregious"[968] manner "which offends a sense of judicial propriety."[969] In addition, the most widely-recognized substantive standard applicable to legislative and rule-making acts in the investment context is the rule barring expropriation without compensation, but that obligation is particularized in the NAFTA under Article 1110.[970] In the absence of a customary international law rule governing

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[966] *See, e.g., Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award ¶¶ 67-77 (June 27, 1990); *Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award ¶ 6.06 (Feb. 21, 1997).

[967] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 44 (2005) (citing IRIZARRY Y PUENTE, DENIAL OF JUSTICE at 406); *id.* at 4 ("[A] state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner."); *Chattin* case (U.S. v. Mex.), 4 R.I.A.A. 282, 286-87 (1927) ("Acts of the judiciary . . . are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.") (emphasis omitted); D.P. O'CONNELL, INTERNATIONAL LAW 948 (2d ed. 1970) ("Bad faith and not judicial error seems to be the heart of" a denial of justice claim.).

[968] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 60 (2005) ("The modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of justice.").

[969] *Loewen Group, Inc. v. United States of America*, 7 ICSID REP. 442, Award ¶ 132 (June 26, 2003) (a denial of justice may arise where there has occurred a "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety"). Claims for denial of justice may also arise with respect to administrative proceedings that are quasi-judicial in nature, although international law restraints on administrative action are even less strict. *See International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award ¶ 200 (Jan 26, 2006) ("As acknowledged by Thunderbird, the SEGOB proceedings should be tested against the standards of due process and procedural fairness applicable to administrative officials. *The administrative due process requirement is lower than that of a judicial process*.") (emphasis added); *see also id*. (noting that in the administrative context, mere procedural errors that may lead to a seemingly arbitrary or unfair result "do[] not attain the minimum level of gravity required under Article 1105 of the NAFTA").

[970] *See* ANDREAS H. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 168 (1949) ("With regard to the legislative power, no general customary rule limiting the legislative power of

State conduct in a particular area, however, a State remains free to conduct its affairs as it deems appropriate.[971]

The burden is on the *claimant* to establish the existence of a rule of customary international law.[972] "The party which relies on a custom . . . must prove that this custom is established in such a manner that it has become binding on the other party."[973] The claimant also bears the burden of demonstrating that the State has engaged in conduct that has violated that rule.[974]

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[a] State to legislation not interfering with vested rights, or making internationally illegal, legislation infringing vested rights and therefore rendering a State internationally liable for it, has ever been shown to exist . . . . "; noting only substantive obligation to pay compensation for expropriation); 5 CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 44-66 (1970) (extensive analysis of State responsibility for legislative acts that identifies three categories of legislative acts that implicate State responsibility: expropriation, promulgation of a law contrary to international agreements, and failure to promulgate a law required by international agreement or to abrogate a law inconsistent with an international agreement); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 178-196, ch. 2 intro. n. (1965) (extensive review of substantive principles of State responsibility for injury to aliens, in which sections 178-183 "relate to applications of this [international minimum] standard to the procedure followed by a state in the administration of justice, as distinct from the provisions of its substantive law;" remaining sections address expropriation, repudiation of contract and prohibition on gainful activity by aliens).

[971] *S.S. Lotus* (Fr. v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 18 (rejecting any implied '[r]restrictions upon the independence of States," and noting that States "enjoy a wide measure of discretion which is only limited in certain cases by prohibitive rules."); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 52 (July 8) ("State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.").

[972] *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 200 (Aug. 27) (Judgment) (quoting *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 276 (Nov. 20) (Judgment)) ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party."); NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 330 § 214 (6th ed. 1999) (burden is placed on the party "who relies on a custom to establish its existence and exact content") (translation from French by counsel); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 12 (5th ed. 1998) ("In practice the proponent of a custom has a burden of proof of the nature of which will vary according to the subject-matter and the form of the pleadings.").

[973] *Asylum (Colom. v. Peru)*, 1950 I.C.J., at 276.

[974] *See, e.g., Tradex Hellas S.A. v. Albania*, 14 ICSID REV. – FOREIGN INV. L.J. 197, 219 (Final Award Apr. 29, 1999) ("[I]t is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim . . . . A Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.") (internal quotation omitted); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 334 (1987) ("[T]he general principle [is] that the burden of proof falls upon the claimant . . . ."); *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, 42 I.L.M. 625, Award ¶ 177 (Dec. 16, 2002) ("[I]t is a generally accepted

### B. Glamis Has Failed To Establish That The California And Federal Measures At Issue Implicate The Minimum Standard Of Treatment

Glamis challenges two sets of California measures: (i) the amendments to the SMGB regulations, adopted on an emergency basis on December 12, 2002, and made permanent on May 30, 2003; and (ii) Senate Bill 22, passed by the California State Legislature and signed into law by Governor Davis on April 7, 2003.[975] Glamis also challenges two aspects of the federal administrative process: (i) the 2001 Record of Decision denying its plan of operations and the 1999 M-Opinion on which that ROD was, in part, based;[976] and (ii) the fact that its plan of operations has not been approved.[977]

Glamis fails to establish that its claims with respect to any of these measures implicate any rule under the customary international law minimum standard of treatment. Glamis does not allege, for example, a failure to provide adequate police protection for its investment. Nor does Glamis allege that it has been denied fundamental rights of due process in a judicial or quasi-judicial proceeding. Moreover, Glamis's expropriation claim is addressed under NAFTA Article 1110. In short, Glamis has failed to identify any specific prohibition contained in Article 1105(1) that governs the actions at issue here.

Glamis's claims largely concern the substance of California's reclamation requirements embodied in SB 22 and the SMGB regulations. Glamis alleges that these requirements represent a "radical departure from conventional approaches to backfilling"

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canon of evidence in civil law, common laws, and in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.").

[975] Mem. ¶ 405.

[976] *Id*. ¶ 406.

[977] *Id*. ¶ 407.

found in other U.S. jurisdictions and globally.[978] There is no customary international law rule, however, governing the substantive reclamation that may be imposed on open-pit mines.

Indeed, a survey of State practice reveals a wide range of accepted reclamation practices. Many jurisdictions, including Montana, Costa Rica, Turkey, the Czech Republic, and the Argentine province of Rio Negro have imposed bans on cyanide heap-leach mining or, more generally, open-pit mining operations, due to the environmental and health effects associated with those activities.[979] In contrast, California allows such mining, subject to certain reclamation requirements. Glamis has failed to show – and, indeed, the evidence demonstrates the contrary – that there is any customary international law standard that applies to the substance of the California measures.

Glamis also challenges the federal government's interpretation of its laws and regulations. For example, Glamis complains that DOI acted unlawfully by arrogating to itself a "new mine veto authority."[980] As the Chapter Eleven tribunal in *ADF Group Inc. v. United States of America* held, however, "something more than simple illegality or lack

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[978] *Id*. ¶ 554.

[979] *See*, *e.g*., Montana (MONT. CODE ANN. § 82-4-390 (1998)); Costa Rica (Exec. Decree No. 30477-MINAE, June 5, 2002); Turkey (*Ozay v. Ministry of the Environment (Ankara)*, 6th Chamber of the Higher Administrative Court, ref. no. 1996/5348, ruling no. 1997/2311 (Turk.), *available at* http://korte-goldmining.infu.uni-dortmund.de/TurkLP.html); Czech Republic (Act No. 44/1988 Coll. (Mining Act), § 30(2) (Czech Rep.), *available at* http://www.lexadin.nl/wlg/legis/nofr/eur/lxwecze.htm); Argentine province of Rio Negro (Ordenanza [Ordinance] 1.068/05, San Carlos de Bariloche Department, Rio Negro Province, Dec. 19, 2005, *available at* http://www.losandes.com.ar/2005/1220/sociedad/nota291662_1.htm). The 1997 Turkish ruling was recently reaffirmed by the European Court of Human Rights. In 1997, Turkey's Supreme Administrative Court ruled that the grant of an operating permit for a gold mine using the cyanide leaching process was contrary to the public interest in light of environmental and health and safety impacts. Subsequently, Turkish authorities reauthorized the mining company's operations based on a report finding that the identified environmental and health risks had been eliminated or sufficiently reduced. Several Turkish nationals sought relief in the European Court of Human Rights, which held that the reauthorization of mining activities violated Article 8 of the European Convention on Human Rights (right to respect for private and family life). *Taskin and Others v. Turkey*, App. No. 46117/99, ¶ 126 (Nov. 10, 2004) (Final March 30, 2005).

[980] Mem. ¶ 547.

of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements."[981] And as the tribunal in *International Thunderbird Inc. v. United Mexican States* held, "it is not up to the Tribunal to determine how [the Mexican regulatory authority] should have interpreted or responded to" Thunderbird's application to conduct gaming operations, "as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters (which may vary from country to country)."[982] Accordingly, it is not within this Tribunal's authority to second-guess DOI's interpretation of the Mining Law, FLPMA, or the 3809 regulations.

Likewise, matters of domestic law and regulatory policy must be accorded considerable deference by arbitral tribunals such as this one. As the *International Thunderbird* tribunal stated:

> Mexico has in this context a wide regulatory "space" for regulation. . . Mexico can permit or prohibit any form of gambling as far as the NAFTA is concerned. It can change its regulatory policy and it has a wide discretion with respect to how it carries out such policies by regulation and administrative conduct.[983]

Glamis also challenges the *procedures* used by the government to promulgate its rules. Glamis complains, for example, that Solicitor Leshy issued the 1999 M-Opinion without first promulgating a regulation to define the term "undue impairment."[984] Customary international law, however, does not address the processes by which States

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[981] *ADF Group, Inc. v. United States of America*, 6 ICSID REP. 470, Award ¶ 190 (Jan. 9, 2003); *see also* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 5 (2005) (even where a State adjudicatory organ "disregard[s] or misappl[ies] national law, [its] errors do not generate international responsibility.").

[982] *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award ¶ 160 (Jan 26, 2006).

[983] *Id*. ¶ 127.

[984] Mem. ¶ 345.

prescribe their laws, rules, or regulations.[985] The variety of legislative and administrative procedures for promulgating rules is so great – involving democratic States and authoritarian States, parliamentary States and presidential States, federal States and centralized States – that no international consensus on what is a required process has emerged or even been proposed. Thus, the fact that one State adopts regulations by royal decree, while another adopts them pursuant to public referenda, is of no import. More specifically, there is no customary international law rule requiring a notice and comment period for every new regulation.

In sum, Glamis fails to show that its claims concerning the substance of and process concerning the California and federal measure at issue establish a violation of – or indeed even implicate – the minimum standard of treatment under customary international law. Glamis's Article 1105(1) claim should therefore be dismissed.

### C. Glamis Fails To Show That The Standards It Alleges Were Violated Are Part Of The Customary International Law Minimum Standard Of Treatment

Glamis's Article 1105(1) claim rests on a flawed interpretation of the customary international law minimum standard of treatment. While Glamis recognizes that State practice and *opinio juris* are the two essential ingredients for a rule of customary international law to exist, Glamis consistently fails to provide any evidence in support of its allegations that certain conduct is proscribed by customary international law.

Glamis fails, for example, to show any relevant State practice to support its contention that States are obligated under international law to provide a transparent and

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[985] *See, e.g.,* JEAN COMBACAU & SERGE SUR, DROIT INTERNATIONAL PUBLIC 376 (4th ed. 1999) ("Le pouvoir de légiférer et de modifier la legislation est un attribut étatique incontesté en droit international ….") ("The power to legislate and to modify legislation is an attribute of the State uncontested by international law ….") (translation by counsel).

predictable framework for foreign investment. Instead, Glamis relies on a portion of the decision in *Metalclad Corp. v. United Mexican States* that was vacated by the Supreme Court of British Columbia.[986] That court held that in interpreting Article 1105(1), the NAFTA tribunal had "misstated the applicable law to include transparency obligations and then made its decision on the basis of the concept of transparency."[987]

Glamis has also failed to present any evidence of relevant State practice to support its contention that Article 1105(1) imposes a general obligation on States to refrain from "arbitrary" conduct.[988] Instead, it relies exclusively on judicial and arbitral decisions, that, when subject to scrutiny, do not support its contention. No Chapter Eleven tribunal has held that decision-making by an administrative or legislative body that appears "arbitrary" to some parties is sufficient to constitute a violation of Article 1105(1). To the contrary, NAFTA Chapter Eleven tribunals have consistently held that a high level of deference must be accorded to administrative decision-making.

The tribunal in *International Thunderbird Gaming Corp. v. United Mexican States*, for example, remarked that "the threshold for finding a violation of the minimum standard of treatment still remains high."[989] That tribunal held that mere "arbitrary" conduct by an administrative agency is insufficient to constitute a breach of Article 1105(1); rather, the regulatory action must amount to a "*gross denial of justice* or

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[986] *See* Mem. ¶¶ 535-36.

[987] *United Mexican States v. Metalclad Corp.,* 5 ICSID REP. 236 ¶ 70 (Sup. Ct. B.C.) (May 2, 2001). Glamis's reliance on *Maffezini v. Kingdom of Spain* is likewise unavailing. That tribunal's offhand reference to a lack of "transparency" was made in the context of the fair and equitable treatment standard under the Spain-Argentina BIT – which, unlike Article 1105(1) of the NAFTA, is not expressly tied to customary international law. *Emilio Augustín Maffezini v. The Kingdom of Spain,* ICSID Case No. ARB/97/7, Award ¶ 83 (Nov. 13, 2000).

[988] Mem. ¶¶ 523-31.

[989] *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award ¶ 194 (Jan 26, 2006).

*manifest arbitrariness* falling below international standards" in order to breach the minimum standard of treatment.[990] In that case, the tribunal acknowledged that the administrative proceedings in question "may have been affected by certain procedural irregularities,"[991] but that the record did not establish that "the proceedings were "arbitrary or unfair, *let alone so manifestly arbitrary or unfair as to violate the minimum standard of treatment*."[992]

Glamis's reliance on the *Elettronica Sicula (ELSI)* case for the proposition that Article 1105(1) prohibits "arbitrary" conduct in an administrative setting is unavailing.[993] The *ELSI* case does not shed light on the interpretation of NAFTA Article 1105(1) or on the content of the minimum standard of treatment under customary international law. Rather, the arguments concerning "arbitrary" conduct in that case were based on *lex specialis*: Article I of the Supplementary Agreement to the Treaty of Friendship, Commerce and Navigation between Italy and the United States, on which the relevant claims in that case were based, provides that "[t]he nationals, corporations and

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[990] *Id.* (emphasis added). Similarly, *Waste Mgmt. Inc. v United Mexican States* does not assist Glamis. *See* Mem. ¶ 520. The tribunal in that case stated that behavior must be "grossly" unfair or unjust to constitute a breach of the minimum standard of treatment, and mentioned "arbitrary" conduct only in dictum, in an attempt to summarize and synthesize statements in recent arbitral awards, among a long list of adjectives describing behavior that might, depending on the particular circumstances, contribute to a finding that the international minimum standard has been breached. *Waste Mgmt., Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, 43 I.L.M. 967, Award ¶ 98 (Apr. 30, 2004). The tribunal did not concern itself with whether State practice and *opinio juris* supported those comments made by other tribunals regarding the content of the minimum standard. Moreover, the tribunal qualified its statement regarding the content of the minimum standard of treatment by noting that a finding of a breach of customary international law is more likely where the treatment is contrary to specific representations made to the investor – a fact that is not present in this case. *Id.* ("In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant."). *See infra* Arg. Sec. III.B.1

[991] *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award ¶ 200 (Jan 26, 2006).

[992] *Id*. ¶ 197 (emphasis added).

[993] *See* Mem. ¶¶ 524 -25.

associations of either High Contracting Party shall not be subjected to *arbitrary* or discriminatory measures within the territories of the other High Contracting Party."[994]

Nor does *Pope & Talbot v. Government of Canada* support Glamis's contention that mere "arbitrary" conduct violates Article 1105(1).[995] The tribunal in that case exceeded its authority by interpreting a general "fairness" obligation to be "additive" of the minimum standard of treatment contained in Article 1105(1), even though it recognized that "the language of Article 1105 suggests otherwise."[996] The NAFTA Free Trade Commission expressly rejected that interpretation, stating that "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[997] Because the *Pope & Talbot* tribunal's statements regarding "arbitrary" conduct were based on its mistaken – and rejected – interpretation of Article 1105(1), that decision does not support Glamis's interpretation of Article 1105(1).

*Mondev Int'l Ltd. v. United States of America* and *Loewen v. United States of America* likewise do not support Glamis, as those cases both concerned judicial proceedings, and not challenges to administrative proceedings or legislation.[998] Moreover, as the *International Thunderbird* tribunal made clear, the customary

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[994] *Elettronica Sicula S.P.A.* (U.S. v. It.), 28 I.L.M. 1109, 1989 I.C.J. 15, ¶¶ 120-30 (July 20) (Judgment).

[995] *See* Mem. ¶ 526.

[996] *Pope & Talbot v. Government of Canada,* UNCITRAL, Award on the Merits of Phase 2, ¶ 110 (Apr. 10, 2001) ("[I]nvestors under NAFTA are entitled to the international law minimum, *plus* the fairness elements. It is true that the language of Article 1105 suggests otherwise, since it states that the fairness elements are included within international law.").

[997] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions ¶ B(3) (July 31, 2001).

[998] Mem. ¶¶ 527-28.

international law "standards of due process and procedural fairness applicable to administrative officials . . . [are] lower than th[ose] of a judicial process."[999] A far wider degree of discretion is warranted with respect to the latter.

Nor does *S.D. Myers v. Canada* support Glamis's suggestion that Article 1105(1) prohibits conduct that is merely arbitrary. The tribunal in that case stated that a breach of Article 1105(1) occurs only when "an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[1000] "That determination," noted the tribunal, "must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[1001] Thus, the tribunal found no violation of Article 1105(1) under an arbitrariness standard, despite its conclusion that "there was no legitimate environmental reason for introducing the ban" at issue.[1002]

Finally, Glamis has not demonstrated the existence of any customary international law rule requiring States to regulate in such a manner – or refrain from regulating – so as to avoid upsetting foreign investors' settled expectations with respect to their investments.[1003] Glamis's reliance on *Generation Ukraine v. Ukraine* to establish such a

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[999] *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award ¶ 200 (Jan 26, 2006).

[1000] *S.D. Myers, Inc. v. Canada*, 232 I.L.M. 408, First Partial Award ¶ 263 (Nov. 13, 2000).

[1001] *Id*. ¶ 263.

[1002] *Id.* ¶ 195. The tribunal instead based its finding of a violation of Article 1105(1) on the fact that Canada had breached Article 1102 – a rationale that was rejected by the NAFTA Free Trade Commission in its July 2001 Interpretation. *See* NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, ¶ B(3) (July 31, 2001) ("A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).").

[1003] *See* Mem. ¶¶ 532-39.

rule of customary international law is misplaced.[1004] The claimant in that case alleged only a breach of the prohibition on *expropriation* without compensation; it did not allege a breach of the minimum standard of treatment.[1005] That tribunal correctly noted – in the context of the expropriation claim – that a party's expectations concerning the prospects for, and risks to, its investment might be based in part on "the vicissitude of the economy of the [host] state."[1006] That decision, however, does not support Glamis's theory that frustration of its expectations alone constitutes a basis for finding a breach of the minimum standard of treatment.

Glamis's reliance on the decision in *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* is likewise misplaced.[1007] That tribunal interpreted the Spain-Mexico bilateral investment treaty, not Article 1105(1) of the NAFTA. It expressly interpreted the "fair and equitable treatment" standard in that BIT to be an "autonomous" standard whose content is informed by the treaty's object and purpose, as set forth in the preamble, to "create favorable conditions for investments."[1008] The *Tecmed* tribunal, in other words, did not address whether the government's actions violated a rule of customary international law. The approach adopted by the *Tecmed* tribunal – interpreting "fair and equitable treatment" as an autonomous standard – has been soundly rejected in

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[1004] *Id*. ¶ 519; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003).

[1005] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award ¶ 5.1 (Sept. 16, 2003).

[1006] *Id.* ¶ 20.37.

[1007] *See* Mem. ¶ 533.

[1008] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States,* ICSID Case No. ARB (AF)/00/2, Award ¶ 155-56 (May 29, 2003).

the NAFTA context by the Free Trade Commission.[1009] The *Tecmed* decision therefore does not assist Glamis.

For similar reasons, the *CMS Gas Transmission Co. v. Argentina* decision does not support Glamis's argument.[1010] The *CMS* tribunal summarily equated the international law minimum standard of treatment with "the required stability and predictability of the business environment, founded on solemn legal and contractual commitments," without purporting to rely on *any* evidence of a general and consistent State practice followed by States out of a sense of legal obligation, as is required for finding a rule of customary international law.[1011]

An investor's legitimate expectations may be relevant in the context of a regulatory expropriation claim.[1012] Accordingly, Annex B to the U.S. 2004 Model Bilateral Investment Treaty, on which Glamis relies, provides that:

> The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an *indirect expropriation*, requires a case-by-case, fact-based inquiry that considers, among other factors . . . the extent to which the government action interferes with distinct, reasonable investment-backed expectations.[1013]

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[1009] *See supra* Arg. Sec. IV.A.

[1010] *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award ¶ 284 (May 12, 2005).

[1011] *See id.* The tribunal instead relied on the preamble to the U.S.-Argentina bilateral investment treaty, which provides, in pertinent part, that "fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximize effective use of economic resources." *Id.* ¶ 27.4. This method of treaty interpretation is improper. *See ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award ¶ 147 (Jan. 9, 2003) ("The object and purpose of the parties to a treaty in agreeing upon any particular paragraph of that treaty are to be found, in the first instance, in the words in fact used by the parties in that paragraph . . . . [T]he general objectives of NAFTA . . . may frequently cast light on a specific interpretive issue; *but [they are] not to be regarded as overriding and superseding the latter*.").

[1012] *See infra* Arg. Sec. III.B

[1013] 2004 U.S. MODEL BILATERAL INVESTMENT TREATY, Annex B ¶ 4(a)(ii).

By contrast, neither the NAFTA nor the U.S. Model BIT make any reference to investors' legitimate expectations in the context of the minimum standard of treatment article.

Glamis's interpretation of Article 1105(1), in essence, lifts one factor to be considered in an indirect expropriation claim and adopts that factor as the sole test for a violation of the minimum standard of treatment. While the minimum standard of treatment under customary international law requires compensation in the event of an expropriation, there is no such rule requiring compensation for actions that fall short of an expropriation but that frustrate an alien's expectations. Certainly, Glamis has made no showing that States refrain out of a sense of legal obligation from taking regulatory action that may frustrate an alien's expectations. Indeed, most, if not all, regulatory action is bound to upset the expectations of a portion of the populace. If States were prohibited from regulating in any manner that frustrated expectations – or had to compensate everyone who suffered any diminution in profit because of a regulation – States would lose the power to regulate.[1014]

U.S. law certainly imposes no such requirement on the U.S. government. Indeed, the minimum standard of treatment article in the United States' most recent free trade agreements, like NAFTA Article 1105(1), prescribe the minimum standard of treatment under customary international law.[1015] Those agreements were negotiated pursuant to the

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[1014] *See Marvin Roy Karpa Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, 42 I.L.M. 625, Award ¶103 (Dec. 16, 2002) (noting, in the context of an indirect expropriation claim, that "[r]easonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.").

[1015] *See, e.g.,* United States-Chile Free Trade Agreement, art. 10.4, June 6, 2003, State Dept. No. 04-35; United States – Singapore Free Trade Agreement. art. 15.5, May 6, 2003, State Dept. No. 04-36; Dominican Republic – Central America – United States Free Trade Agreement, art. 10.5, Aug. 5, 2004, State Dept. No. 06-63.

authority granted by the Trade Promotion Act of 2000, which explicitly recognized that "United States law on the whole provides a high level of protection for investment, consistent with or greater than the level required by international law," and directed the United States to negotiate agreements that:

> [do] not accord[] greater substantive rights [to foreign investors] with respect to investment protections than United States investors in the United States [are accorded under U.S. law], and to secure for investors important rights comparable to those that would be available under United States legal principles and practices . . . .[1016]

United States law does not compensate plaintiffs solely upon a showing that regulations interfered with their expectations, as such a showing is insufficient to support a regulatory takings claim.[1017] Tellingly, despite Glamis's heavy reliance on domestic jurisprudence throughout its Memorial, Glamis nowhere cites U.S. legal authority to support its proposition that an interference with one's expectations alone is compensable. It is inconceivable that the *minimum standard of treatment* required by international law would proscribe action commonly undertaken by States pursuant to national law.

In sum, Glamis fails to demonstrate that the standards it alleges the United States breached form part of the customary international law minimum standard of treatment. Glamis's Article 1105(1) claim thus fails as a matter of law.

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[1016] Trade Promotion Authority Act of 2000, 19 U.S.C. § 3802(b)(3).

[1017] *See, e.g., Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 16 (1976) (stating that "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations"); *United States v. Carlton*, 512 U.S. 26, 33-34 (1994) ("An entirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process.").

### D. None Of The California Or Federal Government Actions Violated The Standards Proposed By Glamis

Even accepting, *arguendo*, Glamis's flawed interpretation of Article 1105(1), the conduct of California and the federal government did not violate the standards that Glamis contends inform that article.

#### 1. The California Measures Do Not Run Afoul Of The Standards Alleged By Glamis

Contrary to Glamis's assertion, neither SB 22 nor the SMGB's amendments are arbitrary. Moreover, both measures were adopted in a transparent manner and neither could have upset Glamis's legitimate, investment-backed expectations.

Citing the ICJ's decision in the *ELSI* case, Glamis contends that something is arbitrary if "it is opposed to the rule of law," where there is a "willful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety."[1018] Under that, or any other standard, neither of the California measures can be considered to be arbitrary. Each of the measures bears a legitimate, rational relationship to its respective purposes, and each was adopted in accordance with due process.

SB 22's purpose is to protect Native American sacred sites from irreparable damage caused by open-pit mining.[1019] The record is clear that Glamis's proposed plan of operations, which envisioned leaving an approximately 800 foot-deep pit over one mile long, with 300 foot-high waste piles, would have irreparably damaged an area of

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[1018] Mem. ¶ 525 (quoting *Elettronica Sicula S.P.A.* (U.S. v. It.), 28 I.L.M. 1109, 1989 I.C.J. 15 (July 20) (Judgment)).

[1019] CAL. PUB. RES. CODE § 2773.3 (2003).

traditional cultural significance to the Quechan.[1020] Glamis's proposed mining plan would have destroyed a portion of the Trail of Dreams, which is integral to the Quechan's religious and cultural traditions; would have completely obstructed the line of sight from Running Man to Indian Pass, which is critical to the Quechan's cultural and religious use of the area; would have prevented the site from being used as a teaching center for future generations; and would have left an indelible scar on the Quechan's sacred landscape.[1021] The religious and cultural significance of the area to the Quechan and the destructive impact that would have been caused by Glamis's proposed project were confirmed by Glamis's archaeological surveyors,[1022] as well as by the ACHP.[1023]

SB 22, which requires backfilling of open-pit metallic mines in close vicinity to Native American sacred sites and requires that the land be re-contoured, is a rational means to mitigate the harm otherwise caused to Native American sacred sites by open-pit mining. The Quechan had indicated that reducing the height of the overburden waste rock piles could mitigate the proposed mine's visual intrusion into their sacred

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[1020] *See e.g.*, *Where Trails Cross* at 281-294 (9 FA tab 83); Letter from Cathryn Buford Slater, Chairman, ACHP, to Bruce Babbitt, Secretary of the Interior (Oct. 19, 1999), at 3 (5 FA tab 201).

[1021] *See* Memorandum from Jim Good & Penny Alexander-Kelley, Gresham, Savage, Nolan & Tilden, LLP, to Steve Baumann, Glamis Gold Ltd. (Jan. 23, 1998), at 6 (7 FA tab 14) [redacted]; Letter from Ed Hastey, State Director, BLM, to Cherilyn Widell, State Historic Preservation Officer, at 4 (Feb. 26, 1998) (3 FA tab 106) (explaining that the Quechan "have indicated that a sense of solitude and viewsheds are important to exercising their religion and other aspects of their culture"); Memorandum regarding Nov. 6, 1997 meeting between the Quechan Tribe, the California State Historic Preservation Office, and BLM (Dec. 16, 1997) (3 FA tab 95) (explaining that the 300 ft waste stockpiles would adversely affect the view from Running Man to Indian Pass and Picacho Peak); *Where Trails Cross* at 284 (9 FA tab 83).

[1022] Cleland Declaration ¶¶ 25, 37; *see also Where Trails Cross* at 281-94 (9 FA tab 83).

[1023] Letter from Cathryn Buford Slater, Chairman, ACHP, to Bruce Babbitt, Secretary of the Interior (Oct. 19, 1999), at 2 (5 FA tab 201) (concluding that although some historic properties can be altered and still retain sufficient integrity to maintain their unique historic value, the area of the Imperial Project had not been previously developed, and should not be developed because the area "is comprised of historic properties whose traditional value is dependent on qualities of continuity and association which are extremely fragile").

landscape.[1024] In addition, in the absence of the reclamation requirements contained in SB 22, the Quechan's ability to traverse the Trail of Dreams, both physically and spiritually, would have been encumbered.[1025] Finally, without the complete backfilling requirements SB 22 imposed, the area could not have continued to serve as a key "teaching area" for Quechan religious leaders.[1026]

Glamis's contention that SB 22 is arbitrary because reclaiming the mine in the manner required would cause greater land disturbance, covering the very cultural resources intended to be protected, is without merit.[1027] Glamis provides no evidence to support its theory that, in all cases, SB 22's reclamation requirements would cause more harm to Native American sacred sites than would be the case were backfilling and recontouring not required. Furthermore, Glamis's assertion that this would be the case with respect to the cultural resources that would be impacted by its Imperial Project is unsound.

Glamis bases its assumption on the estimate of its valuation expert, Behre Dolbear, that the waste material excavated at the project site would swell thirty-five

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[1024] *See* Letter from Pauline Owl, Chairperson, Quechan Cultural Committee, to Pat Weller, BLM (Feb. 10, 1997) (7 FA tab 10) (stating that any site development greater than forty feet would alter the site's "purpose and destroy its future use forever"). While Glamis had agreed to reduce the height of those waste piles from 400 to 300 feet, this would not have permitted the Quechan to view Indian Pass from the Running Man site. *See Where Trails Cross* at 310 (9 FA tab 83); Memorandum regarding Nov. 6, 1997 meeting between the Quechan Tribe, the California State Historic Preservation Office and BLM (Dec. 16, 1997) (3 FA tab 95) (describing "[t]wo of the most important resources" thought to be affected by the proposed Imperial Project as the trails which connect Indian Pass and Pilot Knob and "the actual view from what is known as the 'Running Man' site to Indian Pass and Picacho Peak").

[1025] *See Where Trails Cross* at 309 (9 FA tab 83); Letter from Pauline Owl, Chairperson, Quechan Cultural Committee, to James H. Cleland, KEA Environmental, Inc. (May 14, 1998) (7 FA tab 18) ("Our principle concern at the present time is by fragmenting these trails and trails of dream would significantly jeopardize present and future ability to travel along the trails.").

[1026] *See Where Trails Cross* at 123 (9 FA tab 83); Baksh 1997 at 28 (9 FA tab 82).

[1027] Mem. ¶ 495; *see also id*. n.783.

percent, leaving excess material to be spread after backfilling the pits.[1028] That assumption, however, is incorrect and, in fact, is belied by Glamis's own internal documents, as well as other sources. On at least three occasions – in its 1994 Feasibility Report, in a 1996 letter sent to its mining consultant, and in its internal 1999 mining plan – Glamis itself estimated the average swell factor to be eighteen percent.[1029] BLM similarly used a swell factor of twenty-one percent in its analysis of the Imperial Project.[1030] And, Norwest Corporation, the mine engineering expert retained by the United States, independently calculated a swell factor of eighteen percent.[1031] Behre Dolbear's inflated estimate is indefensible.[1032] Using the correct swell factor makes all the difference: had Glamis done so, it would have realized that the reclamation requirements imposed by SB 22 will not cause any additional land disturbance.[1033] In fact, backfilling all of the pits will *reduce* the total land disturbance.[1034] Glamis's argument that the reclamation requirements are counterproductive is therefore baseless.

In short, SB 22 is not arbitrary: it is a rational means of attempting to mitigate the harmful effects of open-pit mining on Native American sacred sites.[1035]

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[1028] Behre Dolbear Rpt. ¶ A4.4.

[1029] Norwest Rpt. Table 3.

[1030] *Id*.

[1031] *Id*. ¶¶ 17-18.

[1032] The United States' mine engineering expert provides further detail explaining how Behre Dolbear erred in reaching its swell factor estimate. *See Id*. ¶¶ 17 – 18.

[1033] *Id*. ¶ 31.

[1034] *Id*.

[1035] Glamis attempts to cast doubt on the veracity of the Quechan's claim regarding the sacredness of the proposed Imperial Project site by suggesting that the Quechan undertook an "aggressive drilling and mineral exploration program" on its reservation near areas identified as sensitive on the CDCA planning maps. Mem. ¶ 145-54. While it is true that the Quechan commissioned a limited survey of the potential for bulk gold mineralization on their reservation in the late 1980s, the only exploratory drilling involved in this survey was on the Stoneface prospect — an area in the northwest corner of the reservation that had already been mined extensively, and that is not in close proximity to the Imperial Project site. *See* Thomas M.

Nor are the amendments to the SMGB's regulations arbitrary. Those regulations are designed to address the environmental hazards associated with open-pit metallic mining, which leaves enormous unfilled pits in the ground and correspondingly large piles of waste rock.[1036] The record is clear on this point as well. Although SMARA had long required reclamation of mines to leave the land available for alternate uses, prior to the adoption of the 2002 regulations, local lead agencies were approving reclamation plans that left massive craters with enormous waste piles after reclamation was completed.[1037] The SMGB was presented with no persuasive evidence that these open pits and waste piles had been, or could be, converted to a condition readily adaptable for alternate land uses.[1038]

By requiring complete backfilling and re-contouring to a twenty-five foot level, the SMGB's regulations legitimately and rationally responded to the problems posed by unbackfilled open-pit mines, by eliminating those open pits, reducing the height of the waste piles, and recontouring the waste piles to approximate the original contours of the area. Once backfilled in compliance with the SMGB regulations, areas at the reclaimed mines previously containing the open pits and waste piles may then be utilized for a beneficial alternate use as required by SMARA.[1039] Moreover, the open pit no longer

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Sweeney & Robin Bradley, Status of Mineral Resource Information for the Fort Yuma and Cocopah Indian Reservations, Arizona and California (Administrative Report BIA-85) (1981) (10 FA tab 118). In any event, there is absolutely no evidence in the record to suggest that the California Legislature had any reason to doubt the Quechan's claims – or the corroborating archaeological evidence – that the proposed Imperial Project area was sacred to the Tribe.

[1036] Final Statement of Reasons for CAL. CODE REGS. tit. 14, § 3704.1 at 4 (6 FA tab 304).

[1037] State Mining and Geology Board, Executive Officer's Report (Dec. 12, 2002), Agenda Item 2 at 3 (6 FA tab 267); Final Statement of Reasons for CAL. CODE REGS. tit. 14, § 3704.1, at 3 (6 FA tab 304).

[1038] Parrish Declaration ¶ 12; CAL. PUB. RES. CODE § 2712(a) (2003).

[1039] Parrish Declaration ¶ 16; CAL. PUB. RES. CODE § 2712(a) (2003).

poses an attractive nuisance to humans, and does not cause environmental harm, such as endangering wildlife and creating toxic pit lakes.[1040]

Glamis's argument that the regulations are arbitrary because they apply only to metallic open-pit mines, as opposed to all open-pit mines, ignores the obvious differences between the different types of mines.[1041] Gravel and other non-metallic mines do not leave massive waste piles like those created by open-pit, metallic mines because a much larger volume of material from the pits is hauled away and sold as product.[1042] Therefore, this kind of mining does not pose the same environmental and public health and safety concerns associated with the waste piles left behind by open-pit, metallic mining.[1043] In addition, as the SMGB explained when it promulgated the regulations, requiring backfilling of pits where there is insufficient material to fill the hole would

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[1040] *See* Parrish Declaration ¶¶ 10-11(SMGB received "hundreds" of comments voicing concerns over the environmental and public health and safety impacts associated with open-pit metallic mining, which were "starkly illustrated" by OMR staff when reviewing a series of "reclaimed" pits at open-pit metallic mines, including the Jamestown Mine (containing high arsenic levels), the McLaughlin Mine (containing acid water), and the Royal Mountain King Mine (containing high arsenic levels)); 2000 FEIS at 4-62 (8 FA tab 61) ("If mining is suspended or terminated prior to backfilling of the West Pit, the West Pit would remain as an open excavation and would remain as a long-term impediment to the movement to some wildlife species. Individual terrestrial wildlife species could become injured or killed by falls within this open pit.") (8 FA tab 61); Letter from Jason Marshall, Assistant Director, Department of Conservation, to John Morrison, Assistant Planning Director, Imperial County Planning/Building Department, and Douglas Romoli, BLM (Feb. 26, 1998), at 2 (7 FA tab 15) ("[a]s OMR stated in their December letter, the use of large boulders around the excavation probably will not sufficiently deter hikers or off-highway vehicle enthusiasts"); Letter from James S. Pompy, Manager, Office of Mine Reclamation, to Jesse Soriano, Imperial County Planning Department (Feb. 21, 1997), at 2 (7 FA tab 11) (same); Letter from Jason Marshall, Assistant Director, Department of Conservation, to Jesse Soriano, Imperial County Planning/Building Department, and Keith Shone, BLM (Dec. 16, 1996), at 2 (7 FA tab 8) (same); *see also* MARGARET M. LYNOIS, DAVID L. WELDE & ELIZABETH VON TILL WARREN, IMPACTS: DAMAGE TO CULTURAL RESOURCES IN THE CALIFORNIA DESERT 14 (1980) (noting the "increased recreational use of the California Desert during the past 10 years," with campers and off-road vehicles bringing "large numbers of recreationists into the desert").

[1041] Mem. ¶ 378.

[1042] Parrish Declaration ¶ 13.

[1043] *Id*.

defeat the purpose of the regulations because it would require one to dig a second hole just to fill the first hole.[1044]

Similarly, Glamis's complaint that the SMGB did not rely on any specific environmental or technical reports when it promulgated the regulations does not demonstrate arbitrariness.[1045] The SMGB's rulemaking effort concerned the implementation of the existing reclamation standard under SMARA in the context of open-pit metallic mines,[1046] and the testimony at SMGB hearings and evidence in the administrative rulemaking record clearly demonstrated that leaving large open pits and waste piles on mined lands was not consistent with the SMARA standard.[1047] No persuasive evidence to the contrary was presented to the SMGB.[1048]

Nor do the conclusions reached by the NAS/NRC in its report render the SMGB's regulations arbitrary.[1049] That report considered the potential application of reclamation requirements to *existing* mine sites under "current cost structures" and found that complete backfilling would be of *unknown* benefit and *likely* uneconomic.[1050] The amendments to the SMGB regulations, by contrast, apply only to *future* mine sites. The "cost structures" associated with complying with such reclamation requirements will depend on a variety of factors, such as the internal efficiencies of the particular mining company, the richness of the lands to be mined, and the strength of the gold market. As

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[1044] Final Statement of Reasons for CAL. CODE REGS. tit. 14, § 3704.1, at 3, 8-9 (6 FA tab 304).

[1045] Mem. ¶ 379 n.763, ¶ 554.

[1046] CAL. PUB. RES. CODE §§ 2711, 2712 (2003); CAL. CODE REGS. tit. 14, §§ 3500, 3502(a), 3700-13 (1993).

[1047] Parrish Declaration ¶ 18.

[1048] *Id*.

[1049] Mem. ¶ 379.

[1050] NAS/NRC, HARDROCK MINING ON FEDERAL LANDS 82 (1999) (quoting NAS/NRC, SURFACE MINING OF NON-COAL MINERALS xxviii (1979)) (4 FA tab 169).

observed by the OMR's James Pompy, "Will [the SMGB's amended regulations] be the end of gold mining in the Golden State? Well, that depends on the price of gold."[1051] In any event, even if the SMGB had reached a different conclusion than the NAS/NRC, that difference alone would not render the measures arbitrary. In a democratic system of government it is not surprising that different government agencies may reach different conclusions regarding issues of economic or public policy.

Notably, Glamis does not suggest any animus towards it or any other ulterior motive on the part of the California Legislature, the former Governor, or the SMGB for adopting SB 22 and the SMGB's regulations. Glamis's suggestion that the measures were arbitrary because they "pander[ed] to an emerging constituent interest"[1052] to "gain political capital for the Governor"[1053] is without merit. There is no evidence of this in the record, and even if true, it would not mean that the legislative or regulatory process was arbitrary or unjust. As the *Methanex* tribunal observed, investors in the United States ought to "appreciate[] that the process of regulation in the United States involve[s] wide participation of industry groups, non-governmental organizations, academics and other individuals, many of these actors deploying lobbyists."[1054] Receiving input from, and acting in response to, members of the public with differing interests is a normal – indeed, an *essential* – part of the democratic process.

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[1051] James Pompy, California Department of Conservation Environmental Program Manager, "New Legislation Requires Backfilling Metallic Mines" (also available in SMARA Update, Vol. 7, no. 1) (July-Sept. 2003), *available at* http://www.consrv.ca.gov/omr/smara/newsletter/fall03.pdf#search=%22New%20Legislation%20Requires%20Backfilling%20Metallic%20Mines%20pompy%22) (7 FA tab 214).

[1052] Mem. ¶¶ 496, 541.

[1053] *Id*. ¶ 533.

[1054] *Methanex Corp. v. United States of America*, UNCITRAL, Award, Pt. IV, Ch. D ¶ 9 (Aug. 3, 2005).

In fact, as noted earlier, Glamis was one of the most active participants in that process. Charles Jeannes, Glamis's Executive Vice President and General Counsel, testified at a California Senate Committee hearing on April 22, 2002 regarding the related Senate Bill 1828.[1055] Glamis played an instrumental and active role in the California Mining Association's lobbying efforts and public relations campaign against SB 22 and related legislation.[1056] The Association also proposed specific regulatory language directly to then-SMGB Executive Officer Parrish, which was accepted and incorporated into both the SMGB's emergency regulations and the permanent regulations.[1057] And Glamis made its views known directly to the SMGB at public hearings.[1058] That Glamis's views did not prevail and the SMGB's regulations ultimately were adopted does not render the government process arbitrary. And Glamis's extensive participation in both the legislative and regulatory processes belies any claim that either of those processes lacked transparency.

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[1055] Jeannes Statement ¶ 15.

[1056] *See* California Secretary of State, Lobbying Activity: California Mining Association, *available at* http://cal-access.ss.ca.gov/lobbying/employers/detail.aspx?id=1142897&session=2001&view=activity (revealing that the California Mining Association spent more than $40,000 between June 2002 and March 2003 actively lobbying against California Senate Bills 1828, 482, 22 and the emergency regulations) (10 FA tab 102); Memorandum from Adam Harper, California Mining Association (Oct. 1, 2002) (thanking Glamis for its assistance with public relations efforts opposing SB 1828) (7 FA tab 37); E-mail from Denise M. Jones, California Mining Association, to Charles Jeannes, Senior Vice President, Glamis Gold Ltd. (Aug. 13, 2002) (detailing the Association's public relations efforts) (7 FA tab 36).

[1057] *Compare* E-mail chain between James Good, State Mining and Geology Board, and Adam Harper, California Mining Association (Dec. 2002) (noting that the Association had proposed language directly to John Parrish that would exempt existing mines with approved reclamation plans) (7 FA tab 41), *with* CAL. CODE REGS. tit. 14, § 3704.1(i) (2003) (exempting from the reclamation requirements mines that had obtained approval for their reclamation plans and provided financial assurances by December 18, 2002). *See also infra* Facts Sec. V.B. detailing Glamis's active collaboration with the Association in 2002 and 2003.

[1058] *See* State Mining and Geology Board, Executive Officer's Report (Jan. 16, 2003), Agenda Item 7 at 1 (10 FA tab 113); Comments of Glamis Chief Operating Officer James S. Voorhees before the State Mining and Geology Board (Nov. 14, 2002) (10 FA tab 104); Charles A. Jeannes, Senior Vice President, Glamis Gold Ltd., Comments before the State Mining and Geology Board (Dec. 12, 2002) (6 FA tab 268); *see also* Final Statement of Reasons for CAL. CODE REGS. tit. 14, § 3704.1, at 1 (6 FA tab 304).

The Tribunal should likewise reject Glamis's legitimate expectations argument. As explained above, Glamis's argument that the provision in the CDPA excluding the use of "buffer zones" around wilderness areas created a legitimate expectation that the Imperial Project would not be subject to any further regulations is based on a misunderstanding of the law.[1059] Rather than constituting the "promise" that Glamis repeatedly alleges, the provision at issue merely states that the fact that mining activities on non-wilderness land can be seen or heard from within a wilderness area does not *alone* preclude such mining activities.[1060] As the legislative history makes clear, however, such mines are not immune from "regulation . . . flowing . . . from the application of *other* law[s]," such as California's legitimately enacted legislation and regulations.[1061]

Moreover, as discussed more fully above, Glamis could not have reasonably expected that California would never impose more specific reclamation requirements, including backfilling requirements, for open-pit metallic mines in the state.[1062] SB 22 implements principles under the U.S. and California Constitutions, and under California's Sacred Sites Act, to accommodate the exercise of Native American religious practices.[1063] Glamis could not have had reasonable expectations that California would not legislate to accommodate the free exercise of religion.

Furthermore, both the legislation and regulations merely specified pre-existing statutory standards embodied in the Sacred Sites Act and SMARA. The Sacred Sites Act

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[1059] Mem. ¶ 555.

[1060] California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471, § 103(d) (Oct. 31, 1994).

[1061] H.R. REP. NO. 103-498 (1994), at 55 (emphasis added).

[1062] *See supra* Arg. Sec. III.B.

[1063] *See supra* Arg. Sec. II.B.2(a).

prohibits irreparable damage to Native American sites on public land absent a showing of necessity.[1064] SB 22 merely specifies, in the context of open-pit metallic mines, the pre-existing protections for Native American cultural and religious sites under the Sacred Sites Act. Similarly, SMARA required that mined lands be reclaimed "to a usable condition which is readily adaptable for alternative land uses" and that "residual hazards to the public health and safety are eliminated," and contemplated that backfilling could be required.[1065] The SMGB regulations implement SMARA's mandate by requiring that open-pit metallic mines throughout California be backfilled, and that the overburden material be recontoured to achieve SMARA's desired ends.

The legal principles underlying SB22 and the SMGB regulations were all in force when Glamis made its investment in the Imperial Project, and foreclose any reasonable expectations by Glamis that California would not legislate to accommodate Native American religious practices, legislate to protect sacred sites from irreparable harm, or regulate to ensure compliance with SMARA's reclamation standard.

Finally, Glamis's argument that the SB 22 and the SMGB regulations defeated its settled expectations because they were applied "retroactively" likewise fails.[1066] The regulations and legislation do not apply "retroactively;" they apply *prospectively* to plans of operations (including reclamation plans) that had not yet received final approval as of the time the legislation was enacted or the regulations were adopted.[1067] Indeed, the California Mining Association – of which Glamis is a member – acknowledged that SB

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[1064] CAL. PUB. RES. CODE § 5097.9 (1976).

[1065] *Id.* § 2712(a) and (c).

[1066] Mem. ¶¶ 552-55 (alleging that it was deprived of the ability to know "beforehand any and all rules and regulations that will govern its investments").

[1067] CAL. PUB. RES. CODE § 2773.3 (2003); CAL. CODE REGS. tit. 14, § 3704.1(i) (2003).

22 and the SMGB's regulations were not retroactive. In an e-mail dated December 9, 2002, the Association requested that the SMGB's draft regulations be changed to exempt those plans of operations for which reclamation plans had already been approved, arguing that its otherwise retroactive effect would be unfair.[1068] Specifically, the Association recommended that the SMGB alter the language in its draft regulations to resolve this perceived retroactivity problem by using the language provided for in SB 483 (the precursor to SB 22).[1069] The SMGB accepted this suggestion.

In any event, even if SB 22 and the SMGB regulations applied retroactively – which they do not – there is no general prohibition on retroactive application of laws under international law.[1070] Moreover, it is well established in U.S. law, for example, that the government may impose new regulations or burdens on existing property interests without incurring liability, even if those regulations or burdens may upset well-settled expectations.[1071] And, as the United States Supreme Court has observed, the government's "power to qualify existing property rights is particularly broad with respect to [unpatented mining claims]" such as Glamis's.[1072] In short, the California measures at

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[1068] *See* E-mail from Jim Good, State Mining and Geology Board, to Adam Harper, California Mining Association (Dec. 9, 2002) (7 FA tab 41).

[1069] *See id*.

[1070] *See, e.g., Tradex Hellas S.A. v. Republic of Albania*, ICSID case no. ARB/94/2, 14 ICSID REV. – FOREIGN INV. L.J. 161, 186 (Decision on Jurisdiction Dec. 24, 1996) ("[T]here does not seem to be a common terminology as to what is 'retroactive' application [of a law], and also the solutions found in substantive and procedural national and international law in this regard seem to make very difficult, if at all possible, to agree on a common denominator as to where 'retroactive' application is permissible and where not.").

[1071] *See Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 16 (1976) (stating that even if monetary liability could not have been anticipated when the actions in question were taken, "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 272 (1994) (noting that although prospective application was the default rule in interpreting legislation, "constitutional impediments to retroactive civil legislation are now modest . . . .").

[1072] *United States v. Locke*, 471 U.S. 84, 104 (1985).

issue were not arbitrary, were adopted in a transparent manner, and did not unfairly upset Glamis's legitimate investment-backed expectations.

### 2. The Federal Measures Are Consistent With The Standards Invoked By Glamis

Accepting *arguendo* Glamis's mistaken interpretation of Article 1105(1), Glamis also fails to demonstrate that the federal measures at issue were arbitrary, lacked transparency, or defeated its investment-backed expectations. Despite Glamis's criticisms of the federal government's handling of its plan of operations, the federal government's actions reflected nothing more than an administrative agency's legitimate grappling with difficult issues involving competing economic, environmental and cultural concerns.

#### a. The Record of Decision

As an initial matter, Glamis has no basis for asserting a claim with respect to the January 2001 Record of Decision ("ROD") denying its plan of operations. DOI rescinded that ROD in November 2001. In fact, following the rescission, Glamis withdrew the lawsuit it filed in federal district court, acknowledging that its complaints surrounding the ROD had been rendered moot by the rescission.[1073] The rescission of the ROD disposes of any claim Glamis could possibly have with respect to that ROD.[1074]

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[1073] *See Glamis Imperial Ass'n v. U.S. Dep't of the Interior*, No. 1:01CV00530 (D.D.C.), Defendants' Unopposed Motion for a Stay Pending the Parties Determination About Whether All or Part of This Case is Moot (Nov. 16, 2001); *Glamis Imperial Corp. v. U.S. Dep't of the Int.*, Order, No. 1-01CV00530, at 1 (Dec. 18, 2001).

[1074] *See* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 7-8 (2005) ("[I]nternational law does not impose a duty on states to treat foreigners fairly at every step of the legal process. The duty is to create and maintain a *system of justice* which ensures that unfairness to foreigners either does not happen, *or is corrected*; '[I]t is the whole system of legal protection, as provided by municipal law, which must have been put to the test.' . . . [A] claim of denial of justice would fail substantively in the absence of proof that the national system was given a reasonably full chance to correct the unfairness in question.") (emphasis in original).

In any event, the ROD fully complies with the standards Glamis alleges constitute part of the minimum standard of treatment. Glamis contends that the ROD, and the 1999 M-Opinion on which it was in part based, were "arbitrary and non-transparent" because they disregarded existing law and fabricated a new "mine-veto authority . . . out of whole cloth."[1075] As noted above, however, "simple illegality or lack of authority" does not constitute a violation of customary international law.[1076] Similarly, Glamis has failed to establish that transparency in administrative actions is required by the customary international law minimum standard of treatment.[1077] Even if the rule were otherwise, Glamis has failed to demonstrate a violation of its own proposed standards.

The development of the 1999 M-Opinion and the ROD were not "non-transparent" as Glamis asserts.[1078] The Solicitor's Office issued the 1999 M-Opinion in direct response to a request for legal guidance from the BLM California State Director following recognition of a conflict between the Imperial Project and cultural resources in the Imperial Project area that are integral to the Quechan's religious beliefs.[1079] The Solicitor's Office issued the Opinion pursuant to its pre-existing authority over DOI's legal work.[1080] The Opinion's ongoing preparation was widely known, and the Solicitor's Office accepted input from members of the public, including from Glamis

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[1075] Mem. ¶¶ 531, 546-48.

[1076] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1 ¶ 42; *see also* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 5 (2005) (even where a State organ "disregard[s] or misappl[ies] national law, [its] errors do not generate international responsibility."). *See generally supra* Arg. Sec. IV.B.

[1077] *See supra* Arg. Sec. IV.C.

[1078] Mem. ¶ 548.

[1079] Letter from Ed Hastey, State Director, BLM, to Solicitor, Department of Interior (Jan. 5, 1998) (3 FA tab 98).

[1080] 43 U.S.C. § 1455 (1994); 209 Department of Interior Manual §§ 3.1 & 3.2A (11) (1992) (granting the Solicitor "all the authority of the Secretary" over "[a]ll the legal work of the Department").

itself.[1081] In fact, Glamis met directly with Solicitor Leshy concerning the 1999 M-Opinion, and the final version of that opinion addressed the arguments advanced by Glamis.[1082] An administrative process conducted according to pre-existing rules, and involving members of the public, including Glamis, is not non-transparent.

Furthermore, the 1999 M-Opinion was not arbitrary, nor did it disregard existing law. The 1999 M-Opinion addressed the extent to which FLPMA authorizes or obliges the BLM to protect cultural and historic resources from the adverse impacts of a proposed mining project.[1083] The basic question addressed by the Opinion was whether BLM possessed discretionary authority to deny a plan of operations on account of the project's potential effects on cultural resources, or whether BLM could only act to mitigate harm beyond the harm that would be caused by a prudent mining operator.

This issue was presented in a context that had not previously arisen – the conclusion in the 1997 DEIS that the Imperial Project would have significant adverse impacts on cultural resources in the CDCA even after mitigation measures were imposed.[1084] As explained above, no previous – or subsequent – EIS for any mining project in the CDCA had found a significant, unavoidable adverse impact to cultural resources and Native American sacred sites.[1085] Thus, DOI had never had occasion to

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[1081] *See* Letter from Charles Jeannes, Senior Vice President and General Counsel, Glamis Gold, Inc., and Gary Boyle, General Manager, Glamis Imperial Corp., to Bruce Babbitt, Secretary of the Interior (Nov. 10, 1999) (7 FA tab 31); Memorandum from John Leshy, Solicitor, to Acting Director, BLM (Dec. 27, 1999) ("1999 M-Opinion"), at 17 (5 FA tab 205) (noting that the Solicitor had met directly with Glamis and addressing Glamis's arguments).

[1082] Letter from Jeannes and Boyle, to Babbit (Nov. 10, 1999) (7 FA tab 31); 1999 M-Opinion at 16-17 (5 FA tab 205).

[1083] 1999 M-Opinion at 3 (5 FA tab 205).

[1084] *See Imperial Project Draft EIS/EIR* (Nov. 1997), at S-44 to -53 (8 FA tab 60).

[1085] *See supra* Facts Sec. IV.A.6.

determine whether it had the authority to deny a mining project in the CDCA in such a situation.

Presented with the question of BLM's authority to deny a plan of operations in this context, the 1999 M-Opinion concluded that the "undue impairment" standard found in section 601(f) of FLPMA provided more protection than the "unnecessary or undue degradation" standard as defined in the 3809 regulations.[1086] Specifically, the Opinion concluded that because the existing 3809 regulations did not define "undue impairment," but rather left that standard to be applied on a case-by-case basis, BLM could deny a particular plan of operations in the CDCA pursuant to that standard "if the impairment of other resources is particularly 'undue,' and no reasonable measures are available to mitigate that harm."[1087]

The 1999 M-Opinion also stated that the "unnecessary or undue degradation" standard found in section 302(b) of FLPMA empowered the Secretary of the Interior to prohibit activities found to be unduly degrading, even though necessary to mining.[1088] The 1999 M-Opinion acknowledged that when BLM enacted the 3809 regulations in 1980, it limited its authority under the "unnecessary or undue degradation" standard to mitigate harm to "other resources," but not to allow outright denial of a plan of operations.[1089] Given those 3809 regulations, the 1999 M-Opinion did not suggest that

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[1086] *See* 1999 M-Opinion at 12 (5 FA tab 205).

[1087] *Id*. at 13, 17–18. The Opinion provided that "what is determined to be 'undue' is founded on the nature of the particular resources at stake and the individual project proposal" and advised BLM that it had authority to deny Glamis's plan of operations if it agreed with the Advisory Council's recommendations. *Id*. at 18–19.

[1088] *Id*. at 7.

[1089] *Id.* at 9, 17–18.

the "unnecessary or undue degradation" standard could be a basis to deny the Imperial Project.[1090]

Glamis asserts the 1999 M-Opinion was arbitrary and disregarded existing law for two main reasons. First, Glamis argues that the "undue impairment" standard "had always been equated with 'unnecessary and [sic] undue degradation'" standard as defined by the 3809 regulations.[1091] Glamis, however, fails to cite any authority that has actually equated the "undue impairment" standard with the "unnecessary or undue degradation" standard.[1092] Indeed, under the 3809 regulations, it is clear that the CDCA had been accorded a different level of protection than that afforded by the "unnecessary or undue degradation" standard. The definition of "unnecessary or undue degradation" in those regulations provided, "[w]here specific statutory authority requires the attainment of a stated level of protection or reclamation, such as in the California Desert Conservation Area [*i.e.*, the "undue impairment" standard], . . . that level of protection shall be met."[1093] The "undue impairment" standard was therefore never viewed as equivalent to the "unnecessary or undue degradation" standard.[1094]

Second, Glamis asserts that neither the "undue impairment" standard nor the "unnecessary or undue degradation" standard grant BLM the statutory authority to deny a

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[1090] *Id*. at 9.

[1091] Mem. ¶¶ 66, 546-48.

[1092] *Id*. ¶ 66. Glamis incorrectly argues that the CDCA Plan equated "undue impairment" with "unnecessary or undue degradation" because it only mentions imposing mitigation measures subject to economic feasibility for mining plans on CDCA Class-L lands. *Id*. ¶ 298. The table in the CDCA Plan to which Glamis cites, however, only references the 3809 regulations, and does not mention the "undue impairment" standard. CDCA Plan (amended 1999), at 18 (10 FA tab 96). Moreover, as the 1999 M-Opinion noted, that portion of the Plan only references mitigation measures when a plan is approved, and does not address BLM's authority to deny a plan of operations. *Id*.; 1999 M-Opinion at 17 (5 FA tab 205).

[1093] 43 C.F.R. § 3809.0-5 (k) (1980).

[1094] Nor does the 2001 M-Opinion equate "undue impairment" with "unnecessary or undue degradation." *See generally* 2001 M-Opinion at 18 – 20 (5 FA tab 216).

plan of operations in order to protect other resources, such as environmental or cultural resources.[1095] In support, Glamis cites Solicitor Myers's 2001 M-Opinion that superseded the 1999 M-Opinion.[1096] The 2001 M-Opinion, however, did not conclude that the 1999 M-Opinion's interpretation of the "undue impairment" standard was substantively incorrect. Rather, it narrowly concluded, "unless the Department promulgates substantive regulations to define 'undue impairment' under section 601(f) of FLPMA, the Department should not apply the provision to deny a plan of operations."[1097] The clear implication of that statement is that if DOI promulgated substantive regulations to define "undue impairment," then it could apply the provision to deny a plan of operations. The disagreement between the 2001 M-Opinion and the 1999 M-Opinion interpretation of "undue impairment" was thus one of process, not substance. Moreover, Glamis is incorrect to assert that the Imperial Project was the only mining project denied under the "undue impairment" standard.[1098] In 1990, BLM denied a plan of operations for a mine in the CDCA near the Indian Pass area because the mine would have caused undue impairment to CDCA resources.[1099]

The ROD denied the Imperial Project on the basis of the "undue impairment" standard, and not on the basis of the "unnecessary or undue degradation" standard.[1100]

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[1095] Mem. ¶¶ 76-79, 531, 547.

[1096] *Id*. ¶¶ 341 – 345.

[1097] 2001 M-Opinion at 19-20 (5 FA tab 216).

[1098] Mem. ¶ 79.

[1099] *Eric L. Price, James C. Thomas*, 116 IBLA 210, 220 (Oct. 4, 1990).

[1100] Record of Decision for the Imperial Project Gold Mine Proposal (Jan. 17, 2001) ("ROD"), at 3-4 (5 FA tab 212); 1999 M-Opinion at 17–18 (5 FA tab 205). To the extent the ROD cites the "unnecessary or undue degradation" standard, it did so only because the surface management regulations incorporated any higher standards to be applied to specific areas (*e.g.*, the "undue impairment" standard as applied to the CDCA) into the "unnecessary or undue degradation" standard. 43 C.F.R. § 3809.0-5(k) (1980). The ROD therefore concluded that "[b]y causing undue impairment to CDCA values, it is the conclusion of the

Nevertheless, Glamis also attacks the 1999 M-Opinion's discussion of the "unnecessary or undue degradation" standard and the subsequent changes to the 3809 regulations implemented in reliance on that advice.[1101] The 1999 M-Opinion stated that FLPMA's "unnecessary or undue degradation" standard granted BLM the discretionary authority to prohibit mining activities found to be unduly degrading, even though necessary to mining, but BLM had chosen to define its authority under that standard more narrowly in the original 3809 regulations enacted in 1980.[1102] Glamis characterizes this as a radical reinterpretation of the "unnecessary or undue degradation" standard, which was made without a necessary change in the law.[1103] What Glamis fails to mention is that the only U.S. court to have considered BLM's authority under FLPMA's "unnecessary or undue degradation" standard has agreed with the 1999 M-Opinion's conclusion that FLPMA gives BLM authority to deny a mining project:

> FLPMA, by its plain terms, vests the Secretary of the Interior with the authority – and indeed the obligation – to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.[1104]

BLM may elect not to exercise its full authority under the statute, but Glamis cannot point to any judicial or administrative decision that supports its arguments that the 1999

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Department that the project would result in unnecessary or undue degradation to the public lands." ROD at 15 (5 FA tab 212).

[1101] Mem. ¶¶ 76–79.

[1102] 1999 M-Opinion at 7, 9–10 (5 FA tab 205). The narrower definition in the 3809 regulations was the "prudent operator" standard described above.

[1103] Mem. ¶ 76.

[1104] *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 42 (2003).

M-Opinion arbitrarily and unpredictably created a new discretionary "mine-veto" authority from "whole cloth."[1105]

In sum, there is no support for Glamis's allegation that the 1999 M-Opinion was prepared in a non-transparent manner. Furthermore, no administrative or judicial body has ever concluded that the 1999 M-Opinion's interpretation of the "undue impairment" standard disregarded existing law or arbitrarily fabricated what Glamis calls a "new mine-veto authority."

Glamis further attacks the ROD – in the fact section of its Memorial, but not as part of its Article 1105(1) argument – as "factually unsound," alleging that the Section 106 process, culminating in the ACHP comments, was flawed.[1106] Glamis argues that the cultural resource survey completed for the 1997 DEIS/EIR – which found that the proposed Imperial Project would physically disturb a high concentration of archaeological features of religious-symbolic significance to the Quechan, including the Trail of Dreams – was flawed because the surveyors described the proposed Imperial Project as within an area of traditional cultural concern ("ATCC").[1107] Glamis's primary complaint is that this "artificial construct" became "reified" in the minds of those evaluating the proposed mine's potential effects, including the ACHP.[1108]

*First*, numerous cultural resource inventories conducted before the ATCC was defined clearly indicated to BLM that Glamis's proposed Imperial Project threatened to

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[1105] Mem. ¶¶ 398, 531, 546-48.

[1106] *Id*. ¶¶ 336-38.

[1107] *Id*. ¶¶ 204.

[1108] Sebastian Rpt. at 57.

destroy archaeological sites of historical and potential religious-symbolic significance to Native American tribes.[1109]

*Second*, to fully evaluate the archaeological sites and trails identified in and around the Imperial Project site (including their eligibility for the National Register) and to respond to the substantial criticism it received regarding the adequacy of the cultural resource inventory prepared for the 1996 DEIS/EIR,

.[1110] Section 106 expressly requires that federal undertakings are evaluated for their effects on such TCPs.[1111]

.[1112]

As described in further detail in the attached declarations of Russell Kaldenberg, former BLM California State Archaeologist, and James H. Cleland, PhD, archaeologist and author of the 1997 KEA survey and cultural resource inventory of the Imperial Project site, BLM determined that it could not burden Glamis with the expense of surveying the entire Quechan traditional territory, so instead, instructed KEA to examine a smaller area bounded by culturally significant sites the Quechan had identified and encompassing the confluence of trails that ran in and around the Imperial Project.[1113] Given that the ATCC was created to alleviate burdens placed upon Glamis by the

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[1109] *See supra* Fact Sec IV.A.; Kaldenberg Declaration ¶ 14.

[1110] *See* Kaldenberg Declaration ¶¶ 13, 15; Cleland Declaration ¶¶ 8, 27.

[1111] *See supra* Fact Sec.II.A.

[1112] *See Where Trails Cross*, at 285 (9 FA tab 83).

[1113] *See* Kaldenberg Declaration ¶ 17; Cleland Declaration ¶ 27.

ordinary Section 106 process, it is not surprising that Glamis did not complain of its use at that time.[1114] Furthermore, KEA's Transect Survey results confirmed that the ATCC was more densely populated with archaeological resources than the area that surrounded it, which provided archaeological evidence that the specific area on which Glamis proposed to build the Imperial Project was used by Native Americans for religious and ceremonial purposes.[1115]

Glamis also alleges – again, in the fact section of its Memorial and not as part of its legal claim – that the ACHP predetermined its recommendation to the Secretary of the Interior and that the ACHP's consultation process was a mere "façade."[1116] That accusation does not withstand scrutiny. Glamis presented its views directly to the ACHP working group at the March 1999 public meeting.[1117] At that public meeting, the ACHP Executive Director, John Fowler, noted that the ACHP could take different steps after assessing the issues, such as recommending further consultation on mitigation, or recommending that comments be issued.[1118] Glamis subsequently had a lengthy direct meeting with the working group and BLM representatives on July 14, 1999,[1119] and later exchanged correspondence with the ACHP working group, seeking to persuade the group that its reclamation plan was adequate because it would "re-establish the trail corridor at

[1114] Kaldenberg Declaration ¶ 18; Cleland Declaration ¶ 30.

[1115] *See* Cleland Declaration ¶ 25.

[1116] Mem. ¶ 314.

[1117] Fowler Declaration ¶ 19; Transcript of Advisory Council on Historic Preservation Public Hearing (Holtsville, CA) (Mar. 11, 1999) (10 FA tab 115).

[1118] Fowler Declaration ¶ 20; Transcript of Hearing (Mar. 11, 1999) (10 FA tab 115).

[1119] Letter from Ed Green, Crowell & Moring, LLP, to John Fowler, Executive Director, ACHP (July 15, 1999) (thanking Mr. Fowler for arranging the meeting with the working group and representatives from BLM on July 14, 1999) (7 FA tab 28).

nearly the same location and elevation as the existing corridor."[1120] As late as August 1999, the ACHP working group had not determined how it would proceed, and was distributing information provided by Glamis to its members so that it could consider those materials and determine how to bring closure to its review.[1121]

Glamis's charges of predetermination are in any event undermined by Glamis's own "evidence." Glamis relies on a September 1998 e-mail by Alan Stanfill, an ACHP staffer who was not a member of the ACHP working group, and who did not otherwise have any decision-making authority within the ACHP.[1122] The e-mail responded to one of the many citizen comment letters received by the ACHP regarding the Imperial Project. The letter's author described the "devastating effects on landscapes that are of deep cultural importance to the Quechan Tribe" and urged the ACHP to fully "review the facts" surrounding the proposed Imperial Project.[1123] In response, Mr. Stanfill indicated his personal thoughts as to how he believed the case might proceed, asked for "suggestions, advice or moral support" in that regard, and stated that he would try to keep the author "up-to-date on any progress" of future developments at the ACHP with respect to the Imperial Project.[1124] Mr. Stanfill's e-mail thus indicates that *no* decision had been made at that time by the ACHP's working group.

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[1120] Letter from Charles Jeannes, Counsel, Glamis Gold Inc., and Gary Boyle, Project Manager, Glamis Imperial Corp., to John M. Fowler, Executive Director, ACHP (Aug. 13, 1999) (4 FA tab 198).

[1121] Memorandum from Don Klima, Director, Office of Planning and Review, to Ray Soon, Department of Hawaiian Home Lands; Richard Moe, National Trust for Historic Preservation; and Dick Sanderson, EPA (Aug. 26, 1999) (7 FA tab 30).

[1122] Mem. ¶¶ 312-13. *See also* Fowler Declaration ¶ 21.

[1123] Letter from Thomas F. King, to Ray Soon, Division Administrator, Land Management Division, Department of Hawaiian Home Lands (Sept. 15, 1998) (4 FA tab 144).

[1124] Mem. ¶ 312.

### b. DOI's and BLM's Processing Of Glamis's Plan Of Operations After The ROD Was Rescinded

Glamis's argument that DOI acted arbitrarily in not approving its plan of operations after the ROD was rescinded is baseless.[1125] Glamis, notably, does not cite a single case to support its contention that the United States has violated the minimum standard of treatment by supposedly delaying the approval of its plan of operations. The relevant case law demonstrates that only extreme delays in the administration of justice by the courts – akin to an outright denial of access to justice – can give rise to State responsibility under customary international law.[1126] Here, unlike in those cases where a claim succeeded, not only did the actions at issue not involve a court or other adjudicatory body, but DOI's diligent processing of the plan of operations presents the starkest contrast with cases where a party was utterly denied access to justice, or denied even "the slightest indication" that it "might be granted the opportunity of pleading its cause."[1127]

After the ROD was rescinded in November of 2001, DOI and BLM proceeded to process Glamis's plan of operations. Because the regulations regarding validity determination had changed in 2001, it was necessary to complete a validity determination

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[1125] *Id*. ¶ 549.

[1126] *See, e.g., El Oro Mining & Railway Co. (Gr. Br.) v. United Mexican States,* 5 R.I.A.A. 191 (June 18, 1931) (finding a denial of justice where the local court had declined to hear the claimant's case for nine years); Conseil d'Etat, *Garde des sceaux, Ministre de la justice*/M. Magiera, June 28, 2002 (holding that France failed to accord a party *procès equitable* in violation of the European Convention on Human Rights where the administrative tribunal of Versailles took seven and a half years to rule on a "request which did not present any particular difficulty") (cited in JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW at 178); *Interoceanic Railway of Mexico (Gr. Br.) v. United Mexican States,* 5 R.I.A.A. 178, at ¶ 13 (finding no liability where claimants had unsuccessfully endeavored to settle their claims with the Minister of Finance for six years, appealed to the National Commission, and had an additional year and a half pass with no ruling or other relief; dismissing the claim, the Commission took cognizance of the size and complexity of the case, and determined that it cannot "hold that the claimants are the victims of an undue delay of justice" and that "no one would criticize a tribunal for taking a substantial time for examining actions in which such huge interests are involved").

[1127] *El Oro Mining & Railway Co. (Gr. Br.) v. United Mexican States,* 5 R.I.A.A. 191, ¶ 9 (June 18, 1931).

before proceeding to process the plan of operations.[1128] Thus, once the ROD denying the Imperial Project was rescinded in November 2001,[1129] BLM promptly announced in February 2002 that it would be examining the validity of Glamis's mining claims.[1130] It completed the validity examination with significant input from Glamis in September 2002.[1131] The process was no more extended than that for dozens of other California mining projects.[1132] Despite Glamis's complaints about delay, Glamis has no basis for complaining about the validity determination, which was issued in Glamis's favor on September 27, 2002.

Furthermore, Glamis's suggestion that its plan of operations should have been approved in the short, ten-month period between the late-September 2002 validity report and Glamis's filing of its notice of intent in this case in July 2003 is without merit. Just ten weeks after the validity report was issued, Glamis requested that BLM suspend "all ongoing efforts to process the Imperial Project Plan of Operations . . . ."[1133] BLM responded on January 7, 2003, stating that it was "willing to suspend processing" of the Imperial Project POO "at Glamis' specific request."[1134] BLM also requested that Glamis resubmit its suspension request together with a commitment relieving BLM of any legal

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[1128] 43 C.F.R. § 3809.100 (2001).

[1129] Rescission of Record of Decision for the Imperial Project Gold Mine Proposal (Nov. 23, 2001) (5 FA tab 219).

[1130] BLM Press Release, BLM Initiates Validity Examination on Glamis Imperial Mining Claims (Feb. 13, 2002) (5 FA tab 223).

[1131] BLM Mineral Report (Sept. 27, 2002) (6 FA tab 255).

[1132] *See* BLM LR2000 Report: Processing Time for California Patent Application Mineral Reports (LR2000 Reports can be obtained from http://www.blm.gov/lr2000/) (10 FA tab 97) (showing dozens of California mining projects where processing of a validity examination took up to five and even ten years).

[1133] Letter from C. Kevin McArthur, President, Glamis Gold Ltd., to Mike Pool, California State Director, BLM (Dec. 9, 2002) (6 FA tab 265).

[1134] Letter from Mike Pool, California State Director, BLM, to C. Kevin McArthur, President, Glamis Gold Ltd. (Jan. 7, 2003) (6 FA tab 271).

liability to Glamis for the suspension.[1135] Waiting nearly three months, Glamis eventually replied, stating that "we cannot reaffirm our request to the Interior Department to suspend the Glamis plan of operations when we have no reasonable expectation that an alternative resolution for the Imperial Project is likely."[1136]

DOI then began processing Glamis's plan of operations again . DOI had to determine whether the 2001 FEIS was sufficient, or whether a new EIS should be prepared, and whether California's recently-enacted California SB 22 or the SMGB's regulations should be applied to the Imperial Project as part of the federal processing.[1137] Between April and July 2003, DOI and BLM engaged in discussions to determine how to proceed with the processing of the plan of operations in light of these new developments.[1138]

Glamis brought that process to a halt when it filed its notice of intent under the NAFTA on July 21, 2003. Glamis made it clear that it no longer expected or desired DOI or BLM to continue expending resources on its plan of operations. Glamis thanked DOI officials for their attention to the Imperial Project, but stated that it believed that issues surrounding its plan of operations had become "intractable" and that it would instead pursue "new avenues" of redress – confirming its intent to abandon the regulatory process in favor of this arbitration.[1139]

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[1135] *Id*.

[1136] Letter from Charles A. Jeannes, Senior Vice President, Glamis Gold Ltd., to Mike Pool, California State Director, BLM (Mar. 31, 2003) (6 FA tab 280).

[1137] *See* Draft Working Document (June 26, 2003) (6 FA tab 292).

[1138] Briefing Document on Glamis Imperial Gold Mine (Apr. 8, 2003), at 2 (6 FA tab 286); Draft Working Document (June 26, 2003) (6 FA tab 292).

[1139] Letter from Timothy McCrum, Counsel for Glamis Gold Ltd., to Patricia Morrison, Deputy Assistant Secretary for Land and Minerals, DOI, at 1, 3 (July 21, 2003) (7 FA tab 47).

Notably, in 2000, when Glamis filed a suit in federal court challenging the 1999 M-Opinion, it requested that BLM suspend processing of its plan of operations while the suit was pending. In so doing, Glamis wrote that it "strongly believe[d]" that it would be "inappropriate" for BLM to continue work on the plan of operations while the lawsuit was pending.[1140] Glamis highlighted the "tremendous waste" of money and resources that would result were BLM to process its Imperial Project plan of operations under such circumstances.[1141] When BLM indicated that it would continue to process the plan of operations at its own expense,[1142] Glamis responded that it was "appalled" that BLM would "spend taxpayer resources to accelerate completion of the EIS and ROD in the face of a legal challenge."[1143] It is reasonable to assume that Glamis would likewise have considered it inappropriate for DOI to continue processing its plan of operations in the wake of Glamis's legal challenge – particularly where the legal challenge here involves an assertion that its property interests have already been expropriated as opposed to the earlier dispute over the legal standards that would apply to BLM's processing of the plan of operations.

Likewise, that Glamis did not expect DOI to continue with the processing is confirmed by the fact that Glamis has never inquired about the status of its plan of operations since filing its claim. By contrast, when Glamis was frustrated that the validity report had not been issued, it called DOI officials on more than ten occasions and

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[1140] Letter from C. Kevin McArthur, President, Glamis Imperial Corp., to Al Wright, Director, BLM California State Office (Apr. 14, 2000) (7 FA tab 32).

[1141] *Id*.

[1142] Letter from Al Wright, Director, BLM California State Office, to C. Kevin McArthur, President, Glamis Imperial Corp. (May 19, 2000) (7 FA tab 33).

[1143] Letter from C. Kevin McArthur, President, Glamis Gold Ltd., to Al Wright, Director, BLM California State Office (June 15, 2000) (7 FA tab 34).

secured approximately eight meetings with high-level officials in the DOI.[1144] Glamis's self-serving argument that it expected DOI to continue processing its plan of operations while it challenged DOI's actions under the NAFTA is belied by its own statements and actions.

In conclusion, the measures that Glamis challenges do not violate the customary international law minimum standard of treatment embodied in Article 1105(1). Not only has Glamis failed to establish that the minimum standard of treatment protects investors from arbitrary or nontransparent conduct, or conduct that upsets an investor's reasonable expectations, but Glamis also has failed to demonstrate that the measures were in fact arbitrary or nontransparent, or defeated its reasonable expectations. Glamis's claim under Article 1105(1) must be dismissed.

[1144] *See* Letter from Earl E. Devaney, Inspector General, U.S. Department of Interior, to Senator Barbara Boxer, at 1-3 (Mar. 11, 2003) (6 FA tab 277).

## CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Tribunal dismiss Glamis's claims in their entirety and with prejudice and order that Glamis bear the costs of this arbitration, including the United States' costs for legal representation and assistance.

Respectfully submitted,

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