NAFTA/UNCITRAL ARBITRATION RULES PROCEEDING

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In the Matter of Arbitration Between:

GLAMIS GOLD, LTD.,

Claimant,

and

UNITED STATES OF AMERICA,

Respondent.

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HEARING ON THE MERITS

Friday, August 17, 2007

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

The hearing in the above-entitled matter came on, pursuant to notice, at 9:05 a.m. before:

MR. MICHAEL K. YOUNG, President

PROF. DAVID D. CARON, Arbitrator

MR. KENNETH D. HUBBARD, Arbitrator

Also Present:

MS. ELOÏSE OBADIA,
Secretary to the Tribunal

MS. LEAH D. HARHAY

Assistant to the Tribunal

Court Reporter:

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C O N T E N T S

1382

P R O C E E D I N G S

PRESIDENT YOUNG: Good morning. We apologize for the slight delay, but technology rules again.

I welcome you to the marathon that has become a Glamis Gold versus the United States arbitration for the last day of this session of set of hearings; and I start by asking the parties, as I ask every morning, if there are any issues that they need to raise this morning prior to commencement.

MR. CLODFELTER: No.

PRESIDENT YOUNG: Thank you.

Well, in that case, Mr. Clodfelter, Ms. Menaker, we turn the time to you.

CONTINUED FACTUAL PRESENTATION BY RESPONDENT

MR. CLODFELTER: Thank you, Mr. President.

This morning, we're going to present our defense to Glamis's claim under NAFTA Article 1105, the minimum standard of treatment.

Before we get into that, though, there are a couple of points I would like to make and follow up on questions that you all raised to us yesterday.

One minor question: Professor Caron

1383

09:06:14 asked--excuse me--whether the testimony of Mr. Jeannes

and Mr. Voorhees before the State Mining and Geology Board was in the record, and we've been able to confirm that is in the record. Mr. Voorhees's comments to the SMGB at its November 14, 2002, meeting were submitted as Counter-Memorial Exhibit 104; and Mr. Jeannes's testimony at the December 12, 2002, Board meeting was submitted, with Glamis's Memorial, as Exhibit 268.

Mr. President, more substantively, we'd like to elaborate on answers we gave to two questions that you posed in connection with Ms. Van Slooten's reasonable investment-based expectations presentation yesterday.

First, you asked whether there are limits to a State's ability to regulate on Federal land, and we believe that the relevant limits on that ability are subsumed in the constitutional doctrine of preemption.

Second, you asked whether the Tribunal is required in this case to determine whether the California measures are reasonable or not. On reflection, we do not think that you are required to

09:07:38 make this determination; and, in fact, we think there are compelling reasons why you should not undertake that, that endeavor. There's very little occasion in international law for international tribunals to review the legality of the State measures in accordance with that State's own law or Constitution; and there are lots of reasons why it is an unwise

course for international tribunals to take.

We don't think it's a proper analysis or a Rebes [ph.] analysis. We think that the State measures ought to be taken as facts as given and proceed from there.

Now, the issue arose here, as we understand it, from the Granite Rock case, which held that in enacting Federal Land Policy and Management Act, Congress did not intend to occupy the area to the extent that reasonable state environmental regulations would be preempted. Whether there has been a preemption here, we do not believe, therefore, would be a proper inquiry for the Tribunal to make. As it happens, we don't think that you have to make that inquiry into these particular facts, whether we're

09:09:00 correct in that assertion or not.

In his opening statement, counsel for Glamis conceded that the California measures were legal, which excludes their being unconstitutional under the preemption doctrine and confirms the party's common understanding to that effect. Let me just give that you citation. That is in the first day's transcript, page 52, basically line 17 to the top of page 53.

This is also confirmed, we believe, by Mr. Olson's opinion, so preemption is not an issue in this case, and, therefore, whether these are reasonable environmental regulations does not arise. And, therefore, you do not have to make that

determination, even if you had--and even if for a proper inquiry for an international tribunal to make in a Rebes [ph.] analysis, which we think it is not, nor do we see any other occasion to consider the reasonableness of the State measure.

Now, today we're going to be devoting a lot of time to talking about issues related to that question, whether or not international law permits that kind of inquiry, and we will argue forcefully

09:10:09 that it does not. But I wanted to preface those comments by speaking of this issue in relationship to the reasonable investment-backed expectations issue.

If you don't have any further question on that point, I will proceed.

PRESIDENT YOUNG: Mr. Clodfelter, if I could clarify exactly what you're saying, I think that--I think I understand it, but what I'm still just a little confused about is that I don't know if--if I don't inquire into the legitimacy of the State regulations, I'm not quite sure how I'm going to determine the scope of the Federal property right granted in mining. Can you tell me help me think that through? In other words, I'm not talking about preemption, and I'm not talking about reasonableness. I think I'm talking about, which I think you've conceded or based your argument on, that there is a--there is a federally granted right, but that right is bounded. But if I'm not permitted to inquire into

the boundaries, I don't know how I determine the right.

MR. CLODFELTER: Well, let me--let me give an

09:11:18 initial offer.

PRESIDENT YOUNG: I mean, we may go off on different grounds. We may decide that whether there is a property right or not is irrelevant, et cetera, et cetera; but, if I have to determine there is a property right, I'm a little unsure how I determine it. If it's a federally granted right that is legitimately bounded to some measure by State law, I don't know how I determine the scope of the property right if I don't think about the scope of the appropriate boundaries of State law.

MR. CLODFELTER: As we said, we think the appropriate boundary is subsumed within the constitutional doctrine of preemption. Since preemption is not an issue, you do not have to make that inquiry here. The issue of what rights Glamis enjoys under Federal law is not impacted by some improper overreach by State law in this case by the parties' mutual or common understanding.

Does that help? I mean, if--

PRESIDENT YOUNG: So, your view--your view is that it's not in dispute that the level of regulation

is appropriate here. Therefore, there's--I mean, it seems to me to sort of beg the question. Maybe counsel for Claimant will feel differently, but it seems to me you have assumed away the case. You have assumed there is no property--that there is no incursion on the property right by virtue of the State regulation because State regulation is assumed under preemption, and I can't look at preemption. Am I misstating that?

MR. CLODFELTER: Let me confer.

PRESIDENT YOUNG: I think you made your point, and I'll--I appreciate the answer, and, you know, we have a hearing two or three weeks from now--

MR. CLODFELTER: We thought about that, too, because these are important and difficult questions, and we will be prepared, obviously, in September to give any additional answer that would be helpful.

Let me just consult for one moment, if you don't mind.

(Pause.)

MR. CLODFELTER: I think we could supplement the answer partially at this point. The reason why we

think the inquiry ends at the preemption question, if there is no preemption issue, there is no question of the State measures in effectively limiting the Federal property rights because they are somehow illegal. It really is a question of the content of those State

measures because Federal law recognizes the right of States to put limits on the use of Federal land.

And if those--if the actions of the State takes to put limits on that use is not preempted, then you can accept them as valid constitutionally, and then look at their content and whether or not by their content they do restrict the bundle of rights that make up the Claimant's property.

I'm hoping that helped.

PRESIDENT YOUNG: Counsel, I think it does. It does help. It does seem to me that you put the preemption doctrine back on the table with that answer, but I will take that answer. I probably at some point was going to ask Claimant to--their views on the matter as well, but that's helpful, and we will have more chance to discuss this later on. But that's very helpful. Thank you. I appreciate your answer on

09:15:38 that.

MR. CLODFELTER: Thank you, Mr. President.

Mr. President, we're going to proceed, then, and I'll begin the United States's defense to the Article 1105 claim by citing forth the legal standards that we believe govern that claim. When I'm done doing that, we will then address both again the California and the Federal measures and demonstrate that none of those measures violates Article 1105(1).

To begin with, we have noted in our submissions that there is no disagreement between the

parties, that the obligation contained in Article 1105 is the obligation to accord investments the customary international law minimum standard of treatment. While paying lip service to this fact, Glamis effectively disregards it when advancing its Article 1105 claim, because nowhere does Glamis set out to prove the existence of any rule of customary international law that supposedly has been violated by the United States.

Now, as you're aware, Glamis focused on three alleged obligations which it claims are customary

09:16:47 international law obligations under the minimum standard of treatment and alleges that the United States has breached all three of those obligations. They are the obligation to act transparently, to act in a manner--second, to act in a manner that does not frustrate investors' reasonable expectations or legitimate expectations, and, three, to refrain from arbitrary conduct.

But as Mr. Bettauer carefully explained on Sunday, to demonstrate that any of these alleged requirements is a rule of customary international law, Glamis must show general and consistent State practice by states followed by those states out of a sense of legal obligation. Glamis has failed to do this with each of its supposed rules. Instead, it has merely latched on to disparate statements in a variety of arbitral decisions which it claims supports its

contentions.

But as we have shown in our written submissions, this is not enough. Some of these tribunals were not even interpreting customary international law obligations but, rather, were

09:17:58 interpreting specific Treaty provisions, specific conventional obligations.

Other tribunals acted as though they were applying the minimum standard of treatment, but made no attempt to survey State practice to determine whether there was--whether there was, in fact, an existing rule of customary international law, and, to that extent, cannot serve as legitimate authority for their propositions.

And at other times, Glamis simply takes phrases in these decisions out of context and elevates those phrases to purported rules of law.

I will turn briefly to discuss each of these in turn and show why they cannot form the basis of a violation of Article 1105.

The first purported rule that Glamis relies on is the so-called transparency obligation. Although Glamis repeatedly refers to transparency, it is not at all clear what it means by that term. In fact, Glamis never identifies what exactly it believes States are required to do in order to conform to the so-called rule of customary international law. Glamis invokes

09:19:16 the Tecmed case, as I mentioned at the beginning of this case, and the Azurix case, but both of those tribunals spoke of transparency in reference to a State making public the laws and regulations that govern foreign investment. But as I mentioned, Glamis does not allege that the United States here failed to make public the laws and regulations governing its investment, and thus, cannot be a violation of this standard, even if it existed.

Instead, Glamis, at times, seems to allege that the international minimum standard of treatment requires States to provide foreign investors with an ample opportunity in advance to comment on laws and regulations that may affect it. In other words, Glamis sees the NAFTA as creating some kind of international Administrative Procedures Act.

And in our pleadings, we have shown that this novel and far-reaching interpretation of Article 1105 is legally incorrect.

Now, they're also wrong in the facts, as there was nothing at all nontransparent about the adoption about either of two California measures or

09:20:24 about the Federal Government's actions, and Ms. Menaker will show that in her presentation.

I don't intend to repeat all of the arguments

made in our pleadings showing the other question; that is, why Glamis's legally wrong in this interpretation, but I do want to highlight a few of the authorities that we cited in our Rejoinder, authorities which have rejected the broad transparency obligation proffered by Glamis.

First, the 2004 OECD working paper on fair and equitable treatment, for instance. This is cited by Glamis in support of the transparency argument. That report, however, specifically notes: "In a few recent cases, arbitral tribunals have defined 'fair and equitable treatment' drawing upon a relatively new concept not generally considered a customary international law standard: Transparency."

Now, Glamis cites also the Metalclad versus Mexico NAFTA Chapter Eleven Award in support of its transparency argument. The portion of the Metalclad Award dealing with transparency, however, was specifically nullified by a Canadian court in a

09:21:46 set-aside proceeding. The Supreme court of British Columbia held in no uncertainty terms that, "There are no transparency obligations contained in Chapter Eleven."

Because the Metalclad Tribunal had concluded otherwise, it was deemed by the court to have exceeded its authority, and that portion of the Award was set aside.

Now, that Canadian Court's determination that

NAFTA contains no transparency obligation was quoted approvingly in the Feldman versus Mexico Chapter Eleven award. The Tribunal there stated: "The British Columbia Supreme court held in its review of the Metalclad decision that Section A of Chapter Eleven, which establishes the obligations of host Governments to foreign investors, nowhere mentions an obligation of transparency to such investors, and that a denial of transparency alone thus does not constitute a violation of Chapter Eleven." While this Tribunal is not required to reach the same result as the British Columbia Supreme court, it finds this aspect of their decision instructive.

09:23:00 That's at paragraph 133 of the Feldman Award.

So, Glamis's effort to read a nonexistent transparency obligation into Chapter Eleven should be rejected.

Let me briefly turn to Glamis's claim that Article 1105 protects an investor's legitimate expectations. Again, we've addressed this issue at length in our pleadings; and, of course, we've already analyzed at length the issue of reasonable investment-backed expectations in connection with an indirect takings analysis.

Frustration of an investor's expectations, however, cannot form the basis of a stand-alone claim establishing a breach of customary international law and its minimum standard of treatment. We note this

is also true under U.S. law, which provides no cause of action for frustration of expectation.

Perhaps the best illustration of this point in international law is to consider the instance of a breach of contract. Obviously, a valid contract provides reasonable expectations of the parties' rights and obligations, and yet, under international

09:24:18 law it is well settled that a breach of contract alone does not constitute a violation of the customary international law minimum standard of treatment. Rather, to succeed on a claim relating to violations of contract under customary international law, a party must prove something beyond mere breach, such as repudiation of the contract for noncommercial reasons.

Many investment treaties, in fact, specifically permit claims for breaches of what are labeled "investment agreements" and are defined very precisely in those treaties in order to make investor-State arbitration available specifically because such breaches would not ordinarily give rise to justiciable claims under international law.

Now, if the expectations manifest in a contract cannot provide a basis for a breach of the minimum standard of treatment, no lesser basis for such expectation can do so. That is, if customary international law does not even protect expectations that are backed by contractual commitment by the State, it would be truly extraordinary for this

22 Tribunal to conclude that weaker forms of assurances

1398

09:25:42 1 are legally protected.
2 In any event, as Ms. Van Slooten has already
3 shown and as Ms. Menaker will show again today, Glamis
4 could have had no reasonable expectation that it could
5 operate its mine without regard to California's
6 reclamation requirements. And Ms. Menaker and
7 Mr. Benes will likewise show that Glamis could not
8 have had any legitimate expectation that the Federal
9 Government would not act as it did in connection with
10 the processing of its Plan of Operations.
11 Finally, I'm going to talk briefly about
12 Glamis's claim that the minimum standard of treatment
13 protects so-called arbitrary actions of the State.
14 Like its transparency claim, Glamis invokes this term
15 "arbitrary," but it's not clear what it actually
16 claims States are required to do or in what manner
17 they are required to act in order to abide by this
18 so-called rule.
19 In its submissions, Glamis, in fact, concedes
20 that State legislative and regulatory measures are
21 entitled to significant deference. In practice,
22 however, Glamis is asking this Tribunal to accord no

1399

09:27:02 1 deference whatsoever to the several administrative and

legislative decisions and measures that it happens to disagree with. In fact, Glamis is asking you to find a violation of Article 1105, based on what it perceives to be unwise legislation and mistakes made in the administration--administrative processing of its plan of operations.

As we noted in our Rejoinder, Glamis seeks to impose on the United States as Respondent the burden of justifying the appropriateness of the regulatory and legislative measures at issue. It argues that we have to prove in detail and specifically that the challenged regulatory measures were made without and, "relevant flaws," that they conform to, "international and U.S. best practice," that they were the, "least restrictive measures available," and that they were, "necessary, suitable, and proportionate."

Now, Claimant cites Professor Wälde for these propositions, but neither Claimant nor their expert surveys State practice or even cites a survey of State practice to establish the States by their practice have accepted these obligations out of a sense of

09:28:32 legal obligation.

And it's simply not the case. It cannot seriously be argued that the practice of States has been to subject their legislative and administrative rulemaking to standards such as these. Indeed, international courts and tribunals applying customary international law have expressly rejected this kind of

second-guessing of legislative and regulatory decision making. In this respect, the language used by the S.D. Myers NAFTA Chapter Eleven Tribunal is particularly apt.

The Tribunal in that case stated: "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 potentially 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

09:29:47 remedy, if there were one, for errors in modern Governments is through internal political and legal processes, including elections."

As we have shown in our written submissions, the domestic law of both United States and Canada supports this approach. The courts of both countries accord significant deference to administrators and legislators in economic matters. In the seminal case of Williams versus Lee Optical, for instance, the United States Supreme court held that, "It is for the legislature and not the courts to balance the advantages and disadvantages" of competing legislative measures in the economic sphere.

Similarly, when addressing complaints about administrative processes, we have shown that international law accords a strong presumption of regularity--let me say that again--accords a strong presumption of regularity to administrative decision making.

So, Glamis has failed to demonstrate that any of the alleged rules on which it relies are part of the customary international law minimum standard of

09:31:13 treatment.

Now, this week, during Glamis's presentation, we heard two new variations on Glamis's arguments. First, Glamis seems to suggest that it no longer maintains that any of these three purported rules alone are standing rules of customary international law, but together represent a requirement of the minimum standard of treatment. But there has been no greater showing of State practice and opinio juris with respect to this combined consideration as there was with respect to these rules seen individually.

And second, as Mr. Bettauer pointed out on Sunday, Glamis for the first time used the term "denial of justice" to describe its claim, a field recognized as part of the minimum standard of treatment, but it has nowhere made any effort to show how these claims meet the elements was a denial of just claim, and looks much more like convenient labeling rather than a concerted assertion of right

under Article 1105.

Now, having considered these legal standards, in any event, as Ms. Menaker and Mr. Benes will

09:32:51 demonstrate in detail, each of the challenged California and Federal measures pass scrutiny under any of these standards, even if they were components of the customary international law minimum standard of treatment. So, rather than discussing further these concepts in the abstract, we will discuss these theories in connection with their specific complaints about the measures at issue.

And unless there are any questions, I will now ask that Ms. Menaker address Glamis's challenges to the California measures.

PRESIDENT YOUNG: Ms. Menaker?

MS. MENAKER: Thank you, Mr. President and Members of the Tribunal, and good morning.

As Mr. Clodfelter noted, I'll address Glamis's claim that the California measures violated the customary international law minimum standard of treatment and explain why that claim should be dismissed.

The first thing to note when looking at Glamis's Article 1105 claim is that Glamis has not identified any international law rule governing what

types of mine reclamation measures a State may adopt. And this is really not surprising because States are free to require mining companies--is there any confusion about the handouts?

PRESIDENT YOUNG: I was just wondering if you had handouts for Mr. Clodfelter's PowerPoint presentation.

MR. CLODFELTER: Actually, we don't, but we can--

MS. MENAKER: We will hand those out at the next break.

PRESIDENT YOUNG: Thank you.

MS. MENAKER: Sure. So, Glamis has hasn't identified any customary international law rule that would govern what types of mine reclamation measures a State may adopt, and we don't find this surprising because it is clear by looking at State practice that States require mining companies to remediate the harm that they have caused by mining, and they do this in various different ways. Some jurisdictions have very stringent requirements while others may have no requirements at all.

And other than the customary international law rule against expropriation without compensation, no one has suggested, and Glamis certainly has not proven that customary international law rules restrict the manner in which states may regulate the mining

industry in this regard.

California's reclamation measures are not exceptional in any legally relevant respect as far as their substance is concerned, because although Glamis complains that no other state has adopted a complete backfilling requirement, Glamis has not and cannot demonstrate that states have desisted from adopting regulations that adversely affect the mining industry out of a sense of legal obligation.

In fact, we have shown, and the evidence is undisputed, that other jurisdictions have requirements that would be even more onerous if they were applied to Glamis's Plan of Operations than California's requirements would be. As we referenced in our submissions, several states have banned the use of cyanide leach mining, and some have banned the use of all open-pit mining.

1406

09:36:14 And, currently, this is the only method of extracting very low-grade gold ore, and the Tribunal will recall that Glamis specializes in mining this type of very low-grade gold ore.

So, Glamis's Plan of Operations would not be proved in these states. It could not mine there at all.

By contrast, in California, it can still mine in the manner in which it has planned; that is, by open-pit cyanide heap-leach mining.

So, in short, Glamis can't argue the crux of

its minimum standard of treatment claim cannot be that the requirements that California has placed on mining render it more restrictive than anywhere else. And even if it could make that claim, it has not demonstrated that there is any customary international law rule prohibiting this type of reclamation requirement.

And Glamis's other attacks on the substance of the California measures are equally unavailing. California--excuse me, Glamis claims that the--California's reclamation requirements are

09:37:18 internationally unlawful because they are not legitimate means to address the problems for which they were created. And this is not only wrong, but it does not provide a basis for this Tribunal to find the States--that the United States breached its Treaty obligations.

Customary international law does not grant states or, in this case, corporations the right to second-guess legislative determinations made by other states, and so the flip side of this is also true. Customary international law does not place upon states the obligation to adopt only legislation that is purportedly best suited to address the problem that the State wants to rectify. And Glamis has pointed to no rule of customary international law that provides otherwise. And we have shown in our written submissions, there are certainly no widespread state

practice to that effect.

To the contrary, the State practice which we have cited demonstrates that domestic courts in the United States and Canada, two pertinent jurisdictions for assessing State practice in this case, typically

09:38:29 provide a great amount of deference or a great degree of deference to legislative decisions and do not declare such laws to be invalid on the basis that there may have been better means to address the problem or that the means chosen were ineffective.

Furthermore, during its opening statement, Glamis acknowledged more than once that the actions of the State of California at issue in this proceeding were in lawful. And Mr. Clodfelter referred to this this morning. The citations that I have are--I believe they were to the LiveNote transcript, so they're not right on point, but the first reference was made on or about page 70 and the second on or about page 83.

But by doing this, Glamis itself must be deemed to acknowledge that a United States court would not strike down either California measure on the grounds that it was arbitrary.

So, although Glamis characterizes both of the California measures as arbitrary, it has failed to prove this fact and to demonstrate that such a showing could constitute a violation of Article 1105(1).

1409

09:39:35 The international law cases that Glamis cites do not support the far-reaching proposition that state legislation may be second-guessed by international tribunals to determine whether that legislation is the least restrictive or the best means of accomplishing its objectives.

Legislation that bears no rational relationship to its purported aims might be characterized as arbitrary. But even assuming that there was an international law prohibition against such action, the record in this case so clearly evidences a relationship between each of the California measures and their respective objectives that neither measure could be labeled "arbitrary."

So, in addressing Glamis's challenge to the California measures, I will first show why Glamis's argument that the SMGB regulation is arbitrary--I'll first show why that argument fails, and then I will turn to show why its argument that Senate Bill 22 is arbitrary also fails. After that, I will briefly demonstrate why neither of the California measures could have upset Glamis's legitimate expectations, and

1410

09:40:40 I will show that both measures were fully transparent, thus satisfying Article 1105(1), even accepting Glamis's flawed analysis of the minimum standard of

treatment.

As I showed yesterday, the purpose of the SMGB's regulation is clear from the administrative record. The SMGB sought to ensure that lands that were used for mining were reclaimed to a condition where they could later be used. They were also adopted to ensure that there remained no danger to public health and safety after mining was completed.

As Mr. Feldman noted, the SMGB had ample evidence before it indicating that when land is left with vast open pits and hundred-foot-high stockpiles, that land is not adaptable to alternative uses.

In fact, Dr. Parrish explained that the SMGB was presented with no evidence whatsoever that land with unbackfilled pits and large waste piles had been or could be converted to an alternate use.

By contrast, once the land is backfilled and recontoured, the public land can again be used. Other harms associated with large open pits, such as the

09:41:57 formation of pit leaks, dangers to wildlife and humans, are also eliminated when the open pits are backfilled.

Glamis criticizes the regulation as arbitrary on three bases, none of which has any merit. First, it argues that the SMGB did not rely on scientific or technical reports. But scientific or technical reports aren't required to determine that open pits pose dangers or that land with large open pits and

massive waste piles is not readily adaptable for alternative uses post-mining. Empirical evidence can demonstrate that.

As Dr. Parrish testified, the SMGB held public hearings where it heard testimony on its proposed regulations. As you heard this week in testimony from both Dr. Parrish as well as Mr. Jeannes, Glamis was present at these hearings, and Glamis officers testified at those hearings and had an opportunity to present any evidence which they wished to present.

The California Mining Association, of which Glamis is a member, also testified at those meetings.

09:43:04 Much of the testimony that was presented concerned the ways in which open pits were dangerous and how the land was not being utilized post-mining. This is all contained in the voluminous administrative record. That record overwhelmingly supports the SMGB's actions; and, as Dr. Parrish noted, the SMGB was presented with no persuasive evidence to the contrary. There were no technical or scientific reports introduced that contradicted the SMGB's findings.

Equally baseless is Glamis's second contention that the Board's decision to regulate metallic but not nonmetallic mines was arbitrary. As we have explained and as Dr. Parrish has testified, nonmetallic mines don't present the same issues as

mechanic mines. First, most of the material that is mined, like sand and gravel as opposed to minerals in a metallic mine, is carted away, so you generally don't have the large waste piles that are left with a metallic mine.

You also don't have the material to fill in the hole. The purpose of the regulation is to reclaim

09:44:12 the land so that it can be used for alternate uses, and it would be counterproductive to require companies to completely backfill when there isn't enough fill material to backfill the pit. The company would need to go elsewhere to dig a hole and cart that material back to the open pit, but then it would have created another hole which, in turn, would need to be backfilled, unless material was then again carted in to fill that hole and so on and so on. Indeed, it would not make much sense at all if the regulation did require backfilling under such circumstances.

And as Dr. Parrish also noted, in practical terms, the nonmetallic open-pit mines just haven't presented the same problems because, for economic reasons, they are generally located close to urban areas, and, thus, there is an incentive for the mining operator to backfill the hole, even if it does need to acquire the fill material because the land is so valuable that it can often incur that cost just so the land can be used for an alternate use so it can be later built upon if it is located close to an urban

22 area. So, the same problems weren't presented with

1414

09:45:30 1 respect to nonmetallic mines as were presented with
2 respect to the metallic mines.
3 And just to follow up on a point that was
4 raised yesterday, which was whether the Boards
5 considered this distinction between metallic and
6 nonmetallic mines, and we said that we would look back
7 because we were certain that it had, and I just want
8 to point the Tribunal to pages 8 and 9 of the Final
9 Statement of Reasons.
10 And in that document, the Board there
11 responds to a comment that was made regarding the
12 percent revenue rate to be used for purposes of
13 determining whether a mine falls within the definition
14 of a metallic mine under the regulation. The Board
15 had proposed a 10 percent rate test, meaning that if
16 10 percent or more of a mine's revenue was derived
17 from metallic minerals, then the mine would be covered
18 by the regulation. It would be considered a metallic
19 mine for purposes of the regulation.
20 The commenter proposed increasing this to
21 50 percent, and said that, no, you should only fall
22 within the definition of a metallic mine if 50 percent

1415

09:46:41 1 or more of your revenue was derived from metallic

minerals. And the Board declined to change the regulation, and it maintained the 10 percent rate.

In doing so, it observed that if some aggregate mines were to be swept into the definition of metallic mines, those aggregate mines would be accorded relief under the regulation if they did not have enough fill material to fill in the hole because the regulation only requires the holes to be backfilled to the extent there is enough fill material.

So, there wasn't a problem on that account, but at the same time, the Board wanted to ensure that mines that were really creating this problem were swept within the scope of the regulation, and it did maintain that low 10 percent rate.

Now, in his rebuttal statement, Mr. Leshendok raised the issue of the Borax nonmetallic mine in Kern County, California, and you also heard some testimony about that mine this week. And he noted in particular that this aggregate nonmetallic mine is larger than the proposed Imperial Project and would leave a large

09:47:48 hole with very large waste piles.

But as Dr. Parrish explained in his first statement, with respect to aggregate mines, generally there are no large waste piles left on-site, and so backfilling of such mines is usually unfeasible. This may not be the case for every single aggregate mine.

And the SMGB regulation was not designed to

address every problem resulting from every mine in the State of California, but rather to tackle the problem which appeared most serious and immediate, which was the environmental harm result from open-pit metallic mines.

And the SMGB regulation cannot be found to be arbitrary for doing so. As we explained in our Rejoinder and as the U.S. Supreme court has held, there is, "no requirement that all evils of the same genus be eradicated, or none at all." And that is from the Railway Express Agency versus New York case, U.S. Supreme court case from 1949.

Both the U.S. Supreme court and the Canadian Supreme court have clearly rejected the notion that legislation is arbitrary if it fails to address every

09:49:02 related problem. Both courts have held, and I have put this on the slide, evils in the same fields may be of different dimensions and proportions requiring different remedies, or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one field and apply a remedy there, neglecting the others.

The SMGB's regulation was a rational response to the problems posed by open-pit metallic mines that were not fully reclaimed. The reclamation requirements imposed by the regulation meets the

regulation's objectives of ensuring that the land is available for alternate use and doesn't pose dangers to the public, and there is no evidence that even remotely suggests that the regulation was irrational or arbitrary.

And I believe I made a factual misstatement when I was talking about the Borax mine. It is a nonmetallic mine, but it is not an aggregate mine. It--actually, the material in the mine is boron, which

09:50:11 I don't think falls under the definition of aggregate, but it is a nonmetallic mine.

And finally, on the issue of the arbitrariness or alleged arbitrariness of the SMGB regulation, Glamis suggests that the regulation is arbitrary because it claims that certain studies show that backfilling can have detrimental environmental effects, and particularly, Glamis points to statements made that backfilling can result in water quality concerns where the backfilled material is chemically transformed as a result of conditions in the backfilled pit.

But as Dr. Parrish testified, the California backfilling regulation addresses this concern because that regulation provides that backfilling must be engineered to comply with regional water quality control standards; thus, the water quality problems that are referenced in these studies have been addressed by the regulation and cannot render the

regulation arbitrary.

On Wednesday, Glamis made one final attempt to cast the rationality of the SMGB regulation into

1419

doubt by noting that at the time the emergency regulation was promulgated, there was no mining engineer on the Board. And this would hardly render that regulation arbitrary as Glamis does not and could not contend that the lack of someone with such specialized expertise rendered the enactment of the regulation unlawful in any manner; and, to the contrary, as I noted earlier, Glamis has specifically acknowledged the lawfulness of the California measure.

But in any event, the mining engineer position on the Board was filled by Mr. Julian Isham, in February 2003, which is two months after the adoption of the emergency regulations and two months before the adoption of the permanent regulation.

From February 2003, Mr. Esham participated in Board activities reviewed all materials concerning the backfilling regulation. Mr. Esham attended the April 10th, 2003, Board meeting and he voted in favor of the permanent regulation. Other Board Members who served at the time that the permanent regulation was adopted including a geologist serving as a registered geologist with experience in mining geology, a

1420

09:52:27 1 geologist serving as a member with experience in
2 groundwater hydrology, a certified engineering
3 geologist serving as a public member of the Board, and
4 a certified engineering geologist serving as a civil
5 engineer with experience in seismology.
6 So, clearly Glamis's attempt to cast doubt on
7 the rationality of the regulation by noting this fact
8 on Wednesday has no merit whatsoever.
9 I'm now going to turn to discuss the second
10 of the California measures, which is Senate Bill 22.
11 And Senate Bill 22, like the SMGB's regulation, is not
12 arbitrary. That legislation's goal, as we discussed
13 yesterday, is to protect cultural sites and Native
14 American religious practices. It cannot be contested
15 that cultural, historical, and archeological sites
16 will be damaged if the land on which they are found is
17 mined. By enacting Senate Bill 22, the California
18 Legislature sought to minimize this harm. Glamis, in
19 essence, argues, that anything short of eliminating
20 all harm from an identified problem makes a
21 legislature's actions arbitrary, but this is not and
22 cannot be the case.

1421

09:53:48 1 Governments and specifically legislatures
2 compromise all the time. As I noted earlier, the
3 Methanex Tribunal recognized as much when it observed,
4 and I quote, "Decrees and regulations may be the
5 product of compromises and the balancing of competing

interests by a variety of political actors." That's in the nature of government particularly and the nature of democratic governments. They can't make everyone happy. And most legislation, in fact, makes no one completely happy, and that's really the sign of legislation that has taken into account multiple viewpoints.

Now, there is really no doubt that the Quechan would have liked a complete ban on mining in all areas like the Imperial Project area that have religious and cultural significance to them, but California was unwilling to do that, and the Quechan have no ability to force the State of California to purchase the mining claims. They can lobby for that to be done, but ultimately that's a political choice that the State is free to make.

Now, Glamis, on the other hand, would have

09:54:54 liked to mine without incurring any additional reclamation expense. Faced with these two competing interests and the very legitimate goal of minimizing harm to archeological and cultural resources and ensuring that religious practices were not encumbered, the legislature compromised. It enacted reclamation requirements that obligated companies to take steps to minimize damage that their mining operations would cause to cultural and archeological resources.

And it goes without saying that customary international law does not prohibit this type of

legislation.

Now, Glamis claims that the result of this compromise, Senate Bill 22, is arbitrary because it doesn't serve its goals of protecting the resources, that it is not perfect legislation, that some resources will be damaged, notwithstanding compliance with the legislation does not make the legislation arbitrary. It may not be perfect, but it certainly was not irrational or arbitrary for the legislature to conclude that Senate Bill 22's reclamation requirements would mitigate the harm to Native

09:56:05 American sacred sites and spiritual practices caused by mining.

Without the reclamation requirements in place, open-pit metallic mines might be left unbackfilled, as Glamis planned to do with the last of its three pits. Glamis planned to leave an 800-foot deep, mile-wide pit along with 300-foot-high waste piles in the area.

Those waste piles would have obstructed the view from Running Man to Indian Pass, and this view was characterized by the Tribe in meetings with the BLM as one of the most important resources that would be adversely affected by the Imperial Project. As you can see on the slide, the Chairperson of the Quechan's Cultural Committee wrote in a letter to BLM that waste piles higher than 40 feet would alter the site's "purpose and destroy its future use forever."

The archaeologists and ethnographers that had done work in the Project also concluded that if the Project went forward as planned, the area could no longer be used by the Quechan in the future for religious and ceremonial purposes.

1424

09:57:19 Furthermore, as Dr. Cleland testified yesterday, the Quechan expressed specific concerns about their ability to use the Project area as a teaching place. As he stated, and I have also put this on the screen, but also the area was a teaching place. There were several teaching places where Tribal members can learn traditional culture, and it was one of--it was the first in a series, and there was concern that, "if you could no longer practice learning that you would learn in that practice, then that would mean that the other places would also be considerably reduced in value because the lessons to be learned in that case are relevant to lessons to be learned at other places."

And as Dr. Baksh, the ethnographer that prepared a report on the project noted, and I quote, "Tribal members felt that views of the horizon, including those of Picacho Peak and the Indian Pass area, would be significantly impacted by the construction of 300-foot-high stockpiles. Disruption of current views of the skyline would effectively prevent any future religious use of this site which,

1425

09:58:24 1 from the Tribe's perspective, would be detrimental to
2 their religious beliefs and practices."
3 So, the mining project would have left an
4 indelible scar on the landscape.
5 Senate Bill 22 requires backfilling of all
6 mining pits and regrading to the approximate original
7 contours of the land. It was certainly not arbitrary
8 or irrational for the legislature to conclude that
9 limiting the height of waste piles left over from
10 mining operations would contribute to the preservation
11 of Native American religious and cultural practices.
12 Glamis nevertheless argues that it was
13 arbitrary because first, it claims that the
14 legislation will result in more land area being
15 disturbed than would otherwise be the case; and,
16 second, it argues that the legislation doesn't prevent
17 the destruction of portions of the trail system. But
18 neither of these assertions renders the legislation
19 arbitrary, and I will discuss each of these in turn.
20 First, Glamis is wrong that the
21 legislation--when it says that the legislation would
22 result in greater land disturbance. Glamis bases its

1426

09:59:40 1 conclusion on its calculation of the swell factor of
2 the waste rock or, rather, I should say, on its
3 declaration of what the swell factor for the waste

rock is.

But as Mr. Sharpe explained at great length when discussing valuation issues, Glamis has used a highly inflated swell factor. When the correct swell factor is used, the very same swell factor that Glamis itself used in every single one of its internal contemporaneous documents over a decade-long period, you can see that the land disturbance is not any greater. In fact, it's less, if Glamis's plan were to include complete backfilling.

Moreover, as we noted in our written submissions, Glamis's argument is legally irrelevant in any event. As Norwest explained in its reports and testimony, the swell factor for rock varies, depending on the type of rock and the stage of processing. So, even if were true that for Glamis's particular plan complying with Senate Bill 22's requirements would result in more land disturbance, Glamis has not shown and cannot show that this would necessarily be the

10:00:50 case for every single open-pit metallic mine in California.

Because Senate Bill 22 applies generally, attempting to show that the legislation might possibly have one adverse effect on one particular project cannot render the legislation arbitrary.

And finally on this point, even assuming arguendo that Glamis were correct and that complying with Senate Bill 22's requirements would result in

greater land disturbance in every single case in which S.B. 22 applies, that would still not render the legislation arbitrary. Native American religion and spiritual practice places a high value on the land and view sheds to geologic formations such as mountains that have acquired spiritual significance in the Native Americans' creation stories.

And as I mentioned earlier, the Quechan claimed that preserving the view shed from Indian Pass to Running Man was of great religious significance to them and one of their primary aims.

Furthermore, the Quechan expressed a particular concern that they be able to use the mine

and process area as a teaching Center for future generations.

Senate Bill 22, as I mentioned, requires that waste piles be regraded to the approximate original contours of the land. So, even assuming arguendo that complying with this requirement results in more surface land disturbance, in exchange, view sheds are preserved, and the land can continue to be used as a teaching center and as a place for spiritual reflection and religious ceremonies. There would be nothing irrational or arbitrary about a legislature determining that these were worthwhile goals and making some sacrifices to achieve these objectives.

On the second specific criticism that Glamis makes against Senate Bill 22 is that the legislation

doesn't preserve the Trail of Dreams and, therefore, it's arbitrary. If the portion of the Trail of Dreams that traverses the Project site as KEA found and Glamis has now conceded, if the project goes forward, that portion of the Trail of Dreams will be destroyed because Glamis's plan--proposed Plan of Operations calls for completely backfilling the West Pit, and

10:03:22 West Pit, and this is the pit through which that portion of the Trail of Dreams traverses. And I have put up a diagram there where you can see the red-dotted lines on the upper right-hand corner is where the trail that is labeled F-4 is, and that is the upper position of what would be the West Pit.

But as this diagram shows--and this is taken from--

MR. GOURLEY: If I may--

MS. MENAKER: Yes.

MR. GOURLEY: --is there a place that's in the record?

MS. MENAKER: Yes. This is taken from your 1997 Plan of Operations, which is--which is in the record.

MR. GOURLEY: At the break you could tell us where.

MS. MENAKER: Sure.

So, there are--here it shows that there are hundred-foot-high stockpiles that would be placed where the West Pit and the trail once were.

22 And if the Quechan were to physically

1430

10:04:20 1 traverse the trail after mining work was completed,
2 they would have to climb these stockpiles or detour
3 around them.
4 I do note that in a 1999 letter to the
5 Advisory Council on Historic Preservation, Glamis
6 states, and I quote, "Upon completion of mining, the
7 proposed backfill program will re-establish the trail
8 corridor at nearly the same location and elevation as
9 the existing corridor."
10 Although we have not seen any evidence that
11 Glamis amended its Plan of Operations to provide for
12 this detouring, even if this were the case, hundred
13 foot stockpiles would be immediately to the side of
14 the trail pathway. And the Quechan's view towards
15 Indian Pass and Picacho Peak, which they repeatedly as
16 spiritually important, would certainly be encumbered.
17 But just as important, with the huge piles
18 and the huge crater left by the East Pit, that would
19 destroy the sense of solitude and the unbroken view
20 sheds of the area which the Quechan deemed so
21 important to the transmission of their culture and
22 religious practices. S.B. 22, as I've already

1431

10:05:33 1 mentioned, requires regrading to the approximate

original contours of the land prior to mining. Thus, for any mine in the vicinity of a Native American site that is subject to the legislation, there would be no massive stockpiles remaining on the site which would restrict a Tribe's ability to physically travel along trail pathways, encumber their views towards sacred landmarks, or mar the landscape.

Were the Imperial Project to go forward in compliance with Senate Bill 22's requirements, for example, the Quechan could walk along the path that was the trail until it connected with the remaining part of the trail, even though a portion of the original trail would have been destroyed.

It would also return the land to its approximate original contours prior to mining and restore a sense of solitude to the area. So, it was certainly not arbitrary for the legislature to attempt to address legitimate needs of different constituents, here the Native Americans and the mining companies, by adopting this type of legislation.

So, for the reasons I have just discussed,

10:06:36 it's our submission that neither the SMGB regulation nor Senate Bill 22 can be deemed arbitrary.

But Glamis, nevertheless, complains that the United States violated the international law minimum standard of treatment because it could not have expected that California would adopt these new reclamation measures. We have already shown why such

a claim, even if proven, could not form a basis for a finding that the United States violated customary international law, but Glamis's claim fails on its own terms as well. Glamis argues that it cannot have expected that California would enact arbitrary measures, but as I have just shown, neither measure is arbitrary. Glamis's argument that it could not have expected California to adopted a full, complete backfilling requirement because no other jurisdiction has enacted such a reclamation measure similarly fails because there is no customary international law governing the type of reclamation measures that states may adopt.

And as I noted earlier, the California measures are not even the most onerous of the mining

10:07:42 measures that do exist.

Furthermore, as Ms. Van Slooten demonstrated when discussing Glamis's investment-backed expectations in the context of Glamis's expropriation claims, and as Mr. Feldman and Ms. Thornton also explained in the context of our background principles defense, each of the California measures was a reasonable specification of preexisting legislation.

Given the regulatory environment in California, Glamis could not have had any reasonable expectation that California would not enact the requirements that it did. Nor can Glamis credibly argue, as it has, that the California measures

constitute retroactive legislation that undermined its legitimate expectations. Neither of the California measures applies retroactively. Both the SMGB regulation and Senate Bill 22 apply only to mines that do not have an approved Reclamation Plan with a financial assurance in place as of the date of their enactment.

Now, I posted on the screen an E-mail chain from Jim Good, who is an attorney representing the

10:08:51 California Mining Association and was also Glamis's attorney, at least at one point in time, and this E-mail exchange is between him and Adam Harper, who was also with the California Mining Association.

So, as you can see, those E-mails make clear that the California Mining Association requested that the State Mining and Geology Board add language to their proposed emergency regulations so that the regulations would apply only to those mines that had not already received approval of their Reclamation Plan and did not already have a final assurance in place. Mr. Good notes that, "Adding the exemption taken"--"the exemption language," excuse me, "from Senate Bill 483 probably takes care of his concern," and he notes that the language he has proposed, "makes it clear that a backfilling cannot be required of an open-pit excavation made under a Reclamation Plan approved prior to the effective date of this regulation; i.e., December 12, 2002."

It's incredible for Glamis to now argue before this Tribunal that the measures have retroactive effect when the very mining association of

10:10:04 which it is a member and the very mining association which it has called a spokesman for the California mining industry in California at that time lobbied to have language included in the respective measures to avoid that very effect.

The Tribunal will also recall that one of Glamis's arguments against our background principles defense to its expropriation claim is that neither of the California measures can be deemed to reflect background principles of State law because those measures do not apply retroactively.

So, Glamis can't argue for purposes of their expropriation claim that the measures are not retroactive and for purposes of their minimum standard of treatment claim that they are retroactive. I mean, the fact of the matter is that neither of the California measures applies retroactively.

So, finally, I will just spend a few minutes addressing Glamis's complaint that the California measures violated the customary international law minimum standard of treatment because they were nontransparent. Although we have shown at great

10:11:18 1 length in our written submissions that there is no
2 customary international law rule of transparency, much
3 of this debate, in our view, seems somewhat academic
4 because Glamis never specifies in what way the
5 California measures and challenges can be deemed to
6 have been nontransparent. There was nothing amiss
7 with the way in which the SMGB adopted its regulation.
8 That regulation was first adopted on an emergency
9 basis in December 2002 in a manner that was fully
10 consistent with regulatory practices under the
11 California Administrative Procedure Act.
12 The emergency regulations under the
13 California APA are temporary measures which expire 120
14 days after taking effect.
15 The Board--the Board's consideration of the
16 potential rulemaking requiring the backfilling of
17 open-pit metallic mines began by placing the item on
18 the agenda for its next public meeting, which was to
19 be held in November 2002. The Board then received
20 both written comments and life testimony at the
21 November meeting concerning the proposed regulation.
22 Based on that evidence, the Board instructed its staff

1437

10:12:32 1 to prepare draft language for possible adoption as an
2 emergency regulation at the Board's December 2002
3 meeting.
4 Following further consideration of the issue
5 at a December meeting and based on the evidence that

had been presented to it, the Board made an express finding of an emergency condition. The emergency condition concerned establishing reclamation requirements for the pending Imperial Project, as well as any other proposed open-pit metallic mines of which the Board was unaware.

The finding of an emergency condition was reviewed and approved by the California Office of Administrative Law as consistent with the California APA.

The Board then received additional public comment and testimony during its consideration of the backfilling regulation as a permanent measure. The Board's decision in April 2003 to adopt the backfilling regulation as a permanent regulation was again reviewed and approved by the California Office of Administrative Law.

10:13:33 Senate Bill 22 was likewise adopted in a lawful manner and in a manner that was fully transparent. That legislation was adopted in accordance with California law, and Glamis doesn't even contend otherwise.

Again, Glamis was active in the legislative process, as it was during the regulatory process. Mr. Jeannes, who was Glamis's then-Executive Vice President and General Counsel, testified before legislative committees regarding the proposed legislation, as did the California Mining Association,

of which Glamis is a member.

The process of adopting both the SMGB regulation and Senate Bill 22 was fully transparent. So, even if this Tribunal were to accept Glamis's argument that there is some kind of transparency obligation under customary international law, Glamis has provided no evidence that either of the California measures ran afoul of any such obligation.

So, in sum, Glamis has failed to show how either of the California measures, either the regulation or the Senate Bill 22, violated the

10:14:40 customary international law minimum standard of treatment; and, accordingly, we request that the Tribunal dismiss this claim.

Thank you.

PRESIDENT YOUNG: Thank you, Ms. Menaker. Thank you very much.

Let me turn to my co-arbitrators and see if they have questions.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR HUBBARD: Ms. Menaker, I just have one question. It might be viewed as perhaps more properly addressed to the Claimant, but I'm sure we will hear from them on this point.

I would just like your views of what the Claimant means when they say that a measure is lawful. Does that preclude them from being able to still challenge a measure as arbitrary, for example? Do

they just mean that it went through the regular process to become a law and, therefore, could be considered "lawful," or is there something more that we should take from that?

MS. MENAKER: By having said that the

10:15:52 measures are lawful, Glamis is conceding that they do not violate U.S. law.

Now, of course, it maintains its position that they may violate international law, which it must show and which we contend it hasn't shown. But by doing so, it is--by conceding that the measures were lawful, and I will just read you the quotes, the first, which was on or around page 70, it said: "The actions of the State, while lawful, the State of California were lawful," and then it went on to say, "were designed specifically to injure Glamis." Later it says, "Again, that goes to--we don't challenge the lawfulness of the regulation."

Now, in--to the extent that there is any argument that these measures violate the customary international law minimum standard of treatment because they are arbitrary, Glamis cannot--is not even contesting that--is not even contending that these measures would be found unlawful by a U.S. court. And certainly an international tribunal does not have the authority to review the measures, even to the same degree that a domestic court would, as we have shown.

1441

10:17:16 1 We believe that a U.S. court would accord significant
2 deference and in its review of measures does not set
3 aside measures on the basis that they are so-called
4 arbitrary. They don't test as to whether the measures
5 are the best means of addressing their ends.
6 (Pause.)
7 MS. MENAKER: And to just elaborate, by
8 conceding that the measures are lawful, Glamis is also
9 conceding that they are not arbitrary and capricious,
10 say, under an Administrative Procedure Act standard,
11 which--if they pass muster--as we stated in our recent
12 submissions, if they pass muster under APA, they
13 certainly cannot be suggested to fall afoul of the
14 minimum standard of treatment under customary
15 international law, and that, I think, is a very fair
16 reading of the statements that Glamis has made this
17 week.
18 ARBITRATOR HUBBARD: I appreciate that
19 clarification of your position, and I'm sure, as I
20 say, that we will hear from the Claimant as to their
21 position.
22 Thank you.

1442

10:18:32 1 PRESIDENT YOUNG: Professor Caron?
2 ARBITRATOR CARON: Thank you, Ms. Menaker.
3 I have--I would like to ask actually a

question of Mr. Clodfelter first going back to his original presentation since they are all related and just to help clarify the framework for a moment, and then a few questions for you.

So, yesterday we were talking about Article 1110, an expropriation, and as we transition here to 1105, it is--and the phrase "fair and equitable treatment"--it is your view that that phrase does not have some autonomous treating meaning but a reference to other obligations of the host State to foreign investors under customary international law? Some set of obligations; is that correct?

MR. CLODFELTER: That's exactly right. Professor Caron. It is a reference to established sets of rules which do constitute customary international law because they reflect State practice and opinio juris and are well-known, which is not to say that new rules can't emerge, but new rules must be emerge from State practice, and that is not what has

10:19:46 been demonstrated.

ARBITRATOR CARON: And so, if we were to find one of those obligations and find the application of that obligation to the facts, that there is a breach, we would then apply ordinary rules, ordinary rules of international law to ascertain the damages which flow from that breach; is that a correct description?

MR. CLODFELTER: By one of those rules, you mean one of the rules proffered by Claimant or one of

the rules recognized that I mentioned before in one of the sets of rules?

ARBITRATOR CARON: The rule that exists under customary international law by the rules, by the--yes. There's no hidden ball there.

MR. CLODFELTER: No, no, I just want to make sure I understood. So the question is, you apply ordinary rules of damage to assess the reparation, and the answer is yes.

ARBITRATOR CARON: Okay. And so, your position is that, as far as a customary rule of transparency, the U.S. position is first that it has not been established; second, that you do not think

10:20:53 there is such a rule, other than some very minimal rule of publishing your regulations; is that right?

MR. CLODFELTER: We don't even think there is such a rule. I mean, there is no transparency rule at all in customary international law.

ARBITRATOR CARON: That is your position?

MR. CLODFELTER: That is our position.

ARBITRATOR CARON: And secondly--

MR. CLODFELTER: Excuse me, if I might amend that, obviously in established sets of rules recognized as being part of the minimum standard of treatment, there are some transparency aspects. For example, in a judicial denial of justice, the accessibility of the foreign national to the courts and the availability of records, for example, is

obviously a part of the protection. You might call that transparency, but no stand-alone rule of transparency for all State conduct.

PRESIDENT YOUNG: Right.

And so, denial of justice you do recognize as a past established category of some unclear contour in custom, but you stated you did not think it was

10:21:59 particularly well argued at this moment?

MR. CLODFELTER: No, I think--I'm challenging the capability of the arguers. I think it was well argued, but I think that the point--

ARBITRATOR CARON: Extensively argued?

MR. CLODFELTER: Yeah. They have not--well, first of all, I think they just have resorted to some labeling here. Most aspects of what are called "denials of justice" are clear and accepted in international law. They refer primarily to the activities of national judicial systems.

The area of less certainty in customary international law is the extent to which actions of other arms of the Government can constitute denials of justice, but we have heard nothing about that from the other side. So, I'm not going to respond any more than that except to say there's just nothing at all. No effort made to show an alignment between the evidence produced and any of the elements of a denial-of-justice claim that would be recognized under customary international law.

22 ARBITRATOR CARON: All right. Now going back

1446

10:22:57 1 to the original three you listed that Glamis has
2 mentioned, the Claimant has mentioned, the second was
3 to not frustrate legitimate expectations, and I
4 suppose this is why I raised the damage point. That
5 might be related to expropriation, and we understand
6 what the damages would be in that case. Here, there
7 would be some other set of damages, if such an
8 obligation existed, and your position is that is there
9 a duty of the host State to not frustrate the
10 legitimate expectations of the foreign investor under
11 custom?
12 MR. CLODFELTER: There is no stand-alone
13 obligation of States not to frustrate the legitimate
14 expectations of foreign investors. Even in municipal
15 systems, there are very--it's rare to find in
16 municipal law cause of action for mere frustration of
17 legitimate expectations. Some common law systems
18 recognize such causes of action in connection with
19 specific assurances, specific assurances given by
20 states. The United States does not. For example, you
21 cannot sue an organ of Government for frustrating your
22 legitimate expectations. It's just not a cause of

1447

10:24:22 1 action. It certainly is not an element of the

customary international law minimum standard of treatment.

ARBITRATOR CARON: And finally, the final obligation you described was a customary obligation to not act arbitrary vis-a-vis a foreign investor. And the U.S. position as to that obligation?

MR. CLODFELTER: Well, the parties are agreed that mere arbitrariness alone does not violate the minimum standard of treatment. So, we are not sure exactly what their argument on the--what further they are alleging with respect to this particular alleged violation.

ARBITRATOR CARON: Let me add just a part on that because this is partly related to Ms. Menaker.

At times, the response is as to the meaning of "arbitrary," which seems to be a discussion, then, of purpose, or is there a plausible purpose? A different way sort of is to speak in terms of singling out, which is a different slight twist on the facts, and I'm not sure if that's where you were going about not quite different meanings to arbitrary.

10:25:35 MR. CLODFELTER: I don't --I don't think that there is a sense in which singling out could be considered arbitrary, but I wouldn't foreclose that.

Our argument is that mere arbitrary context does not violate customary international law. So, whatever "arbitrary" means, mere arbitrary conduct alone does not violate customary international law.

Whether something in addition to that is a rule of customary international law has not been established by the Claimant.

Now, you will recall the famous discussion of "arbitrary" in the ELSI case, which is frequently cited, but the Treaty at issue in the ELSI case, of course, included a specific obligation not to act "arbitrarily." So, it was an issue in that case which is not an issue that arises under NAFTA because NAFTA contains no such specific commitment. If there is to be a violation here, it must be established as one of customary international law.

And then you can debate--if it were an element and certainly in conventional obligations not to act arbitrarily, you have to understand what the

10:26:41 word "arbitrary" means.

And we can argue that, but I think in Ms. Menaker's presentation she saw in no proffered sense do any of these measures constitute arbitrary actions by the State.

ARBITRATOR CARON: I understand. This is all apart from your application to this case.

MR. CLODFELTER: Okay.

ARBITRATOR CARON: All right. Thank you.

I think I'm going to Ms. Menaker now.

Ms. Menaker, you were at several times going with the question of arbitrary, talking about the purpose of these bases, and at some point you referred

to California courts, Federal courts, as--and Canadian courts as having deference to the legislative action. And I have a problem with that in that the context is different. I understand--I'm not saying there is no deference, but what I'm wondering is, in the domestic context, the court would be, in essence, declaring invalid to some degree the action if they were to challenge it, whereas we do not declare the action invalid. We have no effect on the legislation in

10:28:06 California or the Federal Government. And we were merely--if the obligation leads us to make an inquiry into the statute, there may be some level of deference, but it's not necessarily, in my view, the deference that structurally would be--that would flow from the relationship of a separation of powers relationship inside the State.

(Pause.)

MR. CLODFELTER: Well, I don't want to answer for Ms. Menaker, but, Professor Caron, I wonder if we could reserve our answer to that question until the question period later today.

ARBITRATOR CARON: That's fine. Of course.

MR. CLODFELTER: Thank you.

ARBITRATOR CARON: All right. The rest are transition to more specific for a moment.

On the nonmetallic mines, am I correct that under the SMGB regulations, apart from the complete backfilling, a Reclamation Plan with other mitigation

measures possibly are required of nonmetallic mines?
MS. MENAKER: Yes, the entirety of--you mean
the regulations generally and not just this particular

10:29:48 amendment?
ARBITRATOR CARON: Correct.
MS. MENAKER: Yes.
ARBITRATOR CARON: As to the point about
disturbance, in the Navigant study that Mr. Sharpe
described, in part, describing the swell factor and
the cost of backfilling, they were saying that one
error was not assuming that, of course, there would be
25 feet remaining on the ground. I'm wondering how
that ties to some of the discussion you have.
So, first of all, is it correct that
the--this assumption in Navigant does not--leaves a
25-foot pile only over--does not increase the
disturbance of the area?
MS. MENAKER: Yes. And again I can, during
the break, get you more precise data, but the Glamis's
contention was because you had to bring everything
down to 25 feet, you would be spreading this stuff
that was on the waste piles over previously
undisturbed land.
ARBITRATOR CARON: Correct.
MS. MENAKER: And according to the

10:30:58 1 calculations that Navigant has done, using the proper
2 swell factor, that is not the case because you would
3 not have that much left-over material after you put it
4 back into the pit; and after you went down to 25 feet,
5 there would not be extra material that needed to be
6 spread over undisturbed land.
7 ARBITRATOR CARON: Okay. And, finally, I
8 realize you contest the question of whether there is
9 an obligation concerning not acting arbitrarily, but
10 you then proceeded to say looking at the statutes,
11 they are not arbitrary, and, in particular, in the
12 sacred sites discussion.
13 Now, the question I have is--I'm tying it
14 over--I guess I wanted to know more about the landfill
15 question. I guess that does not go to arbitrary, but
16 it goes to discriminatory. If the facts were such
17 that it seemed that there is an inconsistent
18 application of this purpose between view at the
19 landfill and view at the Quechan sites, it may not--it
20 may be there was no demand--so, (a), I need to know
21 was there the same concern expressed with the
22 landfill, but that goes more to a question, I would

10:32:25 1 think, of discrimination or inconsistent application
2 than arbitrary.
3 MS. MENAKER: It's not, in our view,
4 inconsistent application because first, we will
5 describe later when Mr. Benes argues, about how that

site is different from the Imperial Project Site, and we will discuss that, but also for their--you know, we go back to the same issue that addressing--the legislature need not address all problems at the same time. And to the extent that that particular site poses a problem or if it's like in the Borax case, for instance, there may be some things that fall outside the scope of a regulation or legislation because of matters of timing, if it was previously approved or something like that, and that does not render, you know, later legislation to correct a problem that was arbitrary in any manner.

ARBITRATOR CARON: Thank you.

That's all my questions. Thank you.

PRESIDENT YOUNG: Professor Caron, thank you.

Mr. Clodfelter, just when you thought it was safe to go back in the water, I want to come back to

10:33:45 the preemption argument just a second and raise just a question again to see if I sort of understand the Government's position.

Is it the Government's position that the California position ran afoul of Granite Rock and was thus presumably not a disguised land-use regulation meant to prohibit mining activity; therefore, the Tribunal cannot consider at all motive and intent of the regulation?

MR. CLODFELTER: If I could just ask for some clarification. In connection with assessing the

property right or in connection with--

PRESIDENT YOUNG: Assessing the property right, which I think is what I'm more concerned about.

MR. CLODFELTER: I think it would be our position that you could not consider motivation in assessing the property right if the State measure does not run afoul of the constitutional limitations, yes.

PRESIDENT YOUNG: Thank you.

And then this a question--let me ask this question both of you, Mr. Clodfelter, and, Ms. Menaker, if you would like to opine as well, I

10:35:10 would appreciate it.

You talked a lot about what 1105 isn't, but presumably the U.S. Government and the Canadian Government meant something when they put it in there, that fair and equitable treatment meant something. There has been an argument that it is tied to customary international law, and both sides seem to agree on that. Can you point me to some arbitral cases that do give substantive content to fair and equitable? I mean, I think you have been--you've talked a lot about what it isn't, but can you point me to some cases about what it is?

MR. CLODFELTER: Sure. I mean, there are areas of the minimum standard of treatment which are widely recognized and have been frequently applied. I mention the area of denial of justice, and there are plenty of denial of justice cases.

Expropriation law itself, you should understand, is also part of the minimum standard of treatment. It happens to get separate textual treatment in investment treaties, but it is also part of the minimum standard of treatment.

1456

10:36:14 The United States recognized that--recognizes the repudiation of a State contract for noncommercial discriminator reasons is a violation of the minimum standard of treatment, and there are cases on that as well. We recognize the obligation to provide full protection and security as a set of rules under the minimum standard of treatment, and there are plenty of cases involving denial of full protection and security.

Now, can I give them to you today? No, but we will be happy to provide some background on that, if you would like, for the September hearing.

PRESIDENT YOUNG: I don't really think you need to do that--well, actually a few would be helpful. I'm just trying to get a little bit of a sense of what you do think it entails, and that's helpful.

Thank you.

That's all I have, and we have reached the break hour, so we will reconvene at five after 11:00.

Thank you.

(Brief recess.)

1457

11:06:37 PRESIDENT YOUNG: We are ready to recommence.

MR. CLODFELTER: Ms. Menaker will begin with an answer to one of the questions we took, and then we will present our case on the 1105 claim with respect to the Federal measures.

MS. MENAKER: Thank you.

I just wanted to follow up to a question that Professor Caron had asked regarding the deference that national courts grant to legislative decisions and decisions perhaps of administrative agencies. And it's our submission that the deference that national courts grant to both administrative agency decisions and legislative decisions is not strictly limited to considerations of separation of power. But it also arises out of a recognition that those courts are not best placed to make those determinations; that they lack the expertise that the legislature and/or the administrative agency has on these particular questions, and they don't have before them the full administrative record on which those bodies acted.

And I would just point the Tribunal to Professor Wälde, Claimant's expert, who he recognizes

1458

11:08:54 as much, and this is something I will also touch on when I talk about the Federal measures, but he states, and this is on page 210 of the Claimant's or I'm

sorry, this is--we cite it in our Rejoinder, but it's in his report where he recognizes that, "A high measure of deference to the facts and factual conclusions seems the only way to prevent investment tribunals from becoming science courts, and from frustrating democratically adopted preferences of risk in matters of fundamental importance such as public health.

So, there he's pointing to two things. First is the matter of expertise, and I think that is well recognized that investment tribunals or any Tribunal applying international law is not acting in an appellate way, as an appellate court to review questions of fact or law.

He's also recognizing another very important aspect, which is they defer that recognizing that these other bodies act on the basis of political judgments that have been made in the normal course of a democratic process, and that that also is not a

11:10:10 proper role for courts to intervene on.

And then a second, another question that Professor Caron had raised was with respect to damages and on that we'll speak more about that later, but I just wanted to make two preliminary remarks.

One is, you know, obviously, the burden is on the Claimant to prove damages flowing from any alleged breach, so here, if they were to--well, they have argued, say, for instance, that the United States

breached the customary international law minimum standard of treatment by not affording them transparency.

In that instance, they would have to show what that breach was and what damages flowed from that breach. How, what monetary damage did they suffer from this alleged lack of transparency? That--they have not even attempted to do that. They have not attempted to show what damages flow from any of these alleged breaches.

And, in fact, as just as a factual matter, that's a legal shortcoming in their case. But as a factual matter, as we showed the other day discussing

11:11:17 valuation matters, the Imperial Project mining claims are worth more now than they were in 2002, when Claimants filed this claim, or in 2003, rather, and it's our contention that they have not suffered any damage because of that.

So, thank you, Mr. President, Members of the Tribunal. I will now turn to address Glamis's contention that the United States Government'S actions violated Article 1105, and one of Glamis's principal contentions in this regard is the fact that in January 2001, the Federal Government issued a Record of Decision denying its Plan of Operations. As the Tribunal is aware, that Record of Decision was rescinded later that very same year.

Glamis also complains that its Plan of

Operations has not been approved since that rescission.

The Record of Decision that denied Glamis's Plan of Operations did so on the grounds that the mining plan would cause undue impairment to resources in the California Desert Conservation Area. In reaching this conclusion, the Department relied on the

11:12:28 Advisory Council of Historic Preservation's finding that even after mitigation measures are implemented, the Imperial Project would "result in a serious and irreparable degradation of the sacred and historical values of the area that sustained the Tribe."

Secretary Babbitt based his authority to issue the Record of Decision on the 1999 M-Opinion, and that M-Opinion was drafted by the Solicitor upon request for legal advice from the BLM.

At issue was the interpretation of the legal standards that should govern review of a Plan of Operations where the mining is to take place in the California Desert Conservation Area, and where the proposed plan would cause great damage to religious values and cultural resources.

Now, the Tribunal should keep in mind that both the ACHP recommendation as well as the M-Opinion were issued more than three years prior to the time that Glamis submitted its claim to arbitration, and thus neither of those measures may serve as the basis for a finding of liability in this case.

22 But Glamis nevertheless raises complaints

1462

11:13:36 1 both about the substance and the process--well, about
2 the substance of the ACHP's recommendation and the
3 M-Opinion, as well as the procedures that were
4 followed by the ACHP and the Department in adopting
5 the M-Opinion and later the ROD. And when I say
6 "ROD," it's the Record of Decision.
7 But none of Glamis's complaints have merit;
8 and, in our view, and it's our contention that none of
9 them could find--form the basis of a finding of a
10 violation of the customary international law minimum
11 standard of treatment in any event.
12 So. I will begin by discussing all of these
13 time-barred events, and these were all the events that
14 occurred prior to the time that the Department of the
15 Interior issued the Record of Decision denying the
16 Plan of Operations.
17 And like I said, Glamis raises both
18 procedural and substantive complaints about these
19 actions which formed a basis for the Record of
20 Decision, and I will show how none of these violation
21 violated or contributed to violation of the customary
22 international law minimum standard of treatment.

1463

11:14:40 1 And after I do that, I'm going to turn the

floor over to my colleague, Mr. Benes, who is then going to demonstrate that the Federal Government's denial of the plan did not deny Glamis's--Glamis treatment in accordance with the minimum standard of treatment. And he will do that by also addressing the issues that have been raised in this arbitration comparing the treatment that Glamis received with the Government's actions with respect to several of the other projects in the CDCA that Glamis has referred to throughout these proceedings.

So, the first event or a process that I'm going to discuss is the cultural resource surveys and the findings that the Federal Government drew based upon these surveys, and I will show that the Federal Government's actions during this phase of the proceeding could not constitute a violation of the customary international law minimum standard of treatment, and that even under the standards proffered by Glamis, its claim based on these events fail because the government's acts were fully transparent, they could not have upset Glamis's legitimate

11:15:47 expectations, and they were not arbitrary. And Then I will do the same with respect to the ACHP process and the 1999 M-Opinion.

As with any undertaking on Federal Lands, as you know, the BLM was required by Section 106 of the National Historic Preservation Act to take into account the effect of the Imperial Project on

properties that were included on or eligible for the National Register of Historic Places. And I'm not going to go over all of the ground that has been covered by the parties in their written pleadings, their Memorials, and expert reports and witness statements regarding the cultural resource issues. We don't believe it's appropriate, nor would it be--it's not necessary or--nor would it appropriate for the Tribunal to reweigh all of that evidence to try to determine if the archaeologists and the Federal Government's conclusions were factually correct.

So, instead, what I propose to do is to just focus on the particular procedural and substantive complaints that Glamis has made regarding this aspect of the processing of its Plan of Operations and show

11:16:56 how these complaints are ill founded and illegally irrelevant.

So, in 1997, KEA, and that is the firm for which Dr. Cleland worked, KEA was retained to conduct a cultural resource survey for the Imperial Project site and the surrounding area. Before that, ASM had conducted a survey of the Project area and had preliminarily concluded that 35 sites which were all sites that related to prehistoric and/or Native American resources, that those sites were likely significant and potentially eligible for the National Register of Historic Places.

Both before and during the comment period for

the Draft EIS/EIR, the Quechan, as well as a prominent archaeologist who had previously surveyed the Project area, identified deficiencies in the ASM survey. And specifically they claimed that the survey had misidentified, had failed to locate, and had misinterpreted the cultural and the ceremonial significance of some of the archeological sites.

So, as a result, BLM initiated a new cultural resource inventory, and KEA was retained for that

purpose.

Although Glamis in its submissions has expressed a preference for the findings of the ASM survey as opposed to those that were found by KEA in its survey, there is no evidence in the record that Glamis at the time objected to BLM's decision to retain another firm to conduct an additional cultural resource survey. Nor is there any evidence that Glamis objected to BLM's decision to obtain an ethnographer to better obtain information as to the Quechan Tribe's concerns.

In its submissions and throughout the expert testimony of Dr. Lynne Sebastian, Glamis has raised several complaints about the procedures that were followed by KEA in its inventory and evaluation of the resources at their Imperial Project Site. But Glamis's criticism of the survey, the KEA survey, has really shifted dramatically over the course of the submissions. As the United States has demonstrated

for each and every one of these criticisms that Dr. Sebastian's criticisms are ill founded and just are simply erroneous.

1467

11:19:11 So, for one example, Dr. Sebastian criticized the survey, arguing that the incidence of the archeological features that it recorded was a direct consequence of the intensity with which KEA reviewed the Project area. She claimed that because the survey interval used was small, that the Government's conclusions regarding the Project's impact on archeological resources were exaggerated and inconsistent with subsequent determinations it made regarding the North Baja Pipeline Project, for instance, which was surveyed using a larger survey interval.

But as we demonstrated through Dr. Cleland's written testimony, quite contrary to Dr. Sebastian's assertions, the use of a more intensive survey interval accorded with standard archeological practice, which calls for a reduction in that survey interval when a number of archeological features in a given area are identified.

Given the sheer number of archeological sites that were recorded in the 1996 inventory, KEA followed standard archeological practice when surveying the

1468

proposed mine in the process area. And, in fact, in her testimony this week, Dr. Sebastian said, and I quote, "The--subsequently they were asked to go back. The company was asked to pay for another survey at a closer survey interval at five meters, which is considerably closer. This is not, you know, totally unreasonable. It was different than what was done with other projects before this and actually after this, but that was not a major deviation."

Not only was this not a major deviation, it wasn't even a minor deviation. Even Dr. Sebastian acknowledges that the procedure was wasn't unreasonable, and she doesn't contest Dr. Cleland's assertion that his survey methodology followed standard archeological practice in this regard.

Glamis and Dr. Sebastian have also raised issues about the fact that when evaluating the significance of the features that were identified in the Imperial Project area, KEA demonstrated or determined that those features were in an ATCC or an area of traditional cultural concern, rather than evaluating those features in the context of an entire

Traditional Cultural Property, or a "TCP" as it's called.

But when deciding which area and how large an area to survey, KEA and BLM talked to the Quechan, as they would be expected to do; and as the record

indicates, the Quechan stated that the area around the Imperial Project was, "a key component that exists within a larger culturally sensitive region of extreme sensitivity to the Tribe."

This larger culturally sensitive area described by the Tribe consisted of much of the Tribe's traditional territory and encompassed approximately 500 miles, square miles.

Surveying such a large area to determine the existence of one or more TCPs would have imposed onerous burdens on Glamis, which was responsible for paying for the survey. So, instead, KEA, with the approval of the BLM and the California State Historic Preservation Office or Officer considered the properties that it had identified in the context of an ATCC. Glamis's argument that the ATCC construct was arbitrary because the Quechan had only expressed

11:22:32 concern about the whole of their traditional territory and had not identified any particularized concerns with the proposed project area is not borne out by the record. As Dr. Cleland testified this week, the Quechan, "expressed deep concerns for a cultural landscape that extends from Pilot Knob to Avikwaame, but I might add, if I may, that they also expressed concerns for specific places within that landscape, so there is at least two levels of potential impact, two levels of traditional cultural properties, if you will, a regional level and a more specific localized

area."

As Dr. Cleland further testified, the KEA study specifically notes that the Quechan expressed specific concerns for the area encompassing the proposed Imperial Project area, and that they told him they had a name for that area in their language. And Dr. Cleland explained in his testimony that KEA had quite extensive archeological and ethnographic information for identifying the boundaries of the district which encompassed the ATCC.

I have just put this on the screen so you can

11:23:38 see, and I believe you have seen this earlier this week. This is a map showing the Imperial Project mine area, which is shaded, and then the dotted line around it, which is the ATCC, and the northeast boundary of the area was drawn to encompass the Indian Pass area, which was already recognized as a highly important cultural area because of the geoglyphs and the trails that are there. Then they drew the Southwestern boundary to encompass the Running Man area, also recognized as important to the Quechan, and the remaining boundaries were drawn by reference to other known extant trails in the area or natural geological features.

Although Glamis now complains that the creation of this ATCC was an artificial construct that skewed the survey's results, at the time the survey was done, Glamis made no complaint about this. In

fact, as Mr. Kaldenberg testified in his first witness statement, Glamis was appreciative of the effort to reduce the costs and time of conducting the 1997 survey.

When confronted yet again with this fact,

11:24:46 Glamis argued this week that it had complained about the use of the ATCC concept, but the only evidence that it referred to was a letter that it had sent to the DOI, the Department of the Interior. That letter was sent to Secretary Babbitt after the ACHP had issued its comments recommending that DOI take whatever legal means available to deny approval for the Project.

So, Glamis did not complain at the time the ATCC construct was utilized, although it had every opportunity to do so. Its manufactured complaint after the fact is proof of nothing.

The KEA survey confirmed the presence of a significant concentration of archeological features in and around the Imperial Project. It identified 88 archeological sites within the Project, APE, or Area of Potential Effect 54 of which it deemed eligible for inclusion in the National Register. And Glamis doesn't contest the accuracy of these findings.

KEA also determined that the proposed Imperial Project would destroy a portion of the Trail of Dreams. Before I go into more detail on this

1473

11:25:49 point, I just want to point out for the Tribunal that in her first report, Dr. Sebastian insisted that notwithstanding KEA's conclusion that the Imperial Project would adverse impact a segment of the Trail of Dreams, she stated, "Nothing in their report," meaning KEA's report, "or in the botched 1997 ethnographic study indicates that Quechan informants identified this complex of trail segments as the Trail of Dreams." It was on the basis of this conclusion that Glamis, in its Memorial stated that, "The only trail segment identified as part of the Trail of Dreams by a Quechan Tribal member lies outside the areas directly affected by the proposed mine and runs in a direction leading away from the mine."

However, contrary to Dr. Sebastian's initial conclusions and Glamis' assertion, the United States demonstrated and Dr. Cleland confirmed that the Quechan Tribal members had, indeed, positively identified the Trail of Dreams within the proposed mine site during the 1997 cultural resource inventory.

Confronted with this evidence, in her second report, Dr. Sebastian argued that, "The preponderance

1474

11:26:59 of the evidence indicates that the trail through the Imperial Project Mine and process area is not the Trail of Dreams."

After another round of submissions and having received another witness statement from Dr. Cleland, Dr. Sebastian, in her third and final rebuttal report, further distanced herself from her prior unsupported statements by concluding that the trail, "described as the Trail of Dreams may or may not pass through the Imperial Project area."

This constant shifting and backing away from her initial unsupported assertions highlights the fact that Dr. Sebastian's earlier criticisms of the Federal Government's actions taken in reliance on the KEA survey were based in large part on misinformation or a misunderstanding.

As reported in its survey and in Dr. Cleland's testimony, the Quechan had identified a portion of the Trail of Dreams, which we have identified as F-4 within the Project area, and I've placed this on the map, and you can see that.

They also identified two segments of the

11:28:02 Trail of Dreams that was outside the immediate project area but inside the ATCC.

Now, as Dr. Cleland noted in his first statement, KEA found several trail markers, spirit break, and scratched petroglyphs along segments of F-4 which indicated that trail's use for religious or ceremonial purposes.

The other two trail segments which the Quechan had identified as being part of the Trail of

Dreams was trail I92-T, which is north of the Project site, and then trail 5359, which is one of two trails that intersects at the Running Man site south of the Project site.

As far as the 5359 trail is concerned, KEA noted that the archeological evidence indicated that this trail contained--also contained several distinctive features which suggested its past use by Native Americans for religious purposes.

Now, you can see that down by trail 5359, it intersects with another trail, which I don't have labels on the side, but that other trail is trail 5360.

11:29:11 Now, Glamis has argued that trail 5360 and not 5359 had been identified in other sources as the Quechan's sacred trail network. IT also argues that this is more consistent with more general statements made regarding the directional orientation of the trail network. But KEA corroborated its conclusion that the Quechan had identified the correct trail network because it found that trail 5359 was associated with an abundance of archeological features, including those indicating past ceremonial and religious use, while trail 5360 had a comparative dearth of such features. As you can see here with the red arrows, those indicate archeological features, including those that indicate past ceremonial and religious use, and you can see there is an abundance

of those on 5359 and a relative lack of any such abundance on 5360.

In 1998, Glamis funded an additional survey which was also conducted by KEA, to definitively establish the location of trail 5359. Glamis noted that this trail had previously been recorded as running northwest of the Project site. And if this

11:30:28 was the case, if you could just put on the slide with all three trails showing. If this was the case and 5359 did run northwest of the Project site, then it was unlikely to be able to connect physically with F-4 located within the Project site, and then it was unlikely that both of these trail segments could be part of the Trail of Dreams.

And because Glamis knew that part of the Quechan's opposition to the Project was their belief that the Project would destroy a portion of the Trail of Dreams, it funded this additional study to gain further confirmation of whether this was, indeed, the case.

As Dr. Cleland testified in both his written declarations and orally, with the benefit of GPS technology, the KEA survey determined that the course of trail 5359 had been previously misrecorded. It determined that its course would have proceeded directly through the--up to the proposed project site and, as such, KEA was able to conclude that all three of these trail segments that the Quechan had

identified as the Trail of Dreams, F-4, I92-T, and

1478

trail 5359, at one time all formed part of the same trail. And this is enabled KEA to confirm that the proposed Imperial Project would adversely impact a segment of the Quechan sacred trail network.

As noted by Dr. Cleland, the map that he received years later from Boma Johnson provided further confirmation of the correctness of his earlier conclusion that the project would impact the Quechan's sacred trail network. Dr. Sebastian now acknowledges that KEA appears to have correctly concluded that all three segments of the trail that the Quechan had identified as part of the Trail of Dreams, including F-4 in the Project area, were part of a coherent trail system that passed through the Imperial Project from Running Man to Indian Pass.

And she doesn't dispute the high incidence of ceremonial features along trail segment 5359 or the relative dearth of such features along 5360.

Nevertheless, Glamis argues that trail 5360 and not 5359 is part of the Trail of Dreams, and it, at times, argues, although I'm still not entirely certain as to what their most recent argument is, that

1479

perhaps trail F-4 is not part of the Trail of Dreams.

But these issues are not relevant to the issues before this Tribunal. It is simply not this Tribunal's task to become archaeologists and ethnographers and to draw a definitive conclusion as to the location of the Trail of Dreams. Even U.S. courts which exercise a degree of review over administrative agencies that much higher than that which ought to be applied by international tribunal applying international law, particularly applying customary international law, would not engage in such fact finding.

As a Federal Circuit court observed, and I quote, "We must look at the decision not as the chemist, biologist, or statistician, which we are qualified neither by training nor expertise to be, but as a review in court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality."

KEA stands by the very professional work that it has done. There is substantial evidence in the record supporting its conclusions. The BLM properly relied on that work. Even assuming that it was in

11:34:13 error, which we have absolutely no reason to believe, there is no evidence whatsoever that BLM knew or should have known that the archaeologists' conclusions were erroneous.

There is certainly no rule of customary international law that permits a Claimant to challenge a factual finding made by a professional that is

suspected by substantial evidence and relied on by a Government agency in good faith. Nor can the Government's agencies--the Government's actions in this regard be considered arbitrary. They were fully transparent, and they could not have upset an investor's legitimate expectations.

So, Glamis's complaints about the cultural resource surveys are a distraction, in our view, and should be disregarded by the Tribunal.

I will now turn to discuss the ACHP process.

Given the findings in the cultural resource surveys that were commissioned by Glamis, in 1998 BLM requested the ACHP's comments on the proposed Imperial Project in accordance with Section 106 of the NHPA. Such referral was required under the nationwide

11:35:25 programmatic agreement which calls for ACHP review in, quote-unquote, controversial undertakings. In its Memorial and in her first expert report, Dr. Sebastian spent considerable time arguing that the procedures employed by the ACHP violated its own regulations and were unusual. Although Glamis has not demonstrated how such allegations, even if proven, could violate customary international law, the United States showed that the complained about procedures, namely ACHP's having appointed a Working Group to directly review the Project, and having terminated consultations and reported directly to the Secretary of the Interior, had been employed in other controversial cases and

were fully consistent with ACHP regulations and practice.

Glamis did not challenge the United States on these points in its reply, so, for example, Glamis did not contest that the ACHP has established working groups and other cases and that such practice was entirely consistent with their procedures.

And regarding the ACHP's decision to terminate consultations and issue a recommendation

11:36:34 directly to the Secretary of the Interior, Dr. Sebastian merely responded without any citation to authority or even examples that in her experience, consultations were normally longer before they were terminated.

Glamis has utterly failed to show that the ACHP acted in any unlawful manner or even that it acted in an unusual manner which, in any event, would be a far cry from a showing that it violated rules of international law.

Glamis also argues that the ACHP process was predetermined and, therefore, illegitimate. These allegations are similarly devoid of merit. In support of its contention, Glamis relies primarily on an E-mail sent by a Mr. Alan Stanfill, who was an ACHP staff member. In that E-mail, Mr. Stanfill states that he doesn't believe the effects of the Imperial Project could be mitigated. But this was a preliminary opinion by a staff member divulged in an

informal E-mail, and the ACHP staff members are not the decision makers for the ACHP. There is simply no basis for this Tribunal to conclude on the basis of

1483

this E-mail that the ACHP process was somehow predetermined and a sham, as Glamis contends that it was.

Second, Glamis also argues that the ACHP's site visit was a sham. It argues that the participants failed to walk the Imperial Project Site and directly examine the archeological evidence.

And just so there is no confusion on this point, and we have talked about it during the witness testimony, you can see on this map that the dotted line is Indian Pass Road that goes through the project area, and there is no dispute between the parties that the ACHP on its site visit traveled along this road and made certain stops along this road.

In questioning of Mr. Purvance, Mr. Purvance seemed to suggest that perhaps, you know, there were other roads that went through the mine project area that Glamis could use, or maybe there were jeep tracks, but as he also testified, there were a dozen vehicles, 40 to 50 people. Clearly the ACHP wasn't going to take a caravan of a dozen vehicles off-roading through the various sites that contains

1484

11:38:59 all of the cultural resources that they are looking to protect.

So, that was clearly--the road where they needed to travel on to see the site, which is what they did.

And from this road, which goes right through the planned project area, stakes for Glamis's mining claims are clearly visible as is most of the mine area. And indeed, if you look at the Record of Decision that denied Glamis's Plan of Operations, that record of decision notes, and I quote, "Visual impacts from the proposed project would be clearly visible from the Indian Pass Road."

So, from this site visit, the ACHP Working Group was able to get a clearer understanding of the overall impacts of the Project area, of the Project to the area, and to better assess the Quechan's claim that the area would be significantly impacted by hundred-foot-high waste piles and to see firsthand how the Project would disrupt the current view sheds and destroy the sense of solitude which had all been testified by the Quechan to be necessary for their

11:40:03 ability to use the area as a teaching center and for religious and ceremonial purposes.

So, in short, none of the Glamis's complaints about the process employed by the ACHP is borne out by the evidence.

At the end of its inquiry, after hearing testimony from various members of the public, including from Glamis, and having conducted the site visit, the ACHP concluded that the Imperial Project would cause significant unmitigatable impacts to the cultural resources in the area.

More specifically, the ACHP found that the Project area has continued importance as a religious and cultural teaching area because, and I put these on the slide, it found that the area, "figures prominently in the Quechan's religious beliefs and functions as a teaching area where Quechan practitioners are instructed in their religious and cultural traditions."

Second, the ACHP concluded that the area's scenic qualities contribute to the integrity of the historic resources and to continued religious and

11:41:06 cultural importance. Specifically, the ACHP noted that, "For the Quechan, this area represents a place of solitude, power, and a source of knowledge, where scenic qualities such as an unmarked landscape and unobstructed view shed, contribute to the integrity of the historic resources and of the area's religious and cultural value."

And, third, the ACHP found that no substantial development had previously infringed on the integrity of the area. In this respect, it noted, and I quote again, "At this time the Trail of Dreams

and the ATCC retained sufficient integrity for continued traditional uses. The only significant intrusion into the area is the unpaved Indian Pass Road. Existing highways, power lines, mining operations, and other types of development that may compromise the setting are not readily visible from the Project area. It remains a place of quiet solitude and substantial environmental integrity."

Based on these findings, the ACHP concluded that, "Even with the mitigation measures proposed by the company, the Imperial Project would result in

11:42:21 serious and irreparable degradation of the sacred and historic values of the ATCC that sustain the Tribe," and then it recommended that the Department, "take whatever legal means available to deny approval of the Project."

The ACHP's recommendation as well as the findings on which it were based were supported by the evidence before it and neither of those findings--neither the findings nor the proposes that were followed by the ACHP can be found to have violated Article 1105's prohibition on treatment falling below the customary international law minimum standard of treatment, even if those actions weren't all time-barred.

So, even under Glamis's own standards, complaints about the ACHP process and substance ring hollow. The processes were fully transparent, the

ACHP did not act arbitrarily, and its determination could not have upset an investor's legitimate expectations.

Now, finally, I want to turn to discuss the M-Opinion.

11:43:23 The Solicitor of the Interior has authority under U.S. law to issue interpretations in the form of M-Opinions that when accepted by the Secretary, are binding on the Department. In January 1999, BLM sought a legal opinion from the Solicitor on the question of the parameters of its authority to grant or deny a mining Plan of Operations where that plan would irreparable damage cultural resources and interfere with religious practices and where those effects could not be mitigated. The Department was thus presented for the first time with the following very difficult legal question: Was it true, as Glamis was asserting, that the Department did not have the discretion to deny a mining Plan of Operations in the CDCA, even if that mine would destroy unique cultural resources and interfere with Native Americans' ability to practice their religious? It was thus confronted with an issue of first impression with a conflict of alleged constitutional concerns. One was the mining company's allegation that to deny its Plan of Operations would violate its constitutional rights? And the second was the allegation from the Quechans

11:44:37 that to allow the Project to go forward would violate its constitutional rights? And they needed to tackle them very serious issue.

Now, when Congress passed FLPMA, it gave the Department of the Interior the express authority to regulate mining activity on public lands, and two of the FLPMA's provisions are relevant for this case which I will put up on the screen.

The first is Section 302(b) of FLPMA, which I have the U.S.C. cite up there, but it is Section 302(b). And that section directs the Secretary of the Interior, "to take any action necessary to prevent unnecessary or undue degradation of the lands."

Secondly, FLPMA created the California Desert Conservation Area, or the CDCA, and in Section 601, it empowered the Department to, "protect the scenic, scientific, and environmental values of the public lands of the California Desert Conservation Area against undue impairment."

Congress singled out the public lands in the CDCA for this protection because it found, and I quote from the CDCA, that, "the California Desert contains

11:45:51 historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources that are uniquely

located in an area adjacent to an area of large population." Congress found these resources were seriously threatened by the inadequate Federal management authority, 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 implementation of such planning and management.

The M-Opinion concluded that a mining Plan of Operations could be denied if it was found to cause undue impairment to lands within the California Desert Conservation Area. And Glamis takes issue with this finding. Glamis notes that throughout its submissions, it notes that the Department had continuously interpreted Section 302(b) of FLPMA to provide it with the authority to impose mitigation measures on mining operators, but only to the extent

11:46:59 that it was economically feasible for mining to still occur. It argues that never before had the Department denied a Plan of Operations on the basis that the plan would cause unnecessary or undue degradation.

And indeed, the M-Opinion recognizes this fact by noting, and I quote, "Under this portion of regulations, then, while BLM may mitigate harm to other resources, it may not simply prohibit mining altogether in order to protect them." IT goes on to

note, however, that the regulations that allow BLM to prevent activities that cause undue impairment to CDCA separate and apart from BLM's authority to prevent unnecessary or undue degradation.

Glamis then argues it was wrong and, in fact, that it violated customary international law for the Department to conclude that BLM could deny a Plan of Operations to protect cultural resources under the undue impairment standard that applies to undertakings in the CDCA. Glamis argues again that the Department's decision was both procedurally defective and substantively wrong, and I will address each of these in turn.

1492

11:48:13 Its two principal complaints regarding the process are, first, that the Solicitor committed a procedural fault by opining on issues that exceeded the scope of the California State BLM Director's request, and we answered this assertion, this allegation in our Rejoinder, and unless the Tribunal has questions on that, I don't--we don't believe it warrants any further attention.

Glamis's second procedural complaint is that the Solicitor issued the opinion without first publishing the opinion and seeking public notice and comment. But again, Glamis has failed to show that any such conduct violated U.S. law, and certainly it has not shown that it had violated the customary international law minimum standard of treatment.

There is no requirement under U.S. law that M-Opinions be subject to notice and comment. Under U.S. law, no notice and comment is required when agencies issue decisions or opinions clarifying statutory or regulatory language that has not been previously defined.

And the undue impairment standard had not

11:49:16 been previously defined. Indeed, the preamble to the 3809 regulations themselves indicated that the undue impairment would not be defined by further regulation but, instead, would be applied on a case-by-case basis.

Now, the Department later decided not to apply the standard without first promulgating regulations, and they did this through the 2001 M-Opinion that rescinded the 1999 M-Opinion, that they decided to--that it shouldn't be applied on a case-by-case basis was something that it could certainly do within its discretion, but it can in no way establish that the Department's prior conduct was unlawful.

And what's ironic about Glamis's argument is the fact that Glamis did have notice that the Solicitor was drafting an opinion before that opinion was issued. Glamis, in fact, was granted an opportunity to comment on the issues that were addressed in the opinion before that opinion was finalized. Glamis met personally with the Solicitor

to convey its concerns with, and its views on, the

1494

issues that were addressed in the opinion. And that treatment is certainly much better than that which any member of the public is entitled to expect when a rule is published for notice and comment.

But we noted in our submissions and Glamis has not contested the fact that there is no customary international law rule designating the manner in which states must promulgate rules or regulatory rules.

So, in other words, there is no customary international law requirement that regulations must be subject to notice and comment, and Glamis hasn't attempted to prove otherwise. Thus, quite apart from all of the other reasons that I have just explained, the fact that Glamis states the proposition that somehow or is arguing that the United States violated customary international law when the Solicitor of the Department of Interior issued a legal opinion interpreting legal standards in a statute without first publishing that opinion for formal notice and comment, confirms the untenable nature of Glamis's argument.

Finally, Glamis's argument that the 1999

1495

M-Opinion's substantive conclusion that the undue

impairment standard could be applied on a case-by-case basis to deny a mining Plan of Operations, that that constituted a violation of international law is likewise without merit. As I mentioned earlier, Glamis argues that the undue impairment standard ought to have been interpreted just as the unnecessary or undue degradation standard which appears in a different provision of FLPMA that had been interpreted. The unnecessary or undue degradation standard has been interpreted as a prudent operator standard. That is to require the avoidance of necessary or undue degradation but only to the extent that that's economically infeasible.

But Glamis cannot ignore the fact that the terms undue impairment or unnecessary or undue degradation are not the same. They appear in different provision of the FLPMA. In his opinion, the Solicitor addressed Glamis's argument that the undue impairment standard was not meant to provide a basis for denial of a Plan of Operations on account of harm to cultural and historic properties.

1496

11:52:31 In making this argument, Glamis relies on language in the CDCA Plan which states, and I put this on the screen. It states, with respect to Class L lands, which are the lands on which Glamis's unpatented mining claims are located, that, "BLM will review Plans of Operations for potential impacts on sensitive resources identified on lands in this class.

Mitigation subject to technical and economic feasibility will be required."

The Solicitor concluded in his M-Opinion that Glamis's argument, "ignores the further language in the CDCA Plan." That further language provides that, "Mitigation will be employed primarily in Classes M and I where resource protection measures cannot override the multiple use class guidelines."

The Solicitor found that this language, "thus implies that Class L areas will allow protection over other uses," and he then concluded, "Therefore, in Class L areas, protection may at times be paramount, and a proposed project can be rejected because it unduly impairs resources."

Now, Glamis may very well disagree with this

11:53:47 interpretation, but it certainly was not an irrational interpretation, and Glamis points to no authority that would require a contrary interpretation. It cites no authority that had previously equated the undue impairment with the unnecessary or undue degradation standard. The only authority, in fact, supports the Solicitor's Opinion that the standards are not interchangeable. A court had previously held, for example, that the term impairment, as used in relation to a management of Wilderness Study Areas under FLPMA, meant something other than undue degradation in relation to the management of Federal Lands generally, and this decision was cited by the Solicitor in his

opinion.

And the only court to directly address the question of the Department's authority to deny a mining Plan of Operations under FLPMA held that the Department did have such authority. And this court is the Mineral Policy Center, the court that decided the case of Mineral Policy Center versus Norton in 2003, and I have put this on the slide as well. That court found that, "FLPMA, by its plain terms, vests the

11:55:00 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 the mining, would unduly harm or degrade the public land." Now, the court here is addressing the unnecessary or undue degradation standard in FLPMA.

So, although it's not addressing the undue impairment standard, it certainly suggests that the Department similarly has authority to deny a Plan of Operations under that standard since the undue impairment standard applies to undertakings in the California Desert Conservation Area and is intended to grant even greater protection to public lands and attendant cultural and historic properties than is the case outside of the CDCA where the ordinary unnecessary or undue degradation standard applies.

So, the Solicitor's determination in the 1999 M-Opinion that the Department could apply the undue

impairment standard on a case-by-case basis was not inconsistent with the preexisting legal authorities. Even if that M-Opinion contained legal errors, as

1499

11:56:11 Glamis argues, that would not give rise to a violation of the customary international law minimum standard of treatment. As the ADF Chapter Eleven trial noted, and I quote, "Something more than simple illegality or a lack of authority under the domestic law of the State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1)."

Here, not only has no illegality been established, but certainly no something more has been proven.

It's not only may the opinion itself not be challenged as a violation of Article 1105(1) because, among other reasons it is also time-barred, but the decision made in reliance on this opinion was later rescinded by the same domestic authorities for the very reason that Glamis complains about the decision. It was rescinded in order to grant the Department the opportunity to promulgate regulations defining the undue impairment standard if it so chose, but the decision was made that the Department would not otherwise use, rely on that standard to deny a Plan of

1500

Operations without first promulgating regulations.

Now, as the EnCana versus Ecuador Tribunal held, and I quote, "Under a Bilateral Investment Treaty, executive agencies must be able to take positions on disputable questions of local law, provided that they act in good faith, the courts are available to resolve the resulting dispute, and judicial decisions adverse to the executive are complied with."

So, even if the 1999 M-Opinion was incorrect, the internal domestic system of the State corrected that alleged deficiency when it rescinded both the opinion and the Record of Decision which relied on that opinion.

So, I'm happy to entertain questions, and then I will turn the floor over to Mr. Benes, who will discuss the decision in light of the other projects.

PRESIDENT YOUNG: Ms. Menaker, thank you. Professor Caron?

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR HUBBARD: I have just one question. I realize that the M-Opinions create a

somewhat confusing, at least to me, picture of what actually happened, what is the effect of each, but it seems to me that you have to really look at both of those together to figure out what at least Solicitor Myers actually thought had happened.

You mentioned that this was a matter of first impression for the M-Opinion, the Leshy Opinion, but I think that in Solicitor Myers's view, it was not a matter of first impression in the sense that the existing regulations seemed to define the standard by reference to what's called the prudent operator standard, and that that applied in both contexts, and that the real problem with the Leshy M-Opinion was that it had been issued, in effect, as amending a regulation without going through the process required by the Administrative Procedure Act for amending regulations, and, therefore, at least in Solicitor Myers's opinions, it was not a lawful measure.

Now, assuming just for sake of argument that that is correct, is it your position that even if we were to find that that was somehow in violation of U.S. law, that we would not be able to, therefore,

12:00:21 say, it also violates international law?

MS. MENAKER: Yes, and I will elaborate, but it is certainly our opinion that this Tribunal is not acting as a domestic court, and there are rules, obviously, under our Administrative Procedure Act, but those rules are not rules of customary international law.

And there is no suggestion, and certainly Glamis has offered no evidence that there are customary international law rules that require States to act in accordance with what the rules require under

our Administrative Procedure Act. And in fact, I think that we have demonstrated quite the opposite.

States promulgate rules in all sorts of different matters. You can have monarchy that just issues--you know, a King issues laws, and that is not inherently violative of customary international law if they choose to do it this way. So, you can have all sorts of different processes, and no one would suggest that the State is required by customary international law to issue only regulations pursuant to notice and comment, and certainly Glamis has not sustained its

12:01:39 burden on that point.

ARBITRATOR HUBBARD: Is that the case even where domestic law would seem to require that they follow a procedure which was not followed?

MS. MENAKER: Yes. And again, I would direct the Tribunal's attention to the ADF Tribunal's decision, as well as other decisions that we have quoted in our written submissions, which clearly establish that a mere--an illegality under domestic law does not necessarily rise to a violation of customary international law, and that we would contend is especially the case when you're talking about an illegality insofar as the procedure or process is concerned.

And so I think that even had this--even if we assumed just for the sake of argument that this was illegal under U.S. law, which we do not concede, but

even if we were to accept that, that alone would not rise to the level of a customary international law violation.

But I think this case there can be no question that it does not because the internal process

12:03:00 of the domestic State corrected for that error.

And while there is no requirement across the board of exhaustion of local remedies or anything of that nature, certainly in the context of judicial rulemaking--I won't go in a whole diversion of the issue of finality as far as challenges to judicial or administrative decisions, but here you have a case where the State has corrected the alleged illegality and has corrected it in the same manner as which the Claimant has asked for it to be done.

The Claimant is saying that, here, this rule was unlawful because you should have promulgated a regulation for notice and comment, and then what does the State do? It rescinds the new rule, and it says, okay, we won't now promulgate a rule without notice and comment.

So, there, in our submission, it would be truly extraordinary for an international tribunal to step in and say that that intermittent error, so to speak, actually rose to the level of a violation of customary international law. I mean, the repercussions of that would be quite great. One could

1505

look at any decision made by an administrative agency or even in a lower or intermediate court decision, and decide that something was in error.

And even if the State corrected it itself, it could still be the subject of international liability, and that, we submit, that cannot be the case.

But I would like to, before I just close off on that question to go back on the assumption that was underlying the question, which was that this was a lawful act. There is in footnote eight of the Myers Opinion, that is where he discusses this issue with the APA.

It's important to recognize, though, that clearly Myers, in his opinion, determines that the--in his view, the prudent operator standard that one should not--he doesn't say how the undue impairment standard should necessarily be applied, but he says it shouldn't be applied to deny a plan unless regulations are promulgated. But the real problem is not with the 1999 M-Opinion that decided to apply these on a case-by-case basis, but rather with the 1980, 3809 regulations because those regulations are the

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regulations that said that the Department would not promulgate regulations to define the undue impairment standard, but rather would apply that standard on a

case-by-case basis.

And Solicitor Myers recognizes this in that same footnote, where he says that, "The Department thus appears to have intended to apply this generally applicable statutory provision on a case-by-case basis without defining the pertinent terms of the provision."

So, he's not taking fault with the earlier Solicitor's understanding or reading of the 1980 regs or decision to apply it on a case-by-case basis. He understands and recognizes that the Department seems--that seems to have been the Department's intent dating back to 1980. But then he goes on to say that the APA may be implicated. He does not say that it would be unlawful, necessarily. He just says--he just notes that the Supreme court has noted that the Administrative Procedure Act was adopted to provide that administrative policies affecting individual rights and obligations be promulgated pursuant to

12:07:00 certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations.

So, he says, consequently, contrary to the preambular statements that are contained in the again 1980 regulations, that he thinks a separate rulemaking should be to first define the undue impairment standard before applying that standard.

ARBITRATOR HUBBARD: Thank you.

PRESIDENT YOUNG: Mr. Benes?

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

I will now address Glamis's contentions that the United States Government violated Article 1105 by approving other mining projects and other undertakings in the California Desert Conservation Area while denying the Imperial Project for the 10 months that the Imperial Project had actually been denied.

As an initial point, I think there are four characteristics that I will talk about that distinguish the Imperial Project from these other mines and from the other undertakings that have been

12:08:21 discussed in this proceeding, and it's these four characteristics taken in toto that presented the unique circumstances that the Department confronted. And, in sum, these characteristics are the density of the archeological features discovered in and around the Imperial Project area, particularly those evidencing extensive past ceremonial or religious use. The second characteristic is the strong, the exceedingly strong, Native American concerns expressed about the effect of the Project on that area. Three is the convergence of the concerns expressed by the Native Americans and the archeological evidence, and I will explain more what I mean by that in a moment; and, fourth, as a fact that this Project was in a place that they found to be substantially undeveloped

and had not been subject to any significant historic mining activity. And again, it's these four characteristics that I said, in toto, made the Imperial Project unique, and it's these four characteristics that led to the processing and the way it was handled that Ms. Menaker has described.

To begin with, we begin with the Record of

12:09:43 Decision issued in January 2001 that denied the Imperial Project, and that Record of Decision noted that, "Information concerning historic and archeological resources identified during expanded field survey and analysis in 1997, a report provided by the Advisory Council on Historic Preservation, and consultation with the Quechan Tribe substantially increased agency awareness and understanding of the importance of the site to Native Americans. That new information was a significant factor in the agency's decision to change its initial preferred alternative to the no action alternative, and ultimately in the Department's decision not to approve the Project."

And again, I'd mention that Glamis has pointed out that the 1996 and 1997 Draft Environmental Impact Statements had both identified the proposed Imperial Project as the preferred alternative, and here the Secretary is noting that it's that additional information learned in the course of those archeological surveys that caused them to change that preferred alternative to the no action alternative.

22 And in making this decision, as Ms. Menaker

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12:10:59 1 has described, the Secretary relied on the Solicitor's
2 advice contained in the 1999 M-Opinion, that the
3 Department had the legal authority to deny a Plan of
4 Operations if it was found to cause undue impairment
5 to cultural or historical resources in the CDCA, and
6 the Department concluded that the Class L lands on
7 which Glamis's claims are located provides for,
8 "generally lower intensity, carefully controlled and
9 multiple use of resources while ensuring that
10 sensitive values are not significantly diminished,"
11 and the proposed Imperial Project was not consistent
12 with that standard.
13 Now, we have already shown that the factual
14 findings and legal conclusions on which the Department
15 relied in making its determination were sound, and
16 that the Department cannot be found to have violated
17 customary international law because it relied on those
18 findings to temporarily deny the Imperial Project Plan
19 of Operations.
20 Glamis, nevertheless, argues that the denial
21 violated the minimum standard of treatment under
22 customary international law because other open-pit

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12:12:00 1 gold mines, as well as other projects in the CDCA,

were approved while the Imperial Project was denied. In making this argument, however, Glamis misconstrues the evidence that was before the Government with respect to the archeological and cultural resources at each project at the time each of those projects was approved. And I want to emphasize that point.

As we reviewed the Government's actions with respect to each of these projects, the focus has to be on what the Government knew at the time that it was considering those undertakings, and it would be inappropriate to try to impute subsequently learned knowledge back to Government Decision makers in the 1980s or the early 1990s to try and say that they should have done something different there.

The Record of Decision actually specifically recognized that other large-scale mining operations on Class L areas in the CDCA had already been approved, but concluded that the, "unique combination of important environmental factors discussed in this Record of Decision set this proposed project apart from those other projects, and the Record of Decision

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12:13:16 observed that, unlike the Imperial Project, "No Native American values or historic property issues other than preservation of the historic mining activities at some of these other sites were identified during the Project review of those other mines."

And the Record of Decision also observed that all of those other mines, "were located on sites

previously disturbed by mining activity." And Glamis cannot show those conclusions are wrong, much less that the Department acted in any way that would violate the customary international law minimum standard of treatment.

Now, the Record of Decision only compared mining projects that had been approved on Class L lands as the Imperial Project sits on. Glamis has pointed to BLM's approval of the following mines, some of which are on Class L lands, but some of which are on Class M lands which provide for more intensive use, again, as Ms. Menaker described. I have prepared a table to compare the projects that Glamis has cited. There is the Picacho Mine, the Rand Mine, and the American Girl Mine, all of which were approved in the

12:14:24 early 1980s with some expansions approved for some of these projects throughout the 1980s early '90s.

The Mesquite Mine was initially approved in 1985. The Briggs Mine was approved in 1995, and the Castle Mountain and Soledad Mountain Mines were approved in 1997.

In addition to these mine projects, we have also heard much about the Mesquite Landfill, which the Government approved in 1996. And again, you can see on the chart which of these projects are on Class L like Imperial Project, and which are on the Class M lands that allow for more intensive use.

Now, the approval dates for these projects

are relevant for two reasons. First, as I mentioned, it would be inappropriate to try to import subsequent knowledge gained by the Government about particular cultural resources backward in time to say that because, say, the Mesquite project in 1985 was approved and might, in retrospect, seem to have similar archeological resources in the area that it would in 1996 or 1997 or in 2000 be inappropriate to deny the Imperial Project once the Government

12:15:38 understands the importance of the cultural resources there.

And second, most of these other projects were approved prior to the 1996 Executive Order that required greater consultation with Native American Tribes regarding cultural resources, and it is through those consultations that the Government has learned much more about the particular nature of the resources.

Now, none of these project sites--

ARBITRATOR CARON: I'm sorry, could I ask a question just before you proceed?

MR. BENES: Yes.

ARBITRATOR CARON: I understand your point about the approval date.

MR. BENES: Yes.

ARBITRATOR CARON: But how would you relate that to the last time you could reverse that approval date? In other words, I'm thinking here of the

landfill which we have heard actually breaks ground on 2007.

MR. BENES: Right.

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12:16:27 ARBITRATOR CARON: So, are there a series of approval dates, or--I'm sorry, did you say it was approved in--

MR. BENES: It was initially approved in 1996. A landfill, by regulation you actually can't have a landfill on Federal Lands, so as part of that approval, there was a land exchange approved so that all the lands that the landfill was actually on would be on private lands. That land exchange was challenged in court, and the litigation process took until about 2002, before that--and it was only the land exchange issue, the value of the parcels of land involved was part of the challenge. That resolved in 2002, and the Mesquite Landfill sort of proceeded since then.

I will address the Mesquite Landfill in more detail and with regard to that issue in a few moments.

ARBITRATOR CARON: But for the moment you're saying the final approval?

MR. BENES: For the moment I'm focusing on the initial approval of the decision in 1996.

ARBITRATOR CARON: Initial or final?

1516

MR. BENES: Well, that's the final approval decision in 1996.

ARBITRATOR CARON: Thank you.

MR. BENES: Now, none of these project sites contained the same density of significant archeological resources related to Native American ceremonial use as that contained by the Imperial Project Site. As a general comparison of the cultural resources to various projects, I will reference the number of archeological sites related to Native American use that were deemed to be eligible for or potentially eligible for conclusion in the National Register of Historic Places.

I also want to clear up a possible misconception about our use of NRHP eligible sites as a comparator for these projects. NRHP eligibility does not mean that an archeological site cannot be harmed or even destroyed and the United States has not suggested otherwise. Rather, we have used our NHRP eligibility as one of the variables for comparing the impacts of the various CDCA mines and projects because to be eligible for the National Register listing, the

archeological sites must be judged to have sufficient significance under certain delineated criteria and sufficient integrity such that the significant characteristics are still present. So, the reference to the NRHP eligibility is sort of a quick shorthand

to distinguish between archeological features and those archeological features adjudged to have some particular scientific importance or are an evidence of a particular past historic event.

The following information that I'll present was gleaned from the final Environmental Impact Statements for approval of the mine projects and their expansions and/or in some cases from the cultural resource inventories for those projects. Now, this information was presented in both our Counter-Memorial and Rejoinder, and I would refer the Tribunal specifically to pages 237 and 238 of our Rejoinder which contains the relevant citations to the exhibit documents.

Now, two mines, the Rand and Picacho Mines, contained no NRPH eligible sites of any sort. Two mines, the American Girl and Soledad Mountain Mines,

12:19:41 contained some historic resources that were potentially eligible for NRHP listing, but no prehistoric or Native American resources. And the remaining three mines contain some prehistoric cultural resources, but those resources, as understood at the time that those projects were approved, those resources, particularly those possessing sufficient significance and integrity to be eligible for NRHP listing, were not as extensive as those for the Imperial Project. The Castle Mountain Mine impacted seven potentially NRHP-eligible sites, the Briggs Mine

contained two, the Mesquite Mine contained 13, and the Mesquite Landfill contained 10.

And Glamis has not contested the accuracy of this information.

I do also want to mention for the Imperial Project, the number, the 35 NRHP-eligible sites listed there, I relied on the determinations made by the ASM survey at the Imperial Project Site because there had been some previous criticisms of the--that the intensity of the KEA survey may have identified more resources to eliminate any possible argument that that

12:20:51 was not an accurate comparison. I have gone with the ASM survey numbers which had identified 35 NRHP-eligible sites.

Now, Glamis's expert, Dr. Sebastian, objected to just comparing the impacts of various mines based on the simple numbers of National Register-eligible sites because she says that doing so, "ignores the qualitative importance of places that Native Americans consider to be of cultural and religious significance." And the United States agrees with this statement. And when one examines what was known about the qualitative importance of these other areas, as indicated by expressed Native American concerns about the effects of those projects on cultural and religious resources, and to the convergence of those expressed concerns with the archeological evidence, one sees that again the Imperial Project is unique.

Now, I mention one more time that I'm focussing on information possessed by the government archaeologists when each mine was approved. As Mr. McCrum observed on Wednesday, BLM can only act based on the information it knows.

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12:21:56 And I do also just want to put one other proviso, that I'm not making any assertions regarding whether or not particular areas are or are not, in fact, important to Native Americans or hold particular resources. I'm merely recounting the information available to the BLM when it made these decisions.

So, for example, Glamis attributes significance to the fact that in 1997, as part of the ethnographic interviews for the Imperial Project, the Quechan expressed concern and regret that the Medicine Trail, which we have heard about near the Picacho Mine, had already been lost. But there is no evidence that this information was conveyed to or known by the Government when that mine or its expansions were approved beginning in the early 1980s.

Not surprisingly, the Government was also not aware of any specific Native American concerns about the effects of the Rand, American Girl, or Soledad Mountain Mines on significant cultural resources; and as Mr. Purvance testified, the American Girl Mine, although it was in an area that had been identified as an area of very high Native American concern as part

1521

of the CDCA Planning process, he testified that the American Girl Mine had not been the object of any specific concerns by Native Americans in his knowledge.

Now, although the Mesquite Mine impacted several archeological resources, including some that, in retrospect may have related to prehistoric and historic Native American ceremonial use, when that project was approved in 1985, the archaeologist did not believe that the resources in the area were related to any specific modern Native American Tribe, and had concluded that there were no known Native American concerns. And the remaining three projects, the Briggs and Castle Mountain Mines, and the Mesquite Landfill, did elicit comments and concerns from Native American Tribes.

So, as you can see on the slide, this means that in 1998, when the Department of Interior began examining the legal issues regarding its authority to approve or deny a Plan of Operations in light of conflicts between that plan and Native American cultural and religious values, only three of the

1522

Projects identified by Glamis had been in areas with archeological evidence of Native American cultural resources and expressions of concern by Native

Americans about the impacts of those projects.

I would also note that only two of these projects were on Class L lands.

But none of these three projects exhibited the same convergence between the archeological evidence and the Native American expressions of concern as that made the Imperial Project unique.

Now, by convergence, I mean the fact that the archeological evidence in the Imperial Project showed extensive past ceremonial use of the area, particularly in relation to the trail segments identified as part of the Trail of Dreams, and this archeological evidence was consistent with the Quechan statements about the extreme importance of the Project area as a place of past and future ceremonial and educational use.

Now, regarding the Castle Mountain Mine, while the Fort Mohave Tribe expressed concern that the project was located in a sacred area, the mine was

12:25:06 actually seven miles from the area identified by the Tribe, and the comment actually appeared to be based on a misunderstanding. And while the Timbisha Shoshone Tribe indicated the area in and around the Briggs Mine was sacred to them and that the area included burial sites, when they conducted their cultural resource inventories, the archaeologists found no archeological evidence of significant past ceremonial use or of burial sites, and what they found

were two isolated rock rings, which are important archeological resources, but which were not directly impacted by the project.

Finally, while the Quechan expressed concerns about the cultural resources in the Mesquite Landfill area, they did not express the same concerns as they had about the Imperial Project. Their concerns for the landfill were about studying the archeological evidence further to determine if there had been an historic or prehistoric permanent settlement in the area. And while they mentioned that they also wanted to study the area more to determine if had been an historic center or religious practice, the focus of

12:26:10 their official communications to BLM was to study the area further so they could work with BLM to preserve a settlement left by their ancestors. They did not indicate that the area had been one used for ceremonial and religious purposes up until the previous generation, as the Quechan had said about the Imperial Project area, and that they made no comments about a need to use that particular area in the future for ceremonial and educational uses.

Now, BLM reviewed the archeological evidence in the landfill area and concluded that it did not indicate that there had been a settlement--any permanent settlement in that area. Thus, again, there was no convergence between the expressed concerns of the Native Americans and the archeological evidence,

and that Mesquite Landfill project was approved in 1996.

And finally, unlike these other projects, the employment had been substantially undeveloped and had not been subjected to any extensive historic mining activity. This fact is repeated in the Mineral Report for the Imperial Project in the final Environmental

12:27:24 Impact Statement notes this, Where Trail Cross, cultural resource inventory notes that, you know, they were in the presence of a few prospect holds or anything, but that any scale mining had occurred well outside of the Imperial Project area.

In contrast to this, all of the other mines had--were located in areas that had been the subject of or subjected to historic mining activity and/or had much more extensive modern--well, had more modern development there.

For example, the American Girl Mine, at the American Girl Mine approximately half of the acreage of what became the American Girl Mine was already disturbed by previous historic mining activities. The Final Environmental Impact Statement for the Mesquite Mine noted that past small-scale mining and sand and gravel extractions had disturbed much of the site. And, of course, the Mesquite Mine already had Highway 78 going through the area and had to be eventually rerouted around the landfill, so there was that significant modern intrusion there as opposed to in

the Imperial Project area, where there was just the

1526

one dirt road, Indian Pass Road.

And again, as with the rest of the Projects were similarly located in areas that had evidence of historic mining activity and significant disturbance from that activity.

Now, in light of all of this, the Department's processing the Imperial Project cannot be considered arbitrary or contrary to legitimate expectations when compared to past or contemporaneous CDCA projects because none of those projects exhibited the same density of archeological resources associated with ceremonial and religious use, and the convergence of that archeological--and none of those projects exhibited a convergence of that archeological evidence with the statements of Native American Tribes regarding the ceremonial and religious importance of the area, and none of those projects were in an area that was substantially undeveloped without any significant disturbance from historic mining activity.

So, that was the state of the information before the BLM when it made the decisions regarding those various projects.

1527

And Glamis tries to further confuse this

issue by focusing on several projects approved in 2002. First is an expansion to the Mesquite Mine that was approved in 2002, the North Baja Pipeline project which we've heard much about, and the progress of the Mesquite Landfill after the litigation regarding the land exchange had resolved itself.

And Glamis asserts that based upon the issues raised by the Quechan about the importance of the Trail of Dreams during the Imperial Project review, and based upon additional information obtained about that trail's route, the Government should have known that these three projects impacted portions of the Trail of Dreams and/or the Xam Kwatcan Trail network.

But again, before addressing Glamis's assertions about the cultural resources affected by these projects, we wish to emphasize that these projects were all approved or, in the case of the Mesquite Landfill, allowed to proceed in 2002, after the Department had already rescinded the denial of the Imperial Project and had rescinded the 1999 M-Opinion upon which that denial was made. And as part of that

12:30:50 rescission, the Department determined that it would not deny a mining Plan of Operations on the basis of the undue impairment standard until regulations were promulgated to define that standard.

Thus, the approval of, say, the Mesquite Mine expansion is irrelevant in evaluating the Department's earlier denial of the Imperial Project, and the

approval of the other two projects, or I should say the approval of the North Baja Pipeline and allowing the Mesquite Landfill to proceed has no relevance because at that point, Glamis's Imperial Project was not--the denial had been rescinded, and it was a position that it could have tried to go forward with the Project, and, in fact, at that time was proceeding to go forward, for example, with the--participating in the completion of the mineral--the validity determination of the minerals at the Imperial Project site.

Now, with regard to the Mesquite area--and I will start referring to it sort of more generally as the area, so I'm including both the Mesquite Mine and the Mesquite Landfill, the Tribunal will recall that

12:31:50 Dr. Sebastian produced this map of the Mesquite Mine and expansion of the Mesquite Landfill, indicating the presence of archeological sites.

And I think you will notice on this map in the middle part in green is labeled as the area of previous mine disturbance, and there are many archeological features mapped into that area of previous archeological disturbance.

And I just want you to keep in mind when you consider this map, that in those areas of previous disturbance, those archeological features were already impacted by the Mesquite Mine project again, which was initially approved in 1985 and through several

captions since then.

So, when facing decisions about the Mesquite Landfill, this is a very rough approximation of the extant archeological features in that area. I would point out that while we have blocked out the entire Mesquite Mine area, what was labeled as the area of mine disturbance, there are a few areas within that mine disturbance that were left undisturbed, and so now there are a few archeological features that are

12:33:00 surrounded there by the mine processing facilities and piles.

But other than that, this is what the archeological evidence is in this area, as we consider the Mesquite Mine expansion and the Mesquite Landfill.

Now, Glamis argues that a segment of the Trail of Dreams passes through the Mesquite Mine and Landfill, and this is based on the map you have seen throughout these proceedings in which Dr. Sebastian superimposed Boma Johnson's hand drawn map over a map of the area. Now, apart from the several problems we have already identified with this map, as Dr. Cleland testified, it is erroneous for Dr. Sebastian to conclude that all portions of what Mr. Johnson identified as the Xam Kwatcan Trail network are of equal importance to the Tribe.

And moreover, although Dr. Sebastian has said that it's significant that the Mesquite Mine expansion was approved without requiring any cultural resource

mitigation, this ignores the fact that the Record of Decision for the Mesquite Mine expansion clearly states that no sites eligible for the National

1531

12:34:08 Register of Historic Places were found in the Project area, and this determination was made after extensive consultations with the Quechan Tribe, including site visits to the areas of the new disturbance of the Mesquite Mine, observing specific archeological features and, as the Record of Decision indicates, the Quechan Cultural Committee was consulted to help identify properties which may be of religious or cultural significance to the Quechan. The Quechan did not indicate that there are such properties within the proposed expansion area.

So, in 2002, the Quechan are consulted about this project. They make site visits to this project, and they have not identified any religious or culturally significant properties there, and yet Dr. Sebastian asserts that BLM should ignore this information from the Quechan and--perhaps--well, I will just say that.

Now, both parties have referred to the work of J. Von Werlhof.

ARBITRATOR CARON: Let me just ask a quick question again. The table on the--the first table you

1532

had, you indicated there were 13.

MR. BENES: Yes.

ARBITRATOR CARON: Eligible sites.

MR. BENES: Yes.

ARBITRATOR CARON: So, if you could go back to the map.

Are you saying that 13 would have been in the blue filled-in area and, therefore, older? And not--

MR. BENES: The 13 eligible sites, I believed that the cultural resource inventory, many of those sites would have been in the blue area filled over, a few of those sites were able to be avoided by the mine design, and I do not have the information right now as I described, but there were a few sites within the mine project area that were fenced off and avoided. I do not have the information as to whether or not the NRHP-eligible sites were only within that footprint and avoided or if they were able to adjust the boundaries of the mine perhaps to avoid one or two of them.

Right, and the Record of Decision for the 2002 mine expansion clearly indicates that the

13--that there were no sites eligible for the National Register affected by the mine expansion project.

Actually, Mike, could you do back to that map?

There is one other thing about this map is

that the--you will see that larger red outline is labeled as the Mesquite Mine expansion, but that's not--the Mesquite Mine expansion that they approved in 2002 is not going to increase the size of the footprint of the mine out to that red line. If you look, we can provide the information for you.

In fact, in Dr. Sebastian's--this was an exhibit to her rebuttal statement, and she produced a second map right behind this one in the rebuttal statement, and that second map, although it's difficult to identify, you know, on the copies and everything that we have, the mine expansions are in five or six limited areas where they will sort of protrude a few acres from that internal green area. It's not going to expand out there, so I would refer you to that. I believe it's Exhibit 6 B or to her rebuttal statement that shows the actual areas of

12:37:35 expansion.

And also to note the Mesquite Mine that you're looking at there is something on the order of 4,000 acres. The mine expansion that was approved was--I don't remember the exact figure, but it was between 120 and 150 acres of new disturbance.

PRESIDENT YOUNG: Mr. Benes, if I may pursue that question, I listened to everything you said, and there is still an inconsistency between no sites eligible and 13 sites eligible. Could you maybe over the lunch hour just reconcile those for us?

MR. BENES: Well, the no sites eligible that I'm mentioning in regard to the Mesquite Mine expansion?

PRESIDENT YOUNG: Right and 13 eligible in regard to the Mesquite Mine.

MR. BENES: Right. I think I will point you to the Record of Decision.

PRESIDENT YOUNG: I heard everything you said, and I don't understand what you said. I don't quite understand why there are 13 and why there are no.

12:38:34 MR. BENES: Okay. Right. Well, I will say--I think I can answer it right now, that when I said no sites eligible in the Mesquite Mine expansion, that's referring only to the areas of new disturbance.

PRESIDENT YOUNG: So, the 13 that were eligible here are actually within the area that is currently being mined.

MR. BENES: At least, I believe, half of them were. The remaining six or seven we are not clear on, and I don't want to offer any--and we will get that detail for you over lunch.

PRESIDENT YOUNG: Okay, because I thought this information was at the time they approved the expansion, this is what they knew, but this is what they said, and I'm just try--this is confusing.

MR. BENES: We will look at it and give you more information.

PRESIDENT YOUNG: Okay.

MR. BENES: Now, both parties have referred to the work of Mr. J. von Werlhof, who is one of the most noted archaeology experts of the resources in the CDA--CDCA, especially Native American resources and

12:39:33 the trails, and Mr. von Werlhof conducted three surveys of over 7,000 acres in the Mesquite Mine area in 1982, '83, and '84, so it was upon his work in 1985 that the BLM had concluded that there were no known Native American concerns at that time.

Mr. von Werlhof also conducted some surveys in the Imperial Project area. In 1988, he conducted a cultural resource inventory of about 300 or so acres. It was a limited study in the Imperial Project area. Claimants have cited his conclusions from that study where in 1988 he did want believe the area that he had studied showed evidence of current Native American concern.

But Mr. von Werlhof then also consulted on the 1997 KEA survey and consulted and worked on the Baksh ethnographic study that was prepared in conjunction with that survey.

Now, having personally surveyed both areas of the Mesquite Mine and landfill and the Imperial Project area, what was Mr. von Werlhof's conclusion about the resources in the Imperial Project area? He testified before the Advisory Council on Historic

1537

12:40:50 1 Preservation that he noted that while the Imperial
2 Project area was part of a larger sacred geography, as
3 the Quechan had described, he concluded, and I quote,
4 "It is at the center of this sacred area, the area of
5 the Project that contains the greatest concentration
6 and most diverse of the religious sites." And
7 that's--Mr. von Werlhof's testimony is at page 124 of
8 the transcript of the ACHP hearing.
9 Now, Glamis repeatedly alleges that the North
10 Baja Pipeline project also impacted numerous
11 archeological sites and intersected trail segments,
12 including, Glamis alleges, segments of the Trail of
13 Dreams, but again, Glamis ignores the key differences
14 between the Projects.
15 First, the North Baja Pipeline was approved
16 only after its route was changed to avoid the most
17 major trail segments or to intersect them as close as
18 possible to areas of previous disturbance, such as
19 Highway 78 or previous corridors for where the power
20 lines were put in.
21 Second, as Dr. Cleland has testified, the
22 trails that were directly impacted by the pipeline

1538

12:42:02 1 construction did not have the attendant archeological
2 artifacts consistent with the important ceremonial
3 trails that were found in the Imperial Project area,

such as the numerous trail shrines, spirit breaks, and trail markers on the trails in the Imperial Project area that the Quechan had identified as the Trail of Dreams.

Now, Dr. Sebastian has offered no evidence to rebut this testimony.

Third, 27 Native American Tribes were consulted regarding the pipeline, and several Tribes, including the Quechan, participated in evaluating the cultural resources along the pipeline's route. And our specific concerns were expressed about particular areas, those areas were avoided by rerouting the pipeline, and no Tribe stated that the final approved pipeline route would destroy key cultural resources such that it would impact their ability to use an area for sacred and/or religious ceremonial purposes.

Now, fourth, 75 percent of the pipeline was either put in existing right-of-way corridors or directly adjacent to such corridors.

12:43:08 And fifth, the continuing visual and environmental impact of an open-pit gold mine like the Imperial Project and an underground pipeline simply are not comparable.

I think that Claimants have acknowledged that they're not comparable, and they have emphasized still that it cuts this 80-foot wide swathe over 80 miles and disturbs a total of a thousand acres, but I do want to give just a few comparative details between

the actual impacts of the two.

So, again, during construction, the pipeline disturbs an area in the right-of-way of approximately 80 feet wide. Now, the B pipeline that has been approved from 2007 will go in and be put in 25 feet to the side of the original pipeline, and so much of the construction for that will occur in that originally disturbed area. And when they do the pipeline, the pipeline trench is dug, the pipeline laid in it, and then the trench is recovered.

Now, the original--to give you an idea of how long it takes where the actual disturbance is occurring, the original pipeline was constructed in

12:44:14 the spring and summer of 2002, and landscape restoration was completed in the fall of 2002. And the 2002 Final Environmental Impact Statement for the pipeline expansion project notes that, within 20 days of final backfilling, all work areas must be graded and restored to preconstruction contours and natural drainage patterns.

Compare this to the Imperial Project which will result in a permanent change of nearly 2,000 acres in the surrounding landscape, zero acres of the actual pipeline route are considered to be affected during the pipeline's operation.

So, that is once--by the BLM's definitions, once they go in and they bury the pipeline and they recovered it, the acreage that that pipeline occupies

is not considered to be affected because they only need limited access to certain areas to service the pipeline.

Now, I will put on the screen several before and after photos that compare the visual impacts of the North Baja Pipeline compared to the Imperial Project, and these slides I will put up will show--the

1541

top photos in these slides will be the before photos taken before the 2001 pipeline was constructed and the bottom photos will be the after photos taken from the same locations along Highway 78 and 2005.

Now, this information is from the 2007 North Baja Pipeline Final Environmental Impact Statement that Dr. Sebastian references in her final report and that Claimants have referenced several times here in this hearing. It has an appendix to it, Appendix Q that evaluates the visual resource impact and since pipeline B is going in right next to pipeline A, they were able to include in this visual resources inventory some actual photos.

Now, first I will show you this map that shows approximately where along the pipeline and where in relative to the Highway 78 the photo was taken. You will see the Highway 78 is labeled in Brown, with the Brown arrow. It's the line continuing from the southwest to the northeast there. The pipeline with the green arrow points to the blue and red lines, that shows the access roads, and the pipeline right-of-way

22 that go along Highway 78. You will note throughout

1542

12:46:34 1 this area the pipeline is located on the east side of
2 Highway 78.
3 And just as an aside, the Boma Johnson map
4 shows the Trail of Dreams--I'm sorry, the Xam Kwatcan
5 Trail network through this area is located on the west
6 side of the pipeline, but you can see at that point,
7 at Mile Post 42.2, where these photos were taken, the
8 highway is quite close to the pipeline network, and,
9 in fact, the key observation points, which is what
10 they call where these photos were taken, were selected
11 specifically to be points where the pipeline
12 right-of-way is within the field of vision from the
13 highway.
14 Go to the photo.
15 Now, we provided these photos, the full
16 visual resource inventory to you. You can see from
17 the top photo is the--so at this point, you can see
18 Highway 78 there. To the left of it is where the
19 pipeline right-of-way runs, and you can see from the
20 top photo to the bottom photo, it is very hard to
21 discern exactly where that pipeline right-of-way would
22 run.

1543

12:47:48 1 Next slide.

Now, again, this is another segment of Highway 78 and, again, you see the Mile Post 47.6 labeled towards the top. And you can see at that point the pipeline right-of-way appears to be even closer to the highway. If you go to the photo.

And at this point because we're facing a different direction, the pipeline would be on the right side of the road. And again, one has to try fairly hard to find any visible signs of the disturbed pipeline area.

Now, again, this is just to show that the photo that Dr. Sebastian had produced showing a swathe off into the desert is not necessarily indicative of the visual impacts of the pipeline throughout its 80-mile course.

MR. GOURLEY: If I might make one observation, I think I heard Mr. Benes say that this is not in the record, but was a document cited, and we don't object to the Tribunal, in fact, we think the Tribunal should have complete documents, including this complete document, whatever it might be, as well

12:48:59 as any others that have been cited.

MR. BENES: We have in the materials that we provided to the Tribunal, we have included the complete visual resource inventory from the 2007 final environmental impact for the North Baja Pipeline, so it has additional photos. It has all of the before and after photos they took, so there is--we provided

all of those to the Tribunal.

This information is also readily available both on the Federal Energy Regulatory Commission Web site and the California State lands Commission Web site, where one might be able to obtain better resolution copies.

PRESIDENT YOUNG: But setting that second thing aside, it's in the record?

MR. BENES: I'm sorry, no. The document itself has not previously been entered into the record.

PRESIDENT YOUNG: These photos have not been previously introduced?

MR. BENES: No.

PRESIDENT YOUNG: I take it you're not

objecting to that; is that correct?

MR. GOURLEY: We are not objecting provided that the are similar documents like the Final EIS for the Imperial Project and some of these other projects, extracts which both parties have put in pieces of, but the full documents are not there, and we think that the Tribunal should have the full documents.

PRESIDENT YOUNG: Any objections to that?

MS. MENAKER: Well, I think at this point in time, we don't know what they're talking--which documentation, but certainly we would object in their closing arguments in September for them to introduce a number of documents that are not already in the

record. Here, as we have mentioned, I mean, their expert has already relied on this particular document, and they have referenced it many times in the testimony.

So, we are using it mostly as demonstrative evidence, but we would object to putting in, you know. If Claimant is using this as an opportunity to open the door to new evidence, then we do object to that.

PRESIDENT YOUNG: I understand what Claimant

12:51:00 is saying is that the document--when parts of the document, Government document, have been produced, that it would be appropriate to include the whole document.

MS. MENAKER: That's fine. Perhaps I was talking with my colleague, that would go for any document. Certainly a position of document, we don't have an objection.

PRESIDENT YOUNG: Thank you.

MR. BENES: Now, compare these pipeline photos to these computer simulations showing the extensive visual intrusion of the Imperial Project into the surrounding area. Now, these photos are taken from the Record of Decision that denied the Imperial Project in 2001. These are obviously computer simulations.

On the left--and this is, as you can see there, the simulated view from the--

ARBITRATOR CARON: It's not obviously to me

it's a computer simulation. What is this photograph?
MR. BENES: Sorry. That's what I'm starting to explain. This is the Imperial Project area. It's

1547

12:52:09 the simulated view of the Imperial Project area from the Running Man trails, and this was part of the record as part of the 2001 Record of Decision.
MR. GOURLEY: We would like to register one objection here, which is--and this goes back to the dispute the parties have had about how to conduct this hearing.
It's one thing to have this document into the record. It's quite another to have Respondent counsel testify as to what it means, and that's what he's doing.
PRESIDENT YOUNG: Counsel, you are testifying to what it means?
MR. BENES: No, I'm just trying to explain what the document--I mean, I will just read the title on the document rather than explain what it means.
PRESIDENT YOUNG: Is that satisfactory?
MR. GOURLEY: That's satisfactory.
MR. BENES: And the other information I was saying about having been a computer simulation is just from the Record of Decision itself describing it, so I was trying not to add anything to that. But at any

1548

12:53:15 rate, this is the northeast view from the Running Man trial before operations at the Imperial Project area. You will see it labeled on the left is the Indian Pass area. Labeled on the right is Picacho Peak, and then the computer simulated that this would be the visual impact to the horizon of the Imperial Project.

And, again, you see northeast view from Running Man trails after operations.

I will note that the Quechan emphasized that a key component of the ceremonial use of the Imperial Project area was preserving the undeveloped views of the horizon, particularly the views of these two landmarks from the trails at the Running Man.

Now, based upon the information the Government possessed about cultural resources for each respective project when it approved the other CDCA mines, the Mesquite Landfill and the North Baja Pipeline, it's undisputable that the Imperial Project was unique because of the density of archeological resources it would affect, the Native American statements about the qualitative importance of the cultural resources in the area, the convergence of

12:54:23 those Native American statements of importance, and the archeological evidence, and the fact that the area had seen no significant previous Mining Activity or other developments.

And as Dr. Cleland testified on Wednesday

morning, he noted that the process and the concerns expressed in the Imperial Project were unlike any that he had personally experienced, and I quote, "But I would say this: That the concerns expressed for this place--that is, the Imperial Project--were the strongest I'd ever heard in my 30-year career in terms of an impact, a project impact. And I've heard of a lot of Native American concerns for sites, but these were--I know other projects were concerns were of more magnitude have been expressed, but in my career, projects that I have worked on, and this was the highest level of concern ever expressed by Native Americans for location and for the impacts of a project." And that's Dr. Cleland's testimony in the hearing transcript at page 981, lines 7 through 17.

And moreover, the Tribunal cannot ignore that the denial of the Imperial Project was only in effect

12:55:34 for 10 months. So even assuming arguendo that some mistakes may have been made in the government's factual determinations about the importance of the cultural resources at the Imperial Project compared to the importance of the cultural resources at the other CDCA projects, those mistakes were rendered moot by that decision. Glamis cannot show that these rescinded actions nor the subsequent actions of the Government to process the Imperial Project can be considered to have violated customary international law.

And with that, I will accept any questions from the Tribunal.

PRESIDENT YOUNG: Mr. Benes, thank you.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR HUBBARD: Just one question, Mr. Benes. I want to be sure I understand that last computer simulation.

MR. BENES: Yes.

ARBITRATOR HUBBARD: Would that show after there has been even the partial backfilling, or is it before that?

12:56:31 MR. BENES: I will have to check the Record of Decision again and give you that answer afterwards. I do not recall right now whether or not it says--whether or not that was after that computer simulation was after Reclamation Activities had occurred.

ARBITRATOR HUBBARD: You will check that?

MR. BENES: I will check that and give you the answer.

PRESIDENT YOUNG: Mr. Benes, if I could ask a question or two. As I look at your chart, you make the point that the--not aware of Native American concerns at the time of the American Girl, Soledad, Picacho, Rand Mines, et cetera. At the same time, it's my understanding, I think, also from your presentation that they changed the regulations to actually start soliciting information after a certain

date. And that, in fact, I think as I understand the time line, and maybe you can help me think through this, all of these were done before they started soliciting advice. Am I correct in that assumption?

MR. BENES: No, the approvals for--

12:57:45 PRESIDENT YOUNG: What was the date? Do you recall the date at which the regulation changes? I don't have that on the--

MR. BENES: May 29, 1996.

PRESIDENT YOUNG: So, that's '96. And then when were the approvals of American Girl Soledad, Picacho, and Rand?

MR. BENES: Now, the Castle Mountain and the Soledad Mountain Mines were approved in 1997. The remainder of the mines were approved before 1995.

PRESIDENT YOUNG: What do I make of the fact that it's true, you don't know as much about these at the time they made the decision, but they didn't ask, but they made this different decision to start asking where they had not asked before. Is there any legal significance to that?

(Pause.)

MS. MENAKER: As Dr. Cleland testified, there was a recognition that the concerns of Native Americans and particularly their concerns that they retained access to sites for ceremonial and religious purposes was not being recognized or fully taken into

account by the Government, and that led, you know, among other things, to this Executive Order. And it was always the case that these concerns needed to take into account, but as he also testified, it's a difficult thing with many Native American groups who were reluctant to disclose these issues before a project is actually before them that is threatening these things.

But what this Executive Order did is it provided guidance and a directive to Government employees that then, you know, took some time to filter down to lower level Government employees, but basically directed them that they must go and talk to the Native American Tribes and receive this type of information.

And so that--I mean, that was what was occurring, and certainly, you know, for some time after the 1996 Executive Order that would have, you know, taken some time for that to filter out through the Government to get that information.

But it's all part of the same process. The process was always designed in order to take into

account the Native American concerns. And, in fact, that had always been a requirement, and this was just a recognition that those concerns were not being fully

recognized and taken into account and to ensure that the proper--the proper diligence was adhered to.

MR. CLODFELTER: Let me supplement for one second. I mean, your question is what legal significance should be taken of that. We would suggest no legal significance whatsoever. The Government cannot be faulted because it comes upon better ways of gathering information about our public policy decision.

The question is what they knew then and what they knew later. However, whatever means they had for obtaining that information. If--there can be no complaint that previous projects were approved with worse information except perhaps by the Native Americans involved, but certainly the Government measures that were taken later on the basis of better information gathering methods cannot be questioned for that reason.

MS. MENAKER: And this will--and the

13:01:27 Executive Order can, you know, explain in part why there may have been, you know, better gathering methods because there was just an increased awareness as happens with, you know, many environmental sensitivities, you know, sensitivities to many different issues.

PRESIDENT YOUNG: Thank you.

We are ready to break for lunch. Can I ask the Government the time frame for the remainder of

your presentation?

MR. CLODFELTER: We are finished with our presentation in chief, Mr. President.

PRESIDENT YOUNG: Thank you. Then we will return at 2:15.

Would be parties be terribly inconvenienced if we return at two? And we may have a few inquiries of the parties if it remain. Thank you. We'll see you at 2:00.

(Whereupon, at 1:01 p.m., the hearing was adjourned until 2:00 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT YOUNG: We are ready to recommence the hearing and start with just a couple of observations.

One is a genuine appreciation to counsel for both sides for all of your hard work in helping illuminate the details of this case to us. There is a lot of documents, it's a complicated record, and we appreciate the guidance that we have been given this week through all the details of that.

We do have some questions we would now like to ask both sides. I think, not surprisingly, there will be fewer for the Respondent than for the Claimant, in part, because we asked so many through the course, given how you structured your

presentations, and we appreciate that.

But we would like to invite the parties, if in answer to a question you feel like you would like to study the record more or, in the case of technical questions, need to talk to one of the experts that actually provided the report, we would like to invite you to postpone an answer until the September hearing.

14:09:18 We don't want to put anybody on the spot to make an answer based on some part of the record that they may feel like they would like to need to review to give a full answer to. So, if you would like to postpone, please feel free to say that.

I don't think we have an enormous number of questions, but we will start, and each of us will just ask a few in turn and just keep rotating around.

MR. CLODFELTER: Mr. President, there were two questions that were outstanding for us. Would you like to hear those answers first?

PRESIDENT YOUNG: We would be delighted to.

MS. MENAKER: Thank you.

The first question, Mr. Hubbard had asked for verification or just for us to confirm that the second picture that we put of the Imperial Site was the picture of what would it look like post-reclamation, and that is the case, and I could guide you to Tab Number 212 to Claimant's exhibits to its Memorial, which is the Record of Decision. And it's on page 16 of the Record of Decision.

22 And it says specifically: "The plan proposed

1558

14:10:29 1 to backfill and reclaim the Singer and West Pits and
2 leave the 880-foot East Pit open (see Figure 3)", and
3 Figure 3 is what we had projected.
4 Then the other question was the President's
5 question regarding the sites that were eligible for
6 listing on the National Register. And if you look at
7 the slide that has the table of the CDCA mines, so
8 there the reference to Mesquite Mine is--to the
9 original mine, not to the expansion because, on this
10 slide, we are talking about all of the projects that
11 had been approved prior to the Imperial Project. And
12 that information, the 13 potentially eligible sites,
13 comes from--it's Tab 51 in volume seven of our factual
14 materials, which is the Mesquite Mine FEIS, on page
15 2-11, and it says the proposed development will affect
16 five sites considered eligible for the National
17 Register and eight sites of current indeterminate
18 eligibility. So, since those were possibly eligible,
19 those were the 13.
20 PRESIDENT YOUNG: So, this reference, Mr.
21 Benes, to the 13 for the Mesquite Mine, this was the
22 original Mesquite mine, not the expansion, but the

1559

14:12:00 1 Record of Decision that you were referring to is the

expansion?

MS. MENAKER: That's correct. If you look at the Record of Decision, it says--right underneath it, it says "Mesquite Mine Expansion." It's in small letters.

PRESIDENT YOUNG: Thank you.

MS. MENAKER: Sure.

Then I just note, whenever it's convenient for the Tribunal, the Tribunal had asked Mr. Sharpe a number of questions where we said we would guide you to the place in the record in Navigant's report, Norwest's report, where the material was laid out, and we had prepared a piece of paper with some of those citations that we are happy to give to both you and counsel, whenever it's appropriate.

PRESIDENT YOUNG: Thank you. When this is done, if you would share those with us and with Claimant, we would appreciate that.

I do know one other small procedural issue that arose with respect to the full content of certain reports, excerpts of which are referenced in the

14:12:58 record. Not surprisingly, we are not passionate about receiving thousands upon thousands more pages, so what we would suggest and ask parties to do is, if there are partial excerpts from reports in here which you think the Tribunal having the full report would be helpful, if you would give us a hard copy of the table of contents and then the citations to the electronic

version, we think that would be sufficient for our purposes.

So, as we start, Professor Caron, do you want to start with a few?

TRIBUNAL QUESTIONS TO CLAIMANT AND RESPONDENT

ARBITRATOR CARON: I have a few questions. If you want to defer any of these, that would be fine. They're in no particular order, unfortunately.

In Respondent's presentation, there was a discussion about background principles and how they were identified, and I think they're in statement, if I correctly describe it, was, A, statutory restriction as to property or prohibition as to uses of property would qualify; is that approximately correct, Ms. Menaker?

14:14:35 MS. MENAKER: Yes.

ARBITRATOR CARON: I was wondering, counsel, whether that is Claimant's view as to what are the relevance of the background principle, is that how the Tribunal should go about identifying background principles that might possibly be relevant to the scope of the property right?

MR. GOURLEY: We agree that background principles can be both statutory and common law. The teaching of Lucas is that the background principle has to be something that could be enforced as is without the further expression of the legislature or administrative body or a court.

So, in the common-law situation, it is the expression of the court that makes explicit what was already implicit, so it has to be within bounds of the original background principle.

ARBITRATOR CARON: Then I will do a related question.

So, in the case of the Sacred Sites Act, in your view, the question would be whether the authorization to the Attorney General to take certain

14:15:59 actions is a mechanism for enforcement of that background principle? Is that correct?

MR. GOURLEY: Not quite. The Sacred Sites Act, our contention is that that was never applied or intended to apply the enforcement piece of it to block Federal uses on Federal land, and there would be serious constitutional problems had they tried to do that, which is why they did not in the Lyng case. So, it can't be a background principle restricting a Federal property right.

ARBITRATOR CARON: Thank you.

ARBITRATOR HUBBARD: I have two questions to the Glamis side. One relates to the question I asked the Government side this morning, Respondent's, and that is their understanding of what Claimant meant when you said--when you referred to a "lawful measure," and I would just like to hear your views on what you meant.

MR. GOURLEY: I appreciate that, Mr. Hubbard.

My shorthand presentation of the opening was certainly not meant as Respondent has taken it, to truncate our argument that the California measures are

14:17:43 arbitrary in their purpose and effect and also not rational.

What I was trying to contrast was the procedural unlawfulness of the Federal measures with the procedural regularity of the State measures so as only meaning to say these measures--we don't contest that the California measures were--that was a lawfully enacted statute for S.B. 22. They followed the procedures, Governor Davis signed it, that the regulatory process for the SMGB regulations was followed. They noticed it. There was comment period. They promulgated the emergency. They had another comment, I guess. I'm not sure they had a comment period on the first one, but on the second one they did, and it was finally enacted.

That does not detract--in the context of international law, that does not detract from the fact that, having followed that procedure, it still could have an illegal impact, a violation of the international law, and particularly of the fair and equitable treatment standard encompassed in 1105.

ARBITRATOR HUBBARD: Thank you.

14:19:17 My second question relates to the swell-factor issue. We heard yesterday that it's not that significant a factor in terms of valuation. And even assuming that to be true, we did hear at least a couple of times this morning that it's important in other situations, in other issues. And as you probably detected, I think all of us have had some confusion about the various percentage figures that had been set forth in various and sundry documents.

And is there anything that you can point us to that shows that I think it's the 35 percent factor has some specific genesis other than just something that Behre Dolbear came up with?

MR. McCRUM: I will address that, Mr. Hubbard.

We have a number of additional things to point to. We have tried to address this at length this week to clear this up, and there is a Behre Dolbear Report of December 2006, which is, of course, in the record. We have two appendices to that report that, one of which we referred to a number of times earlier this week, which was the WESTEC Report of

14:20:53 February 1996 that said as much as a 700-foot thickness of conglomerate will be exposed by the pit wall.

But a related appendix to that Behre Dolbear Report is an excerpt from the well-known BLM 2002

Mineral Report which contains a site geology cross-section, and this cross-section is through the mine pits, and it shows very clearly that the--all material above the ore zone is tertiary conglomerate. It is not identified as unconsolidated gravel. From an aerial perspective on this geologic map, it does show alluvium, and that is only across the surface of the property. In the cross-section, the alluvium is so thin it doesn't even show up on the cross-section.

So, this is one of the things that Behre Dolbear pointed to to address the reality that the swell factor that they had calculated from the Feasibility Study in 1996, which was the--which was addressed in their very first report, and they did a derivation of what they believed was the correct swell factor from the 1996 Feasibility Study, when Norwest first raised questions and said Behre Dolbear had made

14:22:21 a reference to the term "gravel" in its initial report and Norwest seized on that as well as other references to gravel and said, "Oh, this must mean unconsolidated gravel." Behre Dolbear came back and said the 35 percent swell factor that we have calculated is out of the Feasibility Study--that's the Final 1996 Feasibility Study--is entirely consistent with the geologic cross-section. It's consistent with WESTEC.

And at that point, Behre Dolbear also referred to the Church Chart Handbook which Norwest had acknowledged the significance of that to say that

33 percent is the correct swell factor for conglomerate. A higher swell factor was appropriate for all other rock types identified. There was no significant alluvium, just a couple of feet of alluvium at the surface of the property. So, Behre Dolbear then pointed to that as corroborating the swell factor that it had calculated from the 1996 Feasibility Study.

Now, also bearing on this, we have heard--the calculation that Behre Dolbear reflects after this issue had been raised in its December 2006 report is

at page 27 and page 28 of its--this is its second report, December 2006. It discusses in detail the various Glamis records that had been referred to by the Government expert and taken out of context to seize on the term "gravel," which was not nearly as significant a factor in the mine-planning stage as it is now in the backfilling stage when you're dealing with all of this material having swelled and expanded and now having put back into the pit.

And that then raises the issue of the Government's assertions that no Glamis documents, internal company documents, have, in fact, referred to the 35 percent swell factor, and there is a couple of documents that do bear on this that I want to refer you to.

First, I have copies of the excerpts I'm referring to from the Behre Dolbear Report from

December 2006. We will share with the Tribunal and counsel. These are all in the record.

But the other documents that we have heard quite a bit about from the Government is the Glamis internal valuation from January 9th, 2003.

1568

14:25:03 It should be kept in mind, this is just three weeks after these emergency backfilling regulations come into effect, and I will pass around copies of this additional document, as well.

This is just three weeks after the emergency backfilling regulations come into effect. Glamis prepares this chart and looks at the figure for the gold price that it is using at that time of $300 an ounce, calculates a negative value, which is clearly indicated on the chart. And so, from a business standpoint, the business is killed.

But the same one-page memo states that "Without backfilling and recontouring, the Imperial Project disturbs 1,302 acres. The recontouring requirement forces disturbance of essentially the entire 1,571-acre site in order to meet the 25-foot limitation. This is over a 20 percent increase in disturbance. Additionally, an estimated 15 million gallons of fuel would be consumed to complete this backfilling work."

Now, the document that I'm referring to right now is Appendix F to a Norwest report, so this is a

1569

14:26:19 compilation of this document that has been put together by the Government expert. I believe it's Appendix F in the first and second Norwest Report.

If you look right after the memo--this is the memo from Jim Voorhees to Chuck Jeannes, Kevin McArthur, dated January 9, 2003--there then is a statement regarding Imperial Project backfilling, initials JSV, and it states December 2003, that--it repeats the same finding that relative to the 1,302 acres with the backfilling, 1,571 acres will be disturbed. In other words, the disturbance will get bigger when you're doing the backfilling, the 21 percent increase, which is the same thing that had been stated and found in the internal company valuation that the Government has referred so much. Stated in this Voorhees memo, it says, "Average swell factor is 35 percent."

So, this was a compilation that had been put together by Norwest of Glamis internal documents that reflects the 35 percent swell factor, and that swell factor is what causes the area of disturbance to increase.

1570

14:27:39 So, we have corroboration of the 35 percent swell factor here. We have corroboration of it by the Church report or Church Handbook which applies to the

geology, which is indisputably known at the site to be conglomerate, not unconsolidated gravel, as Norwest continues to refer to the material. In testimony this week, Conrad Houser said the material is 79 percent alluvium. That's just not a credible statement.

That's our perspective on the swell-factor issue. I trust we have it addressed.

Now, on the magnitude issue of this, Navigant, in their very initial report, identified this as a major issue affecting the cost. Norwest, in its second report, identified this as one of the major disputes between the parties affecting the value, and they referred to the issue as is the material gravel or cemented conglomerate? And they framed the issue as that affecting the swell-factor issue.

Behre Dolbear addresses the economic impact of the swell-factor issue in particular in summary in their rebuttal statement of July 2007, and they state that the combination--they give different numbers for

14:29:06 the backfilling, for the cost of filling the material back into the pit as a result of the swell factor, and it's--the figures are specified at page six of the Behre Dolbear rebuttal report, and they identify the swell-factor issue as one of the major issues affecting the economics of the Project that caused the net present value that Navigant has identified to go to a negative $7.1 million, which is much more consistent with the Behre Dolbear conclusions.

ARBITRATOR HUBBARD: Thank you.

No further questions.

ARBITRATOR CARON: I just wanted to follow up for a moment with a few questions, and at some point, although we are directing these more at Claimant, it doesn't mean that if Respondent wishes to reply at one point, this is a question-and-answer period, although I don't think we want to turn it into very long presentations on each question. So, I think brief responses are probably appropriate.

On the one hand, Mr. McCrum, I think you have led us to a particular source for the 35 percent, where it stated in the 2 December 2003 document here.

14:30:41 Respondent, in its presentation, has said it's relied on this series of documents in the nineties that were developed, in which the swell factor is listed as 23 percent in that final table.

And when I reviewed those documents, there is a series of them before the--it becomes titled "bankable." And although it remains 23 percent, some of other figures on the pages are changing, the loose density is changing a little bit, and so some calculations are going on. It doesn't seem to be merely a repetition of the previous document precisely. Something has transpired. When the first bankable document is issued, then they become static over the next several repetitions of that.

So, one statement made was "bankable" meant

something in the mining industry or in this business. Do you have a sense of what that means?

MR. McCRUM: Yes, Professor Caron. In this case, the bankable feasible study is the document--the 1996 Final Feasibility Study, which is the document that Behre Dolbear references in their reports, and they looked to that report--

14:32:07 ARBITRATOR CARON: Just first, could I know what the word "bankable" means.

MR. McCRUM: "Bankable" means a Final Feasibility Study upon which investment decisions can be made, and I believe some of the documentation the Government shared is not actually--is not referring to the Final Feasibility Study itself, which is what Behre Dolbear is looking at the Final Feasibility Study and looking at data which is set forth in there from which they made an engineering determination of what the swell factor was.

ARBITRATOR CARON: And the Final Feasibility Study is dated--sorry, if you could refresh my memory on this.

MR. McCRUM: Final Feasibility Study is in 1996. I don't have the exact date in front of me right now.

ARBITRATOR CARON: And the Final Feasibility Study does not have the figure of 23 percent?

MR. McCRUM: The Final Feasibility Study has data set forth that Behre Dolbear made a calculation

of what they believe the swell factor was. In other

1574

words, they did a first principles reanalysis of the Feasibility Study and determined what the swell factor was.

MR. GOURLEY: Behre Dolbear, when you go to their report, sites to the specific numbers that they took from the Final Feasibility Report on rock density to calculate the 35 percent. So, it's not mysterious, as it was implied yesterday. The calculation is laid right out in the report.

The documents that the Government--you know, the 10 or 11 or whatever it was, you might note that the chart that shows 23 percent says "assumed." It's assumed 23 percent. And it goes back to the November '94 Kevin McArthur assumption, and that goes--is simply repeated in each document. There is no variation in it, as you have observed, because it's simply taking what they have based the Project on at the beginning. It doesn't take the calculation from the Final Feasibility Study.

ARBITRATOR CARON: Let me summarize and then just ask a Respondent to comment on it. So, what I understand to say is, yes, the number 23 is in the

1575

1996 report, but it is not, didn't I? I'm sorry, I

heard you say that data was taken from that first principles approach Behre Dolbear made the final calculation; correct?

MR. McCRUM: Behre Dolbear made the calculation from what they believed was the appropriate data to look at in the Final Feasibility Study to make the determination, yes. And then it had been corroborated by all this other information that has been referred to.

ARBITRATOR CARON: Let me ask for a brief comment from Respondent, and then I will stop at that point. Thank you.

MS. MENAKER: Just very briefly, we note the '96 Feasibility Study, as the Tribunal has noted, doesn't state a swell factor. Again, Behre Dolbear is independently deriving it from the numbers in there.

Now, they have said the numbers in that Final Feasibility Study somehow bore upon the calculation of the swell factor, but the internal Glamis documents that we provided to the Tribunal, some of them postdate 1996, the date of the Final Feasibility

14:36:09 Study. So, not only did we have the bankable study, which, as the Tribunal noted, the numbers changed and were recalculated over the time. Although the 23 percent always remained the same, that was a bankable study.

Now, if what Glamis is suggesting is that there were some numbers in the Final Feasibility Study

that somehow cast that into doubt, that doesn't explain why in 1998 and 1999 they were still working from documents that were their internal budgeted analyses that still used the 23 percent swell factor.

ARBITRATOR CARON: Can I just ask your--the statement was also made that, on the series of reports from Dan Purvance, that although the year is changing, the number 11/99 is repeating--94 is repeating in the upper corner. And I think the implication--what Mr. Gourley was saying is that that reflects an initial project assumption, and some numbers are changing, and some numbers are purposefully remaining constant in those documents.

So, let me just ask for your comment.

MS. MENAKER: Until this dispute arose, there

14:37:28 had been no other internal subsequent analyses that have emerged. So, even if in the '94 document that was the initial data, yes, they did more work, some of those numbers changed the underlying data. It did not affect the analysis, at least for the swell factor, but to the extent that they're now saying, "Well, that is old information," this is information that has gone up to the highest levels of the corporation over almost a decade of time.

And so, it's just not credible to assert that that was just initial data that was somehow cast into doubt. They haven't shown any other internal documents that cast that information into doubt. The

only thing they have pointed to, again, is this '96 study, which doesn't calculate a swell factor. They tried to derive independently a new swell factor from that document. But again, their internal documents don't reflect that. Their internal documents still reflect they are still standing with the 23 percent swell factor.

And I just note that the 2003 model used by both parties also states 23 percent swell factor.

14:38:50 PRESIDENT YOUNG: I want to ask about that from a slightly different angle, which is the 23 percent does end up as an assumption in the documents.

Where does that come from? I'm a little hazy because, indeed, as you demonstrate, many of the things say 35 percent or 33 percent, some say 30 to 40. Nobody really says 23. Norwest says that they got it, but they got it from Glamis's numbers, and independently confirmed which meant that they read Glamis's numbers twice, as nearly as I can tell.

So, where does the 23 come from?

MR. McCRUM: This number shows up in some very preliminary internal company records from 1994 when there were some initial efforts to identify the swell factor in the 1994-1995 time frame, and that data just gets simply repeated. And I think it's clear that the information was spurious, and it conflicts with the actual data that was known about

the site at the time and is known now, which is that that swell factor is not consistent with the vast material being conglomerate, which is why we have the

1579

Norwest expert saying--referring to the large amount of material as being alluvial gravel material, which it clearly is not, which the geologic cross-section shows.

So, we have that data in a very preliminary internal record being repeated a number of times, and that has been seized upon to try to make an issue out of this.

PRESIDENT YOUNG: Let me shift the focus to something that I think may amount to sheer dollar amounts that will have more impact that I would like to have a little clarification on.

There is a dispute over the appropriate price to use in valuing the gold ranging from $325 an ounce to 600 something an ounce. That obviously affects significantly valuation figures. Behre Dolbear chooses the 10-year average figure in the report they did for you; but, in subsequent reports, they seem to focus on a weighted average of 10-year average and six-month spot prices.

Why didn't they use that in the report, and what am I to take from that?

1580

14:41:26 MR. McCRUM: Behre Dolbear had stated that a long-term gold price average is their traditional typical approach and the approach that they follow, and that is the approach they used in this valuation.

They do also say that the primary data valuation to look at is the date of this action that dramatically changed the economics of the Project as of December 2002, and that has been the primary focus of their valuation. That has been the primary response by Norwest and Navigant to look back at that point in time.

And we think that that's the appropriate time, and one of the cases that Ms. Menaker referred to yesterday would support that approach, the Whitney Benefits case, as an appropriate time to look back in time. At that time, the 10-year average and the spot price was pretty much the same, and that is the appropriate analysis, we believe.

MS. MENAKER: Mr. President, if we may offer a comment on your prior question, if we may. If that's okay.

PRESIDENT YOUNG: Let him finish first.

1581

14:42:33 MR. GOURLEY: I just wanted to point one out thing, Mr. President.

As Mr. McCrum stated, if you look at the date of expropriation--and acknowledging there are different dates that you could use here, but to focus

on at least one, we focused on the emergency regulation in December 12--the spot and the long-term average are actually closely aligned, so the spot versus long-term average is not an issue for that piece. It's only an issue when you look in the exuberant gold market of today as to--as you will see, any time that the gold price is dropping, everyone is going to argue, "Well, don't use the average," which is--they will try to capture some of the old, and when it's going up and down, then they will you say, "Wait a minute, how long is it going to stay up?" That's why you use long-term averages.

MR. CLODFELTER: I want to make an initial comment and turn it over to Ms. Menaker.

It is important to recognize that the parties have advanced valuations at three different dates. The third date is the current valuation of the

14:43:45 Project, which is somewhat of a red herring. We asked Navigant to do that because Behre Dolbear had made an opinion about the current value of the company, which we thought was very erroneous.

It's relevant. It's important for us because of the real options value aspect of the valuation of the company on the relevant date, which is, both parties agree, the day after the alleged expropriation date.

On that date, the parties do agree on the appropriate price of gold to use, and they both used

the same price of gold, so I don't want any confusion about that. The difference on the value today--there is an argument, and it does have an impact on the options value; but, in terms of the price used to value the company as of the day after the alleged expropriation date, the parties are in agreement.

PRESIDENT YOUNG: So, if we decide against Respondent, you don't want a $150 million valuation. I take the point.

MR. CLODFELTER: Yes.

MS. MENAKER: Mr. President, if I may just

14:44:50 follow up on the prior question, the last question you asked regarding swell factor, I want to make two points because Claimant's counsel has now said that those documents--that calculation was somehow cast into doubt, that it was preliminary and no one was really relying on it, and there are two points that I think the Tribunal should keep in mind.

First of all, those calculations were made after the core samples were there and after the data was run, and we have seen no subsequent data analysis of those core samples that would seem to cast that into doubt.

Second, I would ask the Tribunal to go back to Dan Purvance's first witness statement. And this is after we had located in the discovery this first--the first document which we located, which had this 23 percent, and we put it in. His response to

that was, "No, you're wrong. The data on the two previous pages was the data that I ran. This last page with that 23 percent swell factor was inadvertently attached. It is not part of the same document. That's not what I said. It was only after

14:45:57 when we did more searches in the database--as you know, there were lots of documents produced in this arbitration--and came up with a whole host of documents that made it clear that those--that that document was not inadvertently attached. Those same calculations were run over and over." And then, in the second statement, he didn't touch it at all. He never offered another explanation.

ARBITRATOR CARON: So, one quick question just on this last point to both Claimant and Respondent.

When I had looked at the earlier Purvance yearly statements, again certain numbers are relatively constant, if not constant, and some numbers are becoming refined, although they're not--becoming more precise. It doesn't seem they are moving that far away.

And I had assumed that a mining engineer or geologist or someone could take the numbers in that report and calculate the swell factor that shows on the page that is not just an assumption that is independent of the numbers on that page.

1585

14:47:08 1 So, just am I correct in that view of the
2 report?
3 MR. McCRUM: Mr. Gourley has correctly
4 pointed out that this particular data calculation does
5 refer to an assumed swell factor for one of the key
6 parameters, and that is the data point that keeps
7 being repeated. And Mr. Purvance is primarily the
8 company geologist, and he is an expert on what the
9 rock type is, and that's what we had him testify to
10 here. He testified about the rock samples, that they
11 were representative--
12 ARBITRATOR CARON: Let me ask--my question is
13 slightly different.
14 The other factors on the page are things like
15 loose density and certain units of measurement--I
16 wasn't quite sure what they were--and I didn't think
17 there was an assumption of the swell factor that was
18 put into a formula; rather, that these empirical
19 numbers were somehow yielding a swell factor. Am I
20 correct in that understanding?
21 MR. McCRUM: These calculations that the
22 Government is relying on do reflect some type of

1586

14:48:21 1 preliminary identification of a swell factor, but the
2 fact is that it is--simply, the issue did not have a
3 magnitude until the complete backfilling was imposed,

at which point it became very important to see what the impact of the swell factor was going to be. The magnitude of that issue is far greater now than it was in the mine-planning stage in a mine that wasn't going to be backfilled.

ARBITRATOR CARON: So the answer to my question, based on the data on the page as core samples were analyzed, there is more data--that was a calculated swell factor. I understand you're saying that it was revisited for different reasons, what your answer just was at a later time, but it's a calculated figure? I just want to understand that.

MR. McCRUM: I believe these references reflect some calculations. I do not believe they reflect any kind of conclusion that they are characteristic of the conglomerate or waste rock as a whole.

ARBITRATOR CARON: Thank you.

MS. MENAKER: Just to state that, yes, that

14:49:38 was our understanding that the calculation derives from the data right there, which is why I urged the Tribunal to look at the testimony of Mr. Guarnera, who says that he does rely on the data. But, when I asked him whether he relies on the analysis of the data follows that through, his answer was nonresponsive, and he basically just stated that it has a 35 percent swell factor.

MR. McCRUM: The only thing further I will

add is that this is part of the difficulty where we have counsel on both sides trying to address these kinds of technical issues, and we brought in our experts here to address any questions that anyone wanted to put to them.

And our understanding was that this was a very preliminary assumed number regarding the swell factor, and it's been relooked at, including in the internal Glamis documents that I referred to at the outset from 2003, where we have a very high-level person, Jim Voorhees, referring to it as 35 percent in the internal company documents.

PRESIDENT YOUNG: I would like to shift away

14:50:48 a little bit from those to ask some legal questions particularly of Claimant because I believe I have asked the same questions to Respondent.

One of the questions that seems that I can't quite get my mind entirely around is the nature of the property right I'm talking about here that has been expropriated. What exactly is that property right? Federally created, I presume. Everybody seems to concede some degree of state definition to that property right. I asked Respondent that question.

How would Claimant help me guide me through that? What is the nature of the property? What is the definition of that property right and its contours that you are claiming has been expropriated?

MR. GOURLEY: The property interest here is

the mining claims and mill sites which give you full access to the above-ground property, right of egress and possessory interest for extraction, and the right to extract subject to the fact that the property remains the Federal Government's, and they can subject it to use restrictions. And among the use restrictions that they had subjected it to was

14:52:29 reasonable reclamation, environmental reclamation, both at the Federal level and the State. But there is a limit.

PRESIDENT YOUNG: In helping me understand that limit, what do we make of the fact that some states have prohibited open-pit mining altogether? Some states have prohibited cyanide--I can't recall what it is they called it.

MR. GOURLEY: Use of cyanide.

PRESIDENT YOUNG: Use of cyanide in the heap-leach process and so forth.

Are those reasonable restrictions?

MR. McCRUM: Well, there was a reference earlier today to some States have banned open-pit mining and done different things, and I think it may have been Ms. Menaker, and I think when she made that statement she may have been referring to States in the sense of countries in the world as opposed to States in the United States.

There is a case from the Eighth Circuit court of Appeals involving Lawrence County--South Dakota

Mining Association versus Lawrence County where a

1590

14:53:56 county passed a resolution prohibiting open-pit mining on Federal land. That was held to be preempted by the Eighth Circuit court of Appeals.

The cyanide ban is only in the State of Montana in the United States. That was carried out by the State, and the State was exercising an environmental authority to place a restriction on that operation. Whether it was reasonable or not, it's not the issue we have here before us in this case. We have this restriction, unprecedented restriction, on the requiring of complete backfilling.

So, I think that that's--I think this presents a very different situation than, frankly, that one in Montana.

PRESIDENT YOUNG: Let me ask a question, if I can, about the nature of the expropriatory act on the Federal Government's part.

One issue you raise is the delay or the initial denial of the permit, and then that denial is reversed, that Record of Decision is reversed, and it was pending.

Is it your claim that the initial denial was

1591

14:55:29 the expropriatory act, or that that denial delayed the

Government's granting of your Plan of Operation, approving your Plan of Operation, sufficiently long that California took action that was the expropriatory act. So, it's not so much the denial was the act but the denial occasioned a delay that occasioned the act. I'm trying to get a little bit of the sense, what is the Federal role in all this, the relationship between them?

MR. GOURLEY: On the expropriation side, we would say it's really both. Respondent would like to slice every act and have you evaluate each act separately.

This is an indirect expropriation, so you have a continuum of acts. The delay caused us--and the unlawful denial at the Federal level--caused us to lose the right to extract. There is a partial lifting, but there is never a correction of that act, and then you have the State coming in to add further measures on top of that that mean that the Federal Government, apparently--because it has never done this--can't correct fully the original denial by

14:56:50 approving the mine.

So, we would say it is all the measures together, but you could look at the Federal by themselves as an uncorrected indirect taking.

ARBITRATOR CARON: If I could just follow on that.

But ultimately, there would be--you're

saying, at the latest, that the taking took place on the date of the regulation. It could have taken place at an earlier time.

MR. GOURLEY: Correct.

ARBITRATOR CARON: And so, as I understand, Respondent has divided the taking claims into the Federal actions and the State actions, but your suggestion would be to analyze the Federal first as to whether there is an earlier date of taking; and, if not, then you continue on--there is a question of whether the Federal is related to the State that has been raised, and then there is a second date of taking later. Is that correct?

MR. GOURLEY: Yes. We think the Tribunal can and should look at it in that manner.

14:58:09 Now, we have addressed--in the factual portions of our Memorial, we have addressed it in that consequence because the State measures are so much more clear of precise date of expropriation. We focus primarily on that, but we also then address the Federal piece of it, as well.

ARBITRATOR CARON: I think these may be quick questions. One would be--I think you saw from--the Tribunal had a number of questions for Mr. Sharpe about Cerro Blanco as an example of real option, but let's put aside that as an example and just return, I think, to what the primary point is, and that is the Real Option Value is a sense that, in valuing

something, because of the future price, that is a value in the mine.

Let me rephrase that question.

What is the Claimant's position regarding Respondent's view of the Real Option Value independent of the example of Cerro Blanco? We don't need to talk about that.

MR. GOURLEY: Well, I have never known a law professor's questions to provoke short answers, and

14:59:56 I'm afraid this one might not be either, although I will try to keep it brief.

We basically disagree. There is a notion of an expectation interest. It is reflected actually in the way Behre Dolbear analyzed the Project in the sense that there are resources, there is the belief to be mineralization in the Singer Pit that they could get.

But the notion that you would take an asset--there is some value in holding an asset that you can't mine; and, for any period of time, that's a function of how much it costs to keep it, so someone who already owns it might well keep it and not sell it at that point, although we heard testimony about core and noncore assets. It quickly becomes noncore if it's not productive, and there is no expectation that, in a reasonable period of time, it could be productive.

So, the market doesn't place value on that.

And, if it did, what you would see is offers to the mining company, saying, you have got a noncore asset here. You don't look like you're producing. We don't

15:01:24 have much, but we have got equipment, we have got reasons we would like to buy it. You would see that kind of activity. There is no such activity with respect to the Imperial Project.

ARBITRATOR CARON: I think I understand your view on that better, thank you.

And the last is not actually a question so much as a suggestion, and that is the Tribunal--and this is noted in the pleadings--the Tribunal has deferred consideration of a few documents as to possible production. And, in September, I would personally find it helpful if we could clearly understand to what issue they would be material; in other words, if we reach that issue, when we need to think about it. So, I'm not asking for an answer right now, but I think that would be helpful.

PRESIDENT YOUNG: And I might just add that that's acting on the assumption that Claimant is still interested in those documents. If you think otherwise there are documents that prove the points those documents would make, you don't need to renew the argument about the documents, if you don't think there

15:02:44 1 is any need for those any longer. So, just the ones
2 you think there is a continued need for, direct us to
3 what issues they would address.
4 MR. GOURLEY: Thank you. And we will
5 evaluate that promptly and let you know.
6 PRESIDENT YOUNG: I think we are concluded in
7 terms of our questions for this session.
8 What we would like to do is the following and
9 wanted to take the parties' temperature on this, if we
10 may. Our inclination is at this point that we may
11 want to send a limited number of questions to the
12 parties that we would like you to address, the answers
13 to which you would like woven in your presentations in
14 September. Now, we may in the end conclude not to do
15 that, but our current inclination is there may be a
16 few things as we reflect and as we talk among
17 ourselves some things that we would like clarified a
18 bit.
19 And, first, is that acceptable to the
20 parties?
21 MR. GOURLEY: It's certainly acceptable to
22 Claimant.

1597

15:03:57 1 MS. MENAKER: Yes, we would welcome that.
2 PRESIDENT YOUNG: Thank you.
3 The second thing I think we will ask for
4 September, we are going to send out a schedule that
5 will sort of tie down the hours and the minutes of the

hearing in September, but, as we reflect particularly on the possibility that we may be sending you some questions that may alter everybody's perception of time frame slightly, that we would, if possible--well, we want to ask whether the parties--the current plan is for the parties to be available Monday morning and Tuesday morning. Could the parties be available Wednesday morning, as well?

MR. GOURLEY: Claimant could and would welcome that.

MS. MENAKER: Yes.

PRESIDENT YOUNG: Another vacation ruined. You did all that without consulting your BlackBerries. Thank you. I'm not sure it will come to that, but again we will want to look at what we are asking you to do as opposed to what you may be inclined to do in that event, and may want to adjust it in a way that

15:05:13 would ensure that you feel you had adequate time to do oral presentations.

Now, the current plan is, as I mentioned in our earlier procedural order, our current plan is each party will have four hours with capacity to pull back as much as an hour of that time for surrebuttal or sursurrebuttal or wherever we are at the point in the process, and something along those lines would largely remain our intent.

MS. MENAKER: Could I ask that Tribunal, with respect to that, could we ask that Claimant let us

know within a week or so or around that time whether it intends to reserve that hour or how much of that hour so we could prepare accordingly? Because, in essence--it's no is secret--if Claimant does rebuttal, we will similarly reserve time for rebuttal. If not, we won't, so that was we would be able to prepare accordingly.

PRESIDENT YOUNG: That sounds like a reasonable request. Do you think you would be able to give them information in that regard?

MR. GOURLEY: Yes. I mean, part of our

15:06:25 frustration with the scheduling of this--the way it happened, is that we don't believe the four hours is now adequate because we didn't really get--we were focused on an evidentiary hearing, not on an argument. They focused on the argument, not the evidentiary hearing. That's all fine, but that was a different set of assumptions than what we came away with from the prehearing.

I don't have any problem signaling to them whether we want to reserve or not--I suspect we will--but I would request the Tribunal if the parties shouldn't get like six hours a piece than the four.

MS. MENAKER: We would object to that. I think now we have had a six-day hearing. Each party was accorded 17 hours, which was quite a lot of time. The United States has not used anywhere near its 17 hours. Claimant, I believe, is within one hour of its

17 hours. It chose to use its hours through witness
testimony, which it was perfectly entitled to do. Had
it wanted to use more time for argument, it was free
to do that; but, having structured our defense of this
case in this matter, you know, at the end of the

15:07:43 week-long hearing, right before closing, it would be
really unfair for us now to be told that actually you
have a great amount of time and you could have done
something differently here had we chosen to structure
our defense differently because now our view of what
the closing arguments was going to be has changed.
PRESIDENT YOUNG: I think we have had some
exchange of letters on this, and I think we understand
the position of the parties and will take this under
advisement and will come out with a procedural order
within the next few days reflecting our decision on
these issues.
So, with that--
MR. GOURLEY: We only have one other point to
make, which is that, as of 9:30 this morning, the
newest member of the Claimant's legal team, Morgan
William Schaefer, was born.
PRESIDENT YOUNG: Well, please send our
congratulations. I actually had that as one of my
questions, but I got so engrossed in the substance
that I failed to ask that question.
Please offer him our congratulations. Tell

15:08:46 him it's the last amount of sleep he will get until the child turns 18, and that's an official factual determination of the Tribunal.

Thank you very much. We stand adjourned.

MS. MENAKER: And we are just passing out that sheet of the documents that I told you about.

(Whereupon, at 3:09 p.m., the hearing was adjourned until 9:00 a.m., Monday, September 17, 2007.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, court Reporter,

do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

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

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DAVID A. KASDAN