

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

GLAMIS GOLD LTD.,
Claimant/Investor,
and
UNITED STATES OF AMERICA,
Respondent/Party.

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LIST OF KEY PERSONS 1

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

GLAMIS GOLD LTD.,)
)
 Claimant/Investor,)
)
 and)
)
 UNITED STATES OF AMERICA,)
)
 Respondent/Party.)

MEMORIAL OF CLAIMANT GLAMIS GOLD LTD.

“Mineral resources, the very basis of our lives and technology, are part of the earth. This leads to one inescapable consequence: to use them we must mine them. If roads and buildings, cars, planes and paper are necessary, then also, are gravel pits and mines. To use something from the earth requires extraction, a hole. There is no alternative. The sentiment has become “do it elsewhere,” but this is not a choice because minerals can only be extracted where they exist. *It is not a question of preserve it or destroy it, but rather, a choice of responsible management of all natural resources. . . .*

Our world is confronted with many challenges to protect the environment in which we live. There exists within America an eagerness to rally in support of these efforts. All are worthy causes but care must be exercised that other life values are not degraded without thorough consideration of the possible costs. Mineral resources are of tremendous value to our lives. We cannot overlook the importance of mineral resources. There must be a balance between the needs and uses of the public resources. *BLM’s land management policies can provide appropriate protection of multiple resource values.”*

The California Desert: Why Mining is Important, 15-17 (April 1991)
Bureau of Land Management, California State Office

INTRODUCTION AND SUMMARY OF THE CASE

1. In 1991, the United States Government, through its federal Bureau of Land Management (“BLM”), a branch of the U.S. Department of the Interior (“Interior”), actively encouraged the development of mineral resources on federal public lands, while taking appropriate steps to ensure that no unnecessary or undue degradation would occur on those lands. That same year, a modest-sized Canadian gold mining company, owning valuable federal mining claims in the southern California Desert, was seeking to develop those mineral resources while complying with all applicable land-management policies. What transpired over the next decade, however, involved a long and extraordinary series of events involving politically motivated senior federal and state government officials acting persistently to expropriate that Canadian gold company’s reasonable investment. The result is that the United States has violated the protections afforded to Canadian investors under Articles 1105 and 1110 of the North American Free Trade Agreement (“NAFTA”).

2. Glamis Gold Ltd. is a publicly held Canadian company incorporated in 1972 under the laws of the Province of British Columbia. The majority of the directors of Glamis Gold Ltd. are Canadian, and the majority of the corporation’s stock is held by Canadian citizens and entities. Glamis Gold Ltd. and its wholly owned subsidiaries are engaged in the exploration, development and extraction of precious metals in the United States, Mexico and Central America. As such, Glamis Gold Ltd. is an Investor of Canada, a Party to NAFTA.

3. In 1987, Glamis Gold Ltd., through its subsidiaries Glamis Gold Inc. and Glamis Imperial Corp. (hereinafter collectively referred to as “Glamis”), acquired interests in federal mining claims and mill sites located on BLM-managed lands in Imperial County, California. Since that time, Glamis has invested over \$15 million to explore and attempt to develop valuable gold deposits that underlie and make up its mining claims. The effort to develop the “Imperial

Project,” as it came to be known, originally progressed as planned, consistent with all applicable laws and regulations.

4. Glamis had every reasonable expectation that its planned mining operation would be approved. It was successfully mining at a substantially similar site a mere eight miles away. It was known for its efficient operation and praiseworthy reclamation practices. More than two decades of Congressionally mandated land-use planning (carried out in consultation with the Quechan Tribe and other Native American representatives) had identified and restricted from further development those areas of the California Desert where cultural or other values were deemed paramount – and the Imperial Project was outside of all of those areas. And, finally, neither the United States nor the State of California had ever denied approval for operation of a mine on federal lands that met all environmental and other applicable laws and regulations. Nonetheless, that is exactly what happened, however, when the United States and the State of California acted to unreasonably delay and then completely block the proposed Project, depriving Glamis of any value from its investment.

5. On January 17, 2001, the eve of his departure from office, then-Secretary of Interior Bruce Babbitt issued a Record of Decision (“ROD”) for the Imperial Project in which he formally denied approval of Glamis’ plan of operations.

6. Interior Secretary Babbitt’s denial of the Imperial Project relied upon an unprecedented legal opinion issued on December 27, 1999 by the former Interior Solicitor John Leshy. In that legal opinion, Solicitor Leshy ignored his own Department’s regulations – as well as over two decades of agency policy interpreting the principal federal land-management law, the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 *et seq.* – and declared that BLM could deny a mining plan of operations based solely on impacts to cultural resources. Prior

to that time, mining plans of operation could be subjected to reasonable regulation and economically and technically feasible mitigation measures, but could not be denied simply because some impact on cultural resources remained unmitigated.

7. Under the direction of Secretary Babbitt and other senior Interior political appointees, BLM also had relied on Solicitor Leshy's erroneous and ill-considered legal opinion and recommended, in a November 17, 2000 Final Environmental Impact Statement/Environmental Impact Report ("EIS/EIR") for the Imperial Project, that the Glamis plan of operations for the Imperial Project be denied. This Final EIS/EIR served as a further purported basis for Secretary Babbitt's January 17, 2001 denial decision. Yet, BLM's decision to recommend denial in the Final EIS/EIR represented a complete reversal of the agency's own conclusions and recommendations made in two earlier draft versions of the EIS/EIR, published in 1996 and 1997, respectively, both of which recommended Project approval as the preferred action, which was most consistent with applicable laws and land use policies.

8. To this day, Interior has not approved Glamis' plan of operation or otherwise remedied the initial expropriation. The current administration took steps to reverse some of the illegal actions of the prior administration, such as on October 23, 2001, when the new Interior Solicitor rescinded the prior Solicitor's legal opinion and recommended that Interior reconsider the Imperial Project denial. The new Secretary of Interior, Gale Norton, concurred in that recommendation, and on November 23, 2001, formally rescinded Secretary Babbitt's denial.

9. After the rescission, BLM completed a mineral examination of Glamis' mining claims (that had begun in 1998, but purposefully was delayed by the ongoing unlawful efforts to deny the plan of operation) to verify that Glamis had "valid existing rights" under the Mining Law of 1872, 30 U.S.C. §§ 22 *et seq.* BLM issued its long-delayed final Mineral Report on

September 27, 2002, confirming that Glamis not only held valid existing rights to its mining claims and to the vast majority of its mill sites, but that it could profitably produce nearly two million ounces of gold from the Project, as proposed.

10. On October 30, 2001, Interior also took steps to rescind a Clinton Administration rulemaking (that went into effect on Inauguration Day, January 20, 2001) codifying the unprecedented denial authority created by Solicitor Leshy's legal opinion. Part of the basis for the rescission was the belief that use of this new denial authority, dubbed a "mine veto" authority, would cause a loss of thousands of mining sector jobs and up to \$877 million in annual mining industry output. Interior determined that this "mine veto" authority should be rescinded as a matter of "basic fairness" and found "that it would be very difficult to implement the standard fairly as it relates to significant cultural resource values."¹ In light of the rescission, Glamis was the only entity subjected to an unparalleled and unfair federal denial of its mine project, as well as severe and costly multi-year delays associated with that unlawful denial.

11. Tragically, just as the current administration began taking steps to reverse the prior administration's unlawful actions, the State of California initiated a series of measures that individually and collectively resulted in the final and complete expropriation of Glamis' investment in the Imperial Project. On September 30, 2002, in the course of vetoing Senate Bill ("SB") 1828, legislation addressing Native American sacred sites statewide, former California Governor Gray Davis stated: "I am particularly concerned about the proposed Glamis gold mine

¹ 66 Fed. Reg. 54,834, 54,837 (Oct. 30, 2001). Claimant's legal authorities are attached in separate volumes entitled "Legal Authorities for Memorial of Claimant Glamis Gold Ltd."

in Imperial County and I have directed my Secretary for Resources to pursue all possible legal and administrative remedies that will assist in stopping the development of that mine.”²

12. Pursuant to the Governor’s directive, on December 12, 2002, the California State Mining and Geology Board (within the oversight and direction of the California Secretary of Resources) adopted an emergency regulation (Section 3704.1 of Title 14 of the California Code of Regulation) requiring – “without exception” – complete backfilling and site recontouring for all proposed open-pit metallic mines within the State. The Board’s accompanying report expressly identified the Imperial Project as the sole “emergency condition” justifying the regulation. With this emergency regulation in place, the State then began work on legislation that would permanently shut down the Imperial Project without providing compensation.

13. The California Legislature intended for SB 1828 to apply to almost all development project in the State that interfered with Native American “sacred site” claims. One of the reasons the Governor eventually vetoed the bill was that, as the Governor’s senior advisors and agency heads warned him, the broad language of the bill “would grant Native American Indian tribes vast powers to stop development virtually anywhere in the State.”³ In other words, while senior California officials and the Governor were quite willing to force Glamis to bear the economic burden of accommodating “sacred site” claims, they were unwilling to expose a wide array of other development activities, including state projects, to such claims.

14. Accordingly, once the Governor vetoed SB 1828, subsequent legislative efforts focused solely on Glamis. Indeed, the California legislature embarked on an unprecedented

² Gov. Gray Davis, *Veto Message for SB 1828*, at 2 (Sept. 30, 2002) (at CON001964), Exhibit (“Ex.”) 256. Claimant’s document exhibits are attached in separate volumes entitled “Exhibits to Memorial of Claimant Glas Gold Ltd.”

³ Cal. Bus., Transp. & Hous. Agency, *Enrolled Bill Report*, at 6 (Sept. 11, 2002) (at ARC02072), Ex. 250.

regulatory effort to “urgently . . . stop the Glamis Imperial mining project . . . proposed by Glamis Gold, Ltd., a Canadian-based company.”⁴

15. The California Legislature’s work concluded on April 7, 2003, when Governor Davis signed into law SB 22. That bill established permanent backfilling and grading requirements similar to those imposed by the State Mining and Geology Board’s emergency regulation, but was limited to projects located on, or like the Imperial Project, within one mile of any Native American sacred site. If there was any remaining doubt as to the discriminatory and expropriatory purpose of this legislation, Governor Davis settled it when he candidly proclaimed in a press release that “the bill essentially stops the Glamis Gold Mine proposal in Imperial County.”⁵ No other mine was so identified.

16. On April 10, 2003, the State Mining and Geology Board made permanent its earlier emergency regulation at Section 3704.1 of Title 14 of the California Code of Regulation, with only minor and inconsequential modification. In the course of promulgating these permanent and unprecedented regulations, the State Mining and Geology Board expressly acknowledged that it relied on *no* scientific, empirical or technical studies to support them. California’s complete backfilling and site-recontouring requirements, adopted between December 12, 2002 and April 10, 2003, created extraordinary obligations for metallic mineral mines as contrasted with the prevailing “best” mine reclamation practices followed elsewhere in the United States, Canada, and Mexico.

⁴ S. Natural Res. & Wildlife Comm., *Summary of SB 22*, at 4 (Jan. 14, 2003 Comm. Hearing) (at ARC01071), Ex. 273.

⁵ Cal. Governor’s Office, *Talking Points – SB 22 Bill Signing* (Apr. 7, 2003) (GOV063), Ex. 285.

17. These unprecedented mandates accomplished their stated objectives of rendering development of the Imperial Project economically infeasible and thereby preserving land in the California Desert. But the cost of this preservation effort – as Respondent well knew – has been borne solely by Glamis. Before the imposition of mandatory backfilling practices, the fair market value of Glamis’ property interests far exceeded its acquisition and development costs. Indeed, an expert appraisal of the Imperial Project has concluded that as of December 11, 2002, the fair market value of the investment in the Project was \$49.1 million. In light of California’s complete backfilling requirements, the fair market value of the investment was reduced to zero.

18. Through the imposition of these measures, more fully described below, Respondent has denied Glamis the minimum standard of treatment under international law guaranteed by Article 1105 (including full protection and security and fair and equitable treatment). It has also expropriated Glamis’ valuable property interests, recognized under both domestic and international law, without providing prompt and effective compensation, as guaranteed by Article 1110. For ease of reference, a detailed timeline of the Imperial Project is provided at Addendum A.

STATEMENT OF FACTS

I. The Parties

A. Glamis Gold Ltd.

19. Glamis Gold Ltd. is a publicly held Canadian corporation engaged in the exploration, development and extraction of precious metals in the United States and Latin America. The company was incorporated in 1972 under the laws of the Province of British

Columbia, and a majority of its directors are Canadian citizens.⁶ The company is an Investor of Canada, a Party to NAFTA.

20. Glamis has grown primarily through Canadian investment. In 2005, for example, Canadian citizens and business entities owned approximately 65 percent of Glamis' shares.⁷ Shares of Glamis have been traded on the Toronto Stock Exchange since 1984, an exchange that, together with an affiliated Venture Exchange (collectively referred to as the "TSX Group"), lists more mining companies than any other exchange in the world.⁸ In fact, in 2004, nearly 50 percent of all global mining financing was raised through the TSX Group, and more than 75 percent of the 325 producing mines operated by TSX Group companies are located outside of Canada.⁹ Accordingly, Canadian capital markets fund and support mining activities around the world. In that respect, Glamis is very much a typical (albeit quite successful) TSX Group company. Through its wholly owned subsidiaries, Glamis owns and operates open-pit gold and silver mines in the United States (Nevada) and Latin America, employing over 1,300 mining professionals worldwide.¹⁰

21. Glamis' early success as a company, nonetheless, was based primarily on gold exploration and development activities in the United States, which is one reason that, since 1998, its management, mine-development staff and administrative personnel have been located at the

⁶ Statement of Charles A. Jeannes, ¶ 2 and Att. C. Claimant's direct testimonies are attached in a separate volume entitled "Witness Statements to Memorial of Claimant Glamis Gold Ltd."

⁷ Statement of Kenneth F. Williamson, ¶ 2.

⁸ *Id.* ¶¶ 4-5. Shares of Glamis Gold Ltd. have also been traded on the New York Stock Exchange since 1993. *Id.* ¶ 4. Glamis is regulated by the U.S. Securities Exchange Commission as a foreign private issuer. *Id.* See <http://www.glamis.com>.

⁹ Statement of K. Williamson, ¶ 5.

¹⁰ Statement of C. Jeannes, ¶ 2.

company's headquarters in Reno, Nevada.¹¹ In particular, Glamis' history and success is tied to the California Desert, where the company successfully developed and operated two large open-pit gold mines throughout the 1980s and 1990s, namely the Rand Mine in Kern County and the Picacho Mine in Imperial County.¹² The Rand Mine was operated by the Rand Mining Company, while the Picacho Mine was operated by Chemgold, Inc., each of which is a subsidiary of Glamis Gold Ltd.¹³ Because of the success of these two mines, Glamis put a great deal of effort into planning its continued growth in the California Desert in the 1990s, focusing on the Imperial Project mining claims.¹⁴ Glamis formed the Glamis Imperial Corporation to develop and operate the Imperial Mine, but accomplished much of the early planning and development activities for the Imperial Project using Chemgold staff, who were located at the Picacho Mine less than ten miles from the Imperial Project site.¹⁵

22. For nearly a decade, between 1987 and 1996, Glamis engaged in extensive BLM-approved mineral exploration and development activities in the Imperial Project area without controversy or any challenge by the Quechan Tribe. The Quechan Tribe's disinterest in Glamis' initial investments in the Imperial Project is not surprising given that, between 1988 and 1992, the Quechan Tribe was in the midst of aggressively pursuing its own mineral exploration in the vicinity. In fact, the Quechan Tribe's exploratory drilling activities – which were funded by

¹¹ See Statement of C. Jeannes, ¶ 2; Statement of C. Kevin McArthur, ¶ 4. Prior to 1998, the Glamis headquarters office was located in Vancouver, Canada. See, e.g., *Annual Meeting Notes of K. McArthur*, at 1 (May 8, 1998) (referencing the closure of the Vancouver office and “consolidating the administration of the company in Reno” as a cost-saving move) (at EGLA08789), Ex. 113.

¹² Statement of K. McArthur, ¶ 2.

¹³ See *Final Environmental Impact Statement/Environmental Impact Report (“EIS/EIR”) for the Glamis Imperial Project*, at 1-2 (Sept. 2000), Ex. 210.

¹⁴ Statement of K. McArthur, ¶ 4.

¹⁵ *Id.* ¶¶ 2, 4, 14.

Interior – marked an attempt to search for “bulk mineable gold mineralization” in the shadow of the Cargo Muchacho Mountains and just several miles from Pilot Knob, both areas of very high Native American concern.¹⁶

23. As a result of the actions at issue in this arbitration, however, Glamis lost confidence in the United States and started redirecting its investment into new mine projects in Mexico and Central America.

B. The United States

24. The United States is a Party to NAFTA, extending to investors of each of the two other Parties the protections set forth in NAFTA Chapter Eleven. Under NAFTA and international law generally, the United States is responsible for the “federal” actions taken by Interior, the federal BLM, and the Advisory Council on Historic Preservation to frustrate and prevent the development of Glamis’ valid existing rights, as well as “state” and “local” actions taken by the California Legislature, the former Governor of California and his Office, the California Resources Agency, the California Department of Conservation, the California Surface Mining and Geology Board, the California Attorney General’s Office, and Imperial County.

25. It is an axiomatic principle of public international law that states are responsible for the acts of state organs at the federal, state, and local levels. As support for this view, the *Metalclad* Tribunal pointed out that the United Nations’ articles on state responsibility, although only adopted in draft form in 1975 by the United Nations International Law Commission, “may nonetheless be regarded as an accurate restatement of the present law [on state responsibility]”¹⁷ Those articles state, in pertinent part:

¹⁶ See ¶ 107 below.

¹⁷ *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (Award) ¶ 73 (Aug. 30, 2000) (hereinafter *Metalclad Award*); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE

(continued...)

The conduct of an organ of a State, of a territorial government entity or of an entity empowered to exercise elements of the Governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.¹⁸

26. NAFTA incorporates this axiomatic standard, noting in Article 105 that “[t]he Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, *by state and provincial governments.*” Article 201(2) adds that “[f]or purposes of this Agreement, unless otherwise specified, a reference to a state or province includes local governments of that state or province.” Indeed, the *Metalclad* panel acceded to the Mexican government’s presumption in that proceeding that “the *normal rule* of state responsibility applies; that is, that [the Mexican government] can be internationally responsible for the acts of state organs at all three levels of government.”¹⁹

27. Given the standard on state responsibility articulated by the *Metalclad* Tribunal, there is no doubt that under NAFTA, the United States is legally responsible not only for the actions of its federal agencies and officials but also for all sub-governmental entities within its borders, including the State of California and Imperial County. This includes the actions of any federal, state, or county agency or employee who took steps or implemented measures that

(...continued)

UNITED STATES § 321 cmt. B (1987) (“A federal state may leave implementation to its constituent units but the state remains responsible for failures of compliance.”).

¹⁸ *Metalclad Award*, ¶ 73 (quoting *Yearbook of the International Law Commission*, vol. ii, at 61 (1975)).

¹⁹ *Metalclad Award*, ¶ 73 (emphasis added). The United States also submitted its views on state responsibility principles under NAFTA in that proceeding, noting that there is “no . . . general exclusion from NAFTA standards for the actions of local governments. Rather, the U.S. intended and we believe the Parties intended, that, except where specific exception was made, the action of local governments would be subject to NAFTA standards.” *Metalclad*, Submission of the Government of the United States, ¶ 4 (Nov. 9, 1999).

effectively prohibited Glamis from developing its valid existing mineral rights in Imperial County, California.

28. Accordingly, each and every one of these federal, state and local agencies or individuals may be treated collectively as Respondent in this arbitration.

II. Background Of The Case: Glamis Looked To Continue Its Mining Operations In The California Desert

29. In or about 1987, Glamis Imperial (then operating under the name Glamis Gold Exploration, Inc.) first acquired interests in mining claims located on federal public lands in Imperial County.²⁰ Specifically, these interests exist in the southern portion of the California Desert Conservation Area (“CDCA”), in eastern Imperial County (east of San Diego near the Arizona and Mexican borders).²¹ Together, they form the basis of what came to be known as the Imperial Project, originally conceived as an open-pit gold mine located in the heart of an active mining district in the California Desert. Indeed, the Imperial Project was particularly attractive to Glamis because it was already operating an open-pit gold mine (Picacho) just eight miles from the Imperial Project site.²²

30. Because the Imperial Project site is located on federal public lands within the State of California, Glamis’ mineral exploration and any subsequent mining operations were subject to regulation under both federal and state laws. Accordingly, this section describes the Imperial Project site, the federal and state legal regimes that Glamis expected would apply to its California mining projects, and the mining district and heritage of which the Imperial Project would be but a small addition. Together, these subjects helped form the reasonable expectations

²⁰ Statement of K. McArthur, ¶ 4.

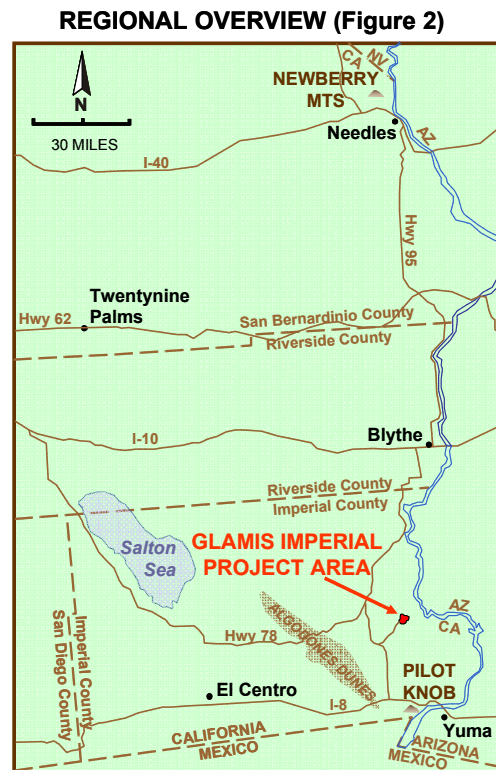
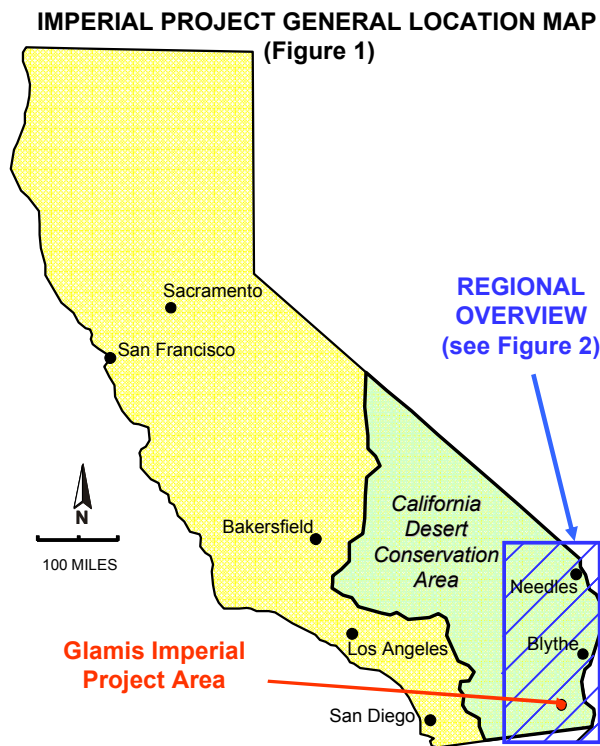
²¹ See Figures 1 and 2, *infra*, page 14.

²² Statement of K. McArthur, ¶¶ 2-4.

on which Glamis relied when it ultimately invested over \$14.8 million in the Imperial Project, with the goal of exploiting its property rights and in anticipation of obtaining approval to commence mining operations.

A. The Imperial Project

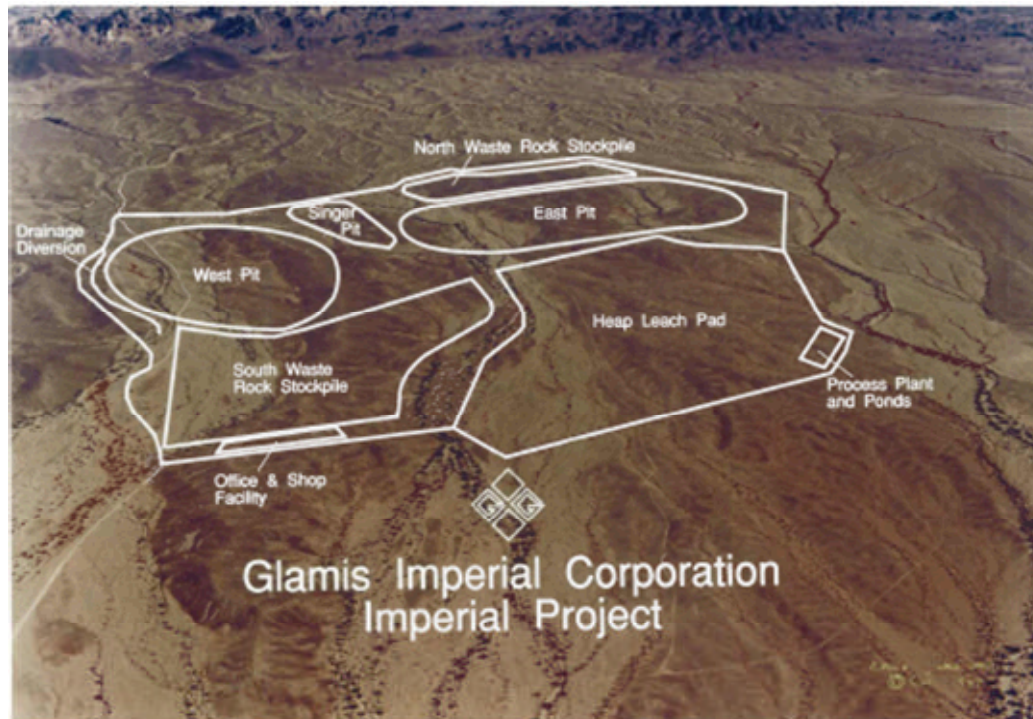
31. The Imperial Project exists in eastern Imperial County, in the southern portion of the California Desert Conservation Area (“CDCA”), which is east of San Diego near the Arizona and Mexican borders:



It is located on 1,631 acres of federal public lands managed by BLM in the heart of an active gold-mining district. In fact, three active, open-pit gold mines were located within approximately one dozen miles of the Imperial Project at the time it was proposed, including the Mesquite Mine to the west, American Girl to the south, and Glamis’ own Picacho Mine to the

east.²³ Glamis planned to construct its proposed Imperial mine on a south- and west-facing alluvial plain south of Indian Pass and the Chocolate Mountains.²⁴

Figure 3



32. The Imperial Project consists of 100 percent interests in approximately 187 mining claims and 277 mill sites on federal lands.²⁵ As described more fully below, Glamis located and acquired these mining claims and mill sites in accordance with the Mining Law of 1872, 30 U.S.C. §§ 22 *et seq.*, as amended, and the relevant BLM regulations. Valid, unpatented mining claims provide the statutory right, consistent with other laws and BLM regulations, to go upon open public lands for the purpose of prospecting, exploring and extracting valuable

²³ *Final EIS/EIR for the Glamis Imperial Project*, at 1-2 (Sept. 2000), Ex. 210.

²⁴ *Id.*; see also Figure 3.

²⁵ BLM, *Mineral Report*, at 13 (Sept. 27, 2002) (at MV023943), Ex. 255.

minerals.²⁶ Mill sites consist of non-mineral land that may be used for purposes ancillary to mineral development.²⁷ United States law recognizes such mineral claims and mill sites as freely transferable property rights, subject to the protections of the Fifth Amendment of the U.S. Constitution.²⁸

33. Glamis planned to mine gold and silver from the Imperial Project through conventional open-pit mining techniques. These techniques would have been used to remove approximately 150 million tons of ore from three large open pits during the Project's projected 19-year mine life.²⁹ The ore would have been processed onsite through conventional heap-leach processing, resulting in the production of approximately 1.17 million ounces of gold (with the prospect of recovering an additional 0.5 million ounces through continued exploration).³⁰ The rate of recovery (ounces of gold produced per ton of ore mined) and grade of ore at the Imperial Project were geologically and operationally very similar to those of other active open-pit gold mines operating in the area.³¹

34. The Imperial Project's proposed plan of operations provided that Glamis would sequentially mine and backfill two of the three open pits through a recognized feasible practice

²⁶ 30 U.S.C. § 22.

²⁷ 30 U.S.C. § 42; *see also Swanson v. Babbitt*, 3 F.3d 1348,1349 (9th Cir. 1993).

²⁸ *See, e.g., United States v. Locke*, 471 U.S. 84 (1985); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963); *United States v. Shumway*, 199 F.3d 1093, 1100 (9th Cir. 1999).

²⁹ *Final EIS/EIR for the Glamis Imperial Project*, at 1-1 (Sept. 2000), Ex. 210.

³⁰ Behre Dolbear Report, at 1. Behre Dolbear is a world reknown mineral rights appraisal company who has evaluated the Imperial Project mining claims on behalf of Glamis. *See supra* ¶ 394. Behre Dolbear's expert report is attached with Claimant's other expert reports in a separate volume entitled "Expert Reports to Memorial of Claimant Glamis Gold Ltd." Note that BLM's *Mineral Report* of Glamis' mining claims estimated that up to 1,980,554 ounces could be profitably produced from the mine. BLM, *Mineral Report*, at 2 (Sept. 27, 2002), Ex. 255.

³¹ Behre Dolbear Report, at 8-9 (referencing the Mesquite and Picacho Mines).

called sequential backfilling.³² That is, waste rock would be initially placed in stockpiles adjacent to the first mined pit, but as mining progressed from one pit to the next, the waste rock would be placed directly in the previously mined pits. After the third pit was mined, it would be partially backfilled and reclaimed with waste rock. Given the costs associated with the process, however, Glamis did not plan to completely backfill the third pit.³³ Thus, the balance of the waste rock would be reclaimed through conventional and accepted reclamation techniques (such as grading, capping and re-vegetation). The third pit would remain accessible for potential future mining activities.³⁴

35. As proposed, Glamis planned to employ as many as 225 workers to construct the Imperial mine and related facilities, as well as an average of about 120 people to operate the completed mine and related facilities over the estimated 19 years of the mine's life.³⁵ The entire Imperial Project would have required initial capital expenditures of approximately \$48 million and additional annual expenditures of approximately \$27.7 million for operation and maintenance costs.³⁶

³² See *Imperial Project Plan of Operations*, at 17 (Nov. 1994) (at GLA056585), Ex. 55; *Final EIS/EIR for the Glamis Imperial Project*, at 2-7 to 2-8 (Sept. 2000); Leshendok Report, ¶¶ 48, 57. As discussed at ¶¶ 230-231, Mr. Thomas Leshendok is a long-time federal mining law expert who has evaluated the Imperial Project plan of operations on behalf of Glamis.

³³ See Leshendok Report, ¶¶ 48, 57.

³⁴ *Id.*

³⁵ *Final EIS/EIR for the Glamis Imperial Project*, at 2-21 (Sept. 2000), Ex. 210.

³⁶ *Id.* at 4-129.

B. The Legal Landscape: Laws And Regulations Applicable To Mining Operations On Federal Public Lands In California Provided Glamis Confidence That Its Mining Operations Would Be Approved

36. As Glamis knew when it began its Imperial Project investment in 1987, the Imperial Project would be subject to various federal and state laws and regulation because the Project was located on federal public lands in the California Desert. Glamis also knew, however, that the applicable laws and regulations – while giving full consideration to recognized environmental and cultural concerns – strongly encouraged the location and development of mining claims and imposed only economically feasible mitigation measures. A brief introduction to these statutory and regulatory requirements is set forth below.

1. The Federal Mining Laws

37. The Mining Law of 1872, as amended, remains the embodiment of the federal government’s longstanding policy to encourage mineral exploration and facilitate the establishment of mining claims. The Mining Law has been amended numerous times, and its purpose was reaffirmed in the Mining and Minerals Policy Act of 1970.

a. The Federal Mining Law Of 1872, As Amended, Actively Promoted The Development Of The Mining Resources Of The United States

38. The Mining Law of 1872 (as amended), 30 U.S.C. §§ 22-42, declares, as a matter of U.S. policy, that property rights attach to any “discovery” of “valuable mineral deposits,” including metallic minerals, on federal lands.³⁷ Congress’s intent in enacting the Mining Law was to encourage and reward the discovery of economically valuable minerals located on public

³⁷ 30 U.S.C. § 23.

lands,³⁸ a policy that traces “its origin to the discovery of gold in California in 1848.”³⁹ The Law provides that “all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase”⁴⁰ It specifically authorizes mining claims for “gold, silver . . . or other valuable deposits.”⁴¹ In short, the 1872 Mining Law, seeks “to promote the development of the mining resources of the United States”⁴² by favoring “the development of mines of gold and silver and other metals”⁴³ and affording “every facility . . . for that purpose”⁴⁴ Interior has administered the Mining Law since the statute’s enactment, although it was not until adoption of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 *et seq.*, that the scope of Interior’s authorities were more clearly defined.⁴⁵

39. Although the mining policies articulated in the Mining Law have been the subject of debate in recent decades, especially since the emergence of policies favoring increased protection of environmental and cultural resources, the Mining Law has never been repudiated or replaced.⁴⁶ As recently as 2004, the bi-partisan Western Governors’ Association has recognized

³⁸ *United States v. Coleman*, 390 U.S. 599, 602 (1968); *see also United States v. Shumway*, 199 F.3d 1093, 1098 (9th Cir. 1999).

³⁹ Bancroft G. Davis, *Fifty Years of Mining Law*, 50 Harv. L. Rev. 897 (1937) (noting that the Sutter Mill, where gold was first discovered, was located on public lands).

⁴⁰ 30 U.S.C. § 22.

⁴¹ *Id.* § 23.

⁴² *McKinley v. Wheeler*, 130 U.S. 630, 633 (1889).

⁴³ *United States v. Iron Silver Mining Co.*, 128 U.S. 673, 675 (1888).

⁴⁴ *Id.*

⁴⁵ *See* 43 U.S.C. § 1201 (“The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulation”) (enacted and amended between 1850 and 1874).

⁴⁶ The Mining Law has been amended and reaffirmed many times, such as in the 1955 amendments which provided that mining claims were to be used for “prospecting, mining or processing operations and uses reasonably incident thereto . . . ,” but not for non-mining purposes. 30 U.S.C. § 612; *see also id.* § 28f
(continued...)

that the “Mining Law of 1872, as amended, has played, and continues to play, an important role in developing this nation’s wealth, providing an important source of state revenue, economic activity and employment.”⁴⁷ Moreover, the U.S. Court of Appeals for the Ninth Circuit also recently recognized that, “[d]espite much contemporary hostility to the Mining Law of 1872 and high[-]level pressure by influential individuals and organizations for its repeal, all repeal efforts have failed, and it remains the law.”⁴⁸ The Ninth Circuit went on to explain just what a mining claim under the Mining Law encompasses:

The phrase ‘mining claim’ represents a federally recognized right in real property. The Supreme Court has established that a mining ‘claim’ is not a claim in the ordinary sense of the word – a mere assertion of a right – but rather it is a property interest, which is itself real property in every sense, and not merely an assertion of a right to property.⁴⁹

In other words, “the government cannot reserve [or take] its own land from an unpatented mining claim without paying the owner the value of the claim, because an unpatented mining claim is property.”⁵⁰

(...continued)

(1993 amendments imposing annual maintenance/rental fee payment obligations to hold mining claims and mill sites).

⁴⁷ WGA Policy Resolution 04-20, *National Minerals Policy* (June 24, 2004), Ex. 296. The Western Governors also recognized that “a more vibrant mining industry is in the best interests of the country” and that “[r]eliable supplies of minerals play a critical role in meeting our economic and national security needs.” *Id.*

⁴⁸ *United States v. Shumway*, 199 F.3d 1093, 1098 (9th Cir. 1999); *see also Collard v. United States*, 154 F.3d 933, 934-935 (9th Cir. 1998) (“A mining claim confers the right to exclusive possession of the claim, including the right to extract all minerals from the claim without paying royalties to the United States. . . . An unpatented mining claim is a fully recognized possessory interest. . . . [D]ue process under the Fifth Amendment of the United States Constitution requires a hearing before this right can be extinguished. . . .”).

⁴⁹ *Shumway*, 199 F.3d at 1099-1100 (citing *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U.S. 428 (1892)).

⁵⁰ *Id.* at 1100. The Mining Law provides an *optional* procedure for a qualified claimant to purchase a mineral patent – a fee simple title to the mineral claim – under certain conditions. *See* 30 U.S.C. § 29. Congress has restricted the issuance of new patents since 1994, however, through annual appropriation bill riders. In any event, a patent is not necessary to develop and extract the minerals within a claim. *See Clipper Mining Co. v. Eli Mining & Land Co.*, 194 U.S. 220, 224 (1904) (“it is a well-known fact that some of the richest
(continued...)

40. The “discovery” of valuable mineral deposits, as used in the Mining Law, exists “[w]here minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine”⁵¹ The Supreme Court has supplemented the prudent person test with a “marketability test,” which places great emphasis on profitability in determining if a mineral deposit is a “valuable mineral deposit.”⁵²

41. Discovery of a valuable mineral deposit is a prerequisite to the establishment of a valid mineral “location.”⁵³ “Location” of a mining claim is the act of appropriating a federal land parcel, generally by posting notice on the ground and publicly recording the notice.⁵⁴ If a claimant wishes to assert its mining claim in opposition to some action purportedly interfering with its right, such as a withdrawal, it must have perfected its discovery before the date of the intervention, thereby creating a “valid” existing right.⁵⁵

42. The concept of valid existing rights (“VER”) is an important one in mining law. Specifically, it refers to the right that a holder of mining claims and sites has to continue to occupy and use for mining purposes lands later withdrawn from mineral entry. The owner must demonstrate, in other words, that he or she has made a “discovery” of a valuable mineral deposit

(...continued)

mineral lands in the United States, which have been owned, occupied and developed by individuals and corporations for many years, have never been patented”).

⁵¹ *Chrisman v. Miller*, 197 U.S. 313, 322 (1905) (citing *Castle v. Womble*, 19 Land Dec. 455, 457 (1894)); see also *Skaw v. United States*, 13 Cl. Ct. 7, 28-29 (1987).

⁵² *United States v. Coleman*, 390 U.S. 599, 602 (1968); see also *Skaw v. United States*, 13 Cl. Ct. 7, 28-29 (1987).

⁵³ Geologic inference will not generally support a discovery. A valuable mineral deposit must be actually and physically exposed within each mining claim or group of claims, typically by drilling. See *Lee Chemicals*, 86 IBLA 164, 167 (1985).

⁵⁴ *United States v. Shumway*, 199 F.3d 1093, 1090 (9th Cir. 1999) (citations omitted).

⁵⁵ 43 C.F.R. § 3809.100; see also *Cameron v. United States*, 252 U.S. 450, 457 (1920).

under the Mining Law, as of the date of withdrawal. A procedure called a “mineral examination” is often used to determine whether or not the holder can claim VER.

**b. The Federal Mining And Minerals Policy Act Of 1970
Reaffirmed The Continuing Policy Of The United States
To Encourage The Development Of Domestic Mineral
Resources**

43. The Mining and Minerals Policy Act of 1970 (“MMPA”), 30 U.S.C. § 21a, reaffirmed the national commitment to mineral exploration and development on federal public lands. The purpose of the Act is to “establish a broad overall national minerals policy with particular emphasis on the need for an economically sound and stable domestic mining and minerals industry.”⁵⁶ In it, Congress declared “that it is the continuing policy . . . to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, [and] (2) the orderly and economic development of domestic mineral resources”⁵⁷

44. In addition to promoting the development of mineral resources, the MMPA also recognizes the need to increase the recycling of used minerals and the use of more environmentally-sensitive methods of mineral extraction and processing. It therefore directs the federal government to encourage mining, mineral and metallurgical research,⁵⁸ as well as to foster the study of reclamation of mineral waste products and of mined lands in an environmentally responsible manner.⁵⁹

⁵⁶ H. Rep. No. 91-1442 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 5792.

⁵⁷ 30 U.S.C. § 21a.

⁵⁸ *Id.* § 21a(3).

⁵⁹ *Id.* § 21a(4).

45. As is clear from the legislative history of the MMPA, Congress believed at the time of the Act's passage that the "future well-being and national security of our nation is directly tied to the supply and availability of minerals,"⁶⁰ and therefore the nation must work to "substantial[ly] increase . . . mineral exploration and development activity. Particular emphasis must be given to develop new technology in the mining and metallurgical fields to utilize lower grade deposits. . . ."⁶¹

2. Federal Land-Use, Environmental, And Cultural Resource Laws

46. The Federal Land Policy and Management Act of 1976, the principal statute under which the federal government balances the need to keep public lands open to competing and multiple uses, was designed to coexist with the Mining Law of 1872 and other laws promoting use and exploitation of federal lands. Moreover, the environmental and cultural resources laws, enacted after the Mining Law of 1872, do not eviscerate policies embodied in the Mining Law.

a. The Federal Land Policy And Management Act Of 1976 Recognized The Nation's Need For Multiple Use Of The Public Lands Including Mineral Development, Subject Only To Reasonable Regulation

47. The Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*, confirms and expands BLM's federal land management authority and sets forth standards governing the nation's use of its federal lands, including the mineral development of those lands. The principal management objective enshrined in FLPMA is "multiple use:"

The Secretary [of the Interior] shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land-

⁶⁰ H. Rep. No. 91-1442 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 5792, 5793.

⁶¹ *Id.*

use plans developed by him . . . when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.⁶²

The concept of multiple use was not, however, intended to override the existing statutory scheme set up by the federal mining laws. Indeed, Congress expressly provided that, except as specifically stated, no provision of FLPMA “shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act”⁶³ Thus, FLPMA recognizes the need to balance different land-use values on public lands, but specifically declares that such lands should be managed “in a manner which recognizes the Nation’s need for domestic sources of minerals . . . from the public lands including implementation of the Mining and Minerals Policy Act of 1970”⁶⁴

48. To achieve the intended balance between mineral extraction and other multiple-use goals, Section 302(b) directs the Secretary of Interior to “take any action necessary to prevent *unnecessary or undue degradation* of the lands.”⁶⁵ FLPMA also created the California Desert Conservation Area (“CDCA”),⁶⁶ to which it extended the statute’s primary management principle to foster the “administration of the public lands in the California desert within the framework of a program of *multiple use and sustained yield*.”⁶⁷

49. Congress established the CDCA to conserve “historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, *and economic resources*

⁶² 43 U.S.C. § 1732(a); *see also id.* §§ 1701(a)(7), 1712(c)(1). FLPMA requires the Secretary of the Interior to manage all public lands in accordance with land-use plans. *Id.* § 1712(a).

⁶³ *Id.* § 1732(b).

⁶⁴ *Id.* § 1701(a)(12).

⁶⁵ *Id.* § 1732(b) (emphasis added).

⁶⁶ Discussed in detail at ¶¶ 95-116 below.

⁶⁷ 43 U.S.C. § 1781(c) (emphasis added).

that are uniquely located adjacent to an area of large population.”⁶⁸ Implicit in this purpose is the goal of striking a balance between the need for conservation and the importance of using the natural bounty of the desert, including its mineral resources.

50. Consistent with the CDCA’s mining heritage, FLPMA expressly preserves the applicability of the U.S. mining laws and the existence of valid existing rights (“VER”) within the CDCA, subject only to “reasonable regulations.”⁶⁹ With respect to three of the identified values (scenic, scientific, and environmental), however, FLPMA Section 601 directed the Secretary to manage the CDCA using “reasonable” regulations to prevent “undue impairment.”⁷⁰ Specifically, this latter section provides:

*Subject to valid existing rights, nothing in this Act shall affect the applicability of the United States mining laws on the public lands within the California Desert Conservation Area, except that all mining claims located on public lands within the California Desert Conservation Area shall be subject to reasonable regulations as the Secretary may prescribe to effectuate the purposes of this section. Any patent issued on any such mining claim shall recite this limitation and continue to be subject to such regulations. Such regulations shall provide for such measures as may be reasonable to protect the scenic, scientific, and environmental values of the public lands of the California Desert Conservation Area against undue impairment, and to assure against pollution of the streams and waters within the California Desert Conservation Area.*⁷¹

51. In sum, FLPMA was created to provide clear federal land-management responsibilities for BLM, while establishing a framework that encourages reasonable

⁶⁸ *Id.* § 1781(a)(1) (emphasis added).

⁶⁹ *Id.* § 1781(f) (“Subject to valid existing rights, nothing in this Act shall affect the applicability of the United States mining laws on the public lands within the California Desert Conservation Area, except that all mining claims located on public lands within the [CDCA] shall be subject to such reasonable regulations as the Secretary may prescribe. . . .”).

⁷⁰ *Id.*

⁷¹ *Id.* (emphasis added).

development and use of the federal lands taking into consideration potential environmental consequences of that development.

b. The National Environmental Policy Act Of 1969 Imposed Only Procedural Obligations To Assess Environmental Impacts And Develop Mitigation Measures

52. Since 1969, all proposed federal action must be reviewed under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-47, a procedural statute that directs agencies to consider the effects of the action on the environment. In practice, the statute applies whenever a federal agency grants a permit or agrees to fund or otherwise authorizes another entity to undertake an action that might affect environmental resources. It is “well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process” for considering environmental implications.⁷² For an action that is likely to have a significant effect on the environment, federal agencies fulfill their statutory duty through preparation of an Environmental Impact Statement (“EIS”), which identifies the impact and available mitigation.⁷³

53. According to BLM guidance, if the agency decides to prepare an EIS, it must define the purpose and need for the proposed action, identify alternatives to be considered, and determine what impacts need to be analyzed.⁷⁴ “Each alternative, except for the no-action alternative, should represent an alternative means of satisfying the identified purpose and need and of resolving issues.”⁷⁵ The “no-action alternative” reflects the continuation of current management practices and/or denial of the action.⁷⁶ The EIS also analyzes the impact of the

⁷² *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citations omitted).

⁷³ 42 U.S.C. § 4332(2)(C).

⁷⁴ NEPA Handbook H-1790-1, Ch. 5(B)(1)(e) (Oct. 25, 1988).

⁷⁵ *Id.* at Ch. 5(B)(1)(e)(2).

⁷⁶ *Id.*

proposed action and each alternative on the affected environment with consideration of mitigation measures.⁷⁷ After completing its analysis of the proposed and alternative actions, BLM selects its “preferred alternative.”⁷⁸ A “preferred alternative” is one that would fulfill [the agency’s] statutory mission and responsibilities, while giving consideration to economic, environmental, technical, and other factors.⁷⁹

54. In the case of the Imperial Project, BLM reached a special agreement with Imperial County, California, which specified that the NEPA review process would occur in conjunction with the review process under a similar state law, the California Environmental Quality Act (“CEQA”), discussed more fully at ¶¶ 89-92 below.⁸⁰ In short, the agreement required the preparation of a joint Environmental Impact Statement/Environmental Impact Report (“EIS/EIR”) by the BLM and Imperial County.⁸¹

c. The National Historic Preservation Act Of 1966 Also Only Imposed Procedural Consultation Obligations, Not Substantive Obligations, To Avoid Impacts To Historic And Cultural Resources

55. Section 106 of the National Historic Preservation Act (“NHPA”), 16 U.S.C. §§ 470 *et seq.*, enacted in 1966, directs federal agencies to take into account the effect of a federal “undertaking” on historic properties and to afford the Advisory Council on Historic Preservation (“ACHP”) a reasonable opportunity to comment.⁸² Courts have recognized that NHPA, like

⁷⁷ *Id.* at Ch. 5(B); *see also* 40 C.F.R. § 1505.2.

⁷⁸ *NEPA Handbook*, at Ch. 5(B)(2)(b).

⁷⁹ Department of Interior Manual Part 516, Ch. 4, Pt. 4.10 A(4) (May 27, 2004).

⁸⁰ *See* Memorandum of Understanding between BLM, Imperial County and Chemgold (Mar. 20, 1995) (GLA028368), Ex. 63.

⁸¹ *See id.*

⁸² 16 U.S.C. § 470f. In addition to the NHPA, Executive Order No. 13007 (Indian Sacred Sites) provides for consultation and consideration of Native American cultural resources by federal agencies with responsibilities for management of public lands. Executive Order No. 13007 directs federal land

(continued...)

NEPA, is primarily a procedural statute, designed to ensure that federal agencies *consider* historic values in their decision-making.⁸³ Again, like NEPA, the NHPA does not mandate a substantive result.

56. Glamis' Imperial Project was subject to NHPA regulations implemented in 1986. The regulations were revised in 2001. Both sets of regulations allow for the ACHP to participate in consultation with a federal agency and State Historic Preservation Office ("SHPO") to find ways to avoid or reduce adverse effects on historic properties.⁸⁴

57. Under both the 1986 and 2001 regulations implementing Section 106, a responsible federal agency must determine whether it has an undertaking that could affect historic properties.⁸⁵ Historic properties are those that are included in the National Register of Historic Places or those that are "eligible" for the National Register.⁸⁶ The 1986 regulations require the agency to establish the undertaking's Area of Potential Effects ("APE").⁸⁷

(...continued)

management agencies, to "the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions," to accommodate Native Americans' use of "sacred sites" for religious purposes and to avoid adversely affecting the physical integrity of sacred sites. Exec. Order No. 13007, 61 Fed. Reg. 26,711 (May 24, 1996).

⁸³ *Morris County Trust for Historic Pres. v. Pierce*, 714 F.2d 271, 278-79 (3d Cir. 1983); *Friends of the Atglen-Susquehanna Trail, Inc. v. U.S. Surface Transp. Bd.*, 252 F.3d 246, 252 (3d Cir. 2001); *Gettysburg Battlefield Pres. Ass'n v. Gettysburg College*, 799 F. Supp. 1571, 1580 (M.D. Pa. 1992).

⁸⁴ 36 C.F.R. § 800.5(e) (1986).

⁸⁵ *Id.* § 800.4; 36 C.F.R. § 800.3(a) (2001).

⁸⁶ 16 U.S.C. § 470f. According to National Register Bulletin 38, "Guidelines for Evaluating and Documenting Traditional Cultural Properties," published by the National Park Service, historic properties may be eligible for listing because of their cultural values. *See* Sebastian Report, at 17. Dr. Sebastian is an anthropologist with extensive experience with cultural-resource issues. Her report and analysis of the Glamis Imperial Project are described, *infra*, at ¶¶ 219-229.

⁸⁷ 36 C.F.R. § 800.4(a) (1986). It must also determine if there is a need for more information-gathering activities to help identify historic properties. *Id.* § 800(a)(2). Early in the Section 106 process, the agency must also identify the appropriate State Historic Preservation Officer ("SHPO") with which to consult. *Id.* § 800.4(a)(ii); *see also* 36 C.F.R. § 800.3(c) (2001). The 2001 regulations also require the agency to identify early "other parties entitled to be consulting parties and invite them to participate as such." 36 C.F.R. § 800.3(f) (2001). The 1986 regulations require the agency to involve "consulting parties" only after the undertaking is deemed "adverse." 36 C.F.R. § 800.5(e)(1) (1986).

58. If the agency determines that there is a potential effect on an historic property, it must further determine if the impact is adverse.⁸⁸ It may then propose a finding of “adverse effect,” after which it must “notify” the ACHP and “consult” with the SHPO “to seek ways to avoid or reduce the effects on historic properties.”⁸⁹ The Council *may* participate in *consultations* even without a request.⁹⁰

59. Once the SHPO has been notified and consultations are underway, if the agency and the SHPO agree upon how the effects should be taken into account, they will execute a Memorandum of Agreement (“MOA”). If the ACHP participates in the consultation, it becomes a party to the MOA. If the ACHP does not participate in the consultation, the MOA is submitted to the ACHP for its comment.⁹¹

60. In the event that an impasse be reached and an MOA cannot be executed, any time after consultations begin, the SHPO, ACHP or agency identifying the undertaking may state that further consultation will not be productive and terminate the consultation process. Finally, the agency must then simply “request” the ACHP’s “comments” and notify other consulting parties of its requests.⁹² The agency must “consider” the ACHP’s comments “in reaching a final decision on the proposed undertaking.”⁹³

⁸⁸ 36 C.F.R. § 800.5(c) (1986). Under the 1986 regulations, there are a series of criteria for deciding whether an effect is adverse or not. *See id.* § 800.9.

⁸⁹ *Id.* § 800.5(e).

⁹⁰ *Id.*

⁹¹ *Id.* § 800.5(e)(4).

⁹² *Id.* § 800.5(e)(6).

⁹³ *Id.* § 800.6(c)(2). If, on the other hand, an MOA is executed and submitted to the ACHP, the ACHP reviews it, and does one of three things. It either accepts the MOA as is, advises the agency of changes that would make the MOA acceptable, or decides to comment on the undertaking itself. If this last alternative is chosen, the ACHP “shall provide its comments within 60 days of receiving the agency’s submission” Again, in the case that the agency, SHPO and ACHP do not reach agreement after submitting an MOA to the ACHP, the agency must simply “request” the ACHP to “comment.” The agency will then “consider”

(continued...)

61. Although Section 106 and the Council's regulations impose important procedural duties on federal agencies, as is clear from the language of the statute and associated regulations, the ACHP is purely an advisory body; it has no authority to impose substantive requirements on an agency.⁹⁴ So long as the agency obtains the ACHP's comments upon termination of the Section 106 consultation process, it has the discretion not to follow them. In other words, the agency may only follow ACHP's comments to the extent consistent with the agency's statutory authority and obligations.

3. Applicable Federal Regulations

62. Interior has implemented FLPMA, while taking into account the review procedures and consultations mandated by NEPA and NHPA, through what are referred to as the 3809 Regulations. These regulations were first promulgated in 1980 after extensive rulemaking involving some 5,000 comments. In 2000 and 2001, during the period that Glamis' Imperial Project remained pending before BLM, the 3809 Regulations were amended. While these amendments had only limited applicability to Claimant, the issues raised during the revisions provide useful context concerning Glamis' expectations and are thus discussed below.

(...continued)

the ACHP's comments "in reaching a final decision on the proposed undertaking." At this point, the agency's only additional obligation is to report its decision to the ACHP. *See id.* § 800.6(a)(1)(iii) and (c)(2).

⁹⁴ *See, e.g., Paulina Lake Historic Cabin Owners Ass'n v. U.S. Forest Serv.*, 577 F. Supp. 1188 (D. Or. 1983), (decision to raze cabins up to agency); *Walsh v. U.S. Army Corps of Eng'rs*, 757 F. Supp. 781 (W.D. Tex. 1990) (NHPA imposes procedural requirements); *Connecticut Trust for Historic Pres. v. Interstate Commerce Comm'n*, 841 F.2d 479 (2d Cir. 1988) (same); *Pennsylvania v. Morton*, 381 F. Supp. 293, 299 (D.D.C. 1974).

a. BLM’s “3809” Regulations, As Adopted In 1980, Recognized That Interior Only Had Authority To Minimize Mining Impacts Which Were Reasonably Avoidable, And That Unavoidable Cultural Resource Impacts Would Not Be A Basis For Mine Denial, Including In The California Desert

63. The 1980 regulations implementing FLPMA, 43 C.F.R. Subpart 3809 (“3809 Regulations”), establish the basic regulatory framework for the submission and review of mining plans of operation. These regulations were a product of rulemaking begun shortly after passage of FLPMA, and thus represent Interior’s contemporaneous interpretation of the statute.⁹⁵ The regulations are consistent with both the 1872 Mining Law and the MMPA, as acknowledged in the regulations themselves:

Under the mining laws a person has a statutory right, consistent with Departmental regulations, to go upon the open (unappropriated and unreserved) Federal lands for the purposes of mineral prospecting, exploration, development, extraction and other uses reasonably incident thereto.⁹⁶

⁹⁵ As the BLM recounted in the preamble to the final 1980 rule:

Proposed rulemaking was published on December 6, 1976 in the Federal Register (41 FR 53428). As a result of changes made in response to the more than 5,000 comments received on the initial publication, a second proposed rulemaking was published in the Federal Register on March 3, 1980 (45 FR 13959).... Public meetings were held in Denver, Colorado and Reno, Nevada. This public exposure resulted in more than 366 written comments. The written comments came from various sources, with 83 coming from companies with mining interests, 173 from individuals, 10 from environmental groups, 33 from mining groups and associations, 29 from State and local governments, . . . and 31 from Federal agencies. Also received were five petitions, with some 1,131 signatures, that commented on various aspects of the rulemaking. Public comments were also obtained at meetings with interest groups and an oversight hearing before the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs. All of the comments have been given careful consideration and the final rulemaking reflects many of the changes suggested by the comments.

45 Fed. Reg. 78,902, 78,902 (Nov. 26, 1980).

⁹⁶ 43 C.F.R. § 3808.0-6 (1980).

64. To initiate mining operations with respect to claims located on federal public lands within the CDCA, the 3809 Regulations require an operator to submit a “plan of operations” before starting any mining activity that will disturb the land.⁹⁷ During review of the proposed plan, BLM evaluates the impacts, consults as required, and determines the reclamation and mitigation measures necessary to prevent “unnecessary or undue degradation.”⁹⁸

65. This key standard in the 3809 Regulations tracked the language in FLPMA exactly, providing: “All [mining] operations . . . shall be conducted to prevent *unnecessary or undue degradation* of the Federal lands and shall comply with all pertinent Federal and State laws.”⁹⁹ The regulations did, however, clarify what prevention of “unnecessary or undue degradation” meant. Essentially, BLM adopted a definition of “unnecessary or undue degradation” that codified what is known as the “prudent operator” standard, meaning that the regulations only circumscribe harm outside of the range of degradation caused by a customary and proficient operator utilizing reasonable mitigation measures:

Unnecessary or undue degradation means surface disturbances greater than what would *normally result* when an activity is being accomplished by a *prudent operator* in *usual, customary, and proficient operations* of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete *reasonable* mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue degradation. Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation.¹⁰⁰

⁹⁷ *Id.* § 3809.1-4(b)(1).

⁹⁸ *Id.* § 3809.2-1(b).

⁹⁹ *Id.* § 3809.2-2.

¹⁰⁰ *Id.* § 3809.0-5(k) (emphasis added).

66. The 3809 Regulations also acknowledged BLM’s responsibility under FLPMA with respect to the CDCA:

Where specific statutory authority requires the attainment of a stated level of protection or reclamation, such as in the California Desert Conservation Area, Wild and Scenic Rivers, areas designated as part of the National Wilderness System administered by the Bureau of Land Management and other such areas, that level of protection shall be met.¹⁰¹

As noted above, FLPMA requires that in the CDCA, the Secretary also prevent “unnecessary impairment” of scenic, scientific, and environmental values (but did not include in this list historical or cultural values). To fulfill this obligation (as explained at ¶¶ 98-102 below), BLM’s land-use plan for the CDCA (first published in 1980), stated that the location of mining claims was non-discretionary, *i.e.* firmly protected by the Mining Law. The operation of mines within the CDCA, however, was subjected to the 3809 Regulations and the level of mitigation to prevent impairment “subject to technical and economic feasibility.”¹⁰² In this way, BLM reasonably equated the general FLPMA requirements to prevent “unnecessary or undue degradation” and the specific requirement to prevent “undue impairment” of certain values to be protected – subject to Valid Existing Rights – within the CDCA.

67. The rulemaking leading up to the 3809 Regulations expanded on the concept that once a mining operator complied with reasonable mitigation requirements, there were few obstacles left before operations could begin. The rulemaking specifically addressed the competing legal requirements of the federal Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, and the NHPA in the context of mine approvals, noting that FLPMA’s goals of

¹⁰¹ *Id.* § 3809.0-5(k).

¹⁰² BLM, *The California Desert Conservation Area Plan*, at 18 (1980) (at MV037137), Ex. 12 (hereinafter the *CDCA Plan*).

multiple and sustained use should always prevail where conflicts with cultural resource areas were unavoidable:

[I]f there is an unavoidable conflict with an endangered species habitat, a plan [of operations] could be rejected based not on section 302(b) of [FLPMA], but on section 7 of the [Endangered Species Act]. *If, upon compliance with the [NHPA], the cultural resources cannot be salvaged or damage to them mitigated, the plan must be approved.* Essentially, . . . these laws may slow the plan approval process; one law may stop a project while the other *may only delay it.*¹⁰³

Thus, the combination of BLM's 3809 Regulations and the preeminence both Congress and BLM gave mining activities in the establishment and management of the CDCA indicate that the location and approval of mining plans of operation in most portions of the California Desert is "nondiscretionary," subject only to reasonable regulation.¹⁰⁴ As described by BLM in a 1998 proposed administrative land withdrawal of land encompassing the Glamis Imperial Project, "nondiscretionary" means just that: "Without a withdrawal, BLM would not have the discretion to deny authorization of a mining plan of operation if the claimant complies with applicable regulations."¹⁰⁵

68. In a final environmental impact statement that accompanied the promulgation of the original 3809 Regulations in 1980 (prepared to analyze the potential environmental impacts associated with BLM's future implementation of the regulations), Interior explained why it was not adopting an alternative that would have imposed a higher level of protection for unavoidable impacts:

The general management standard under FLPMA is to prevent unnecessary or undue degradation Under [this] standard, *the Secretary is authorized*

¹⁰³ 45 Fed. Reg. 78,902, 78,905 (Nov. 26, 1980) (emphasis added).

¹⁰⁴ *CDCA Plan*, at 18 (1980) (at MV037137), Ex. 12; *see also infra* ¶¶ 98-102.

¹⁰⁵ BLM, *Withdrawal Petition/Application for Indian Pass Area of Critical Environmental Concern and Extended Management Area*, at 3 (June 1998) (at D-00142-0001-0007), Ex. 120.

*and required to take some steps to prevent or minimize those environmental impacts due to mining activity which are avoidable. However, it does not go so far as to authorize him to take steps to prevent any and all impacts. This is evident by the use of the word “unnecessary.” This implies he may permit some necessary impacts which cannot be prevented because steps necessary to prevent those impacts are too expensive (to the point of making an entire operation uneconomic), technologically impossible, or highly impractical. He can only hope to minimize those impacts.*¹⁰⁶

69. Mining inevitably changes the natural landscape, and Congress accepted this consequence in creating the “unnecessary or undue degradation” standard in FLPMA Section 302(b) and the “undue impairment” standard in Section 601 – both of which authorize impacts that are necessary and due as the result of conventional mining practices. These interpretations governed federal land-use management decisions throughout the 1980s and 1990s, interpretations that Respondent has expressly recognized as controlling and valid positions of the United States Government for this arbitration, and upon which Glamis relied to invest millions to develop the Imperial Project.

b. The 2001 3809 Regulation Revisions Ultimately Repudiated Secretary Babbitt’s Claimed “Mine Veto” Authority And Recognized That Mandatory Backfilling Was Infeasible

70. In May 1993, soon after arriving at Interior, Secretary Babbitt testified before a U.S. Senate Subcommittee that he found “it astounding that the basic principles of the Mining Law have remained largely intact for 121 years, and still govern hard rock mining and exploration on millions of acres of federal land. I believe that this law no longer serves the

¹⁰⁶ BLM, *Final EIS, Surface Management of Public Lands Under the U.S. Mining Laws*, at 8-5 (Aug. 1980), Ex. 13 (emphasis added); see also *id.* at 5-1 (“Even well regulated, carefully conducted mining activities will result in some degree of conflicts and unavoidable adverse impacts to resources other than mineral, such as rangeland, recreation, wildlife, etc.”) and 9-33 (“Applicable laws do not authorize denial of mining activities because of unavoidable impacts.”) (emphasis added).

public interest”¹⁰⁷ He urged Congress to replace the Mining Law with a different legislative scheme that would increase governmental control dramatically over an industry already highly regulated. After Congress failed to change the Mining Law in the manner advocated by Secretary Babbitt, the Secretary sought to take matters into his own hands. As Secretary Babbitt explained in a January 6, 1997 memorandum, in his view, it was “plainly no longer in the public interest to wait for Congress to enact legislation that corrects the remaining shortcomings of the [1980] 3809 regulations.”¹⁰⁸

71. Secretary Babbitt’s 1997 memorandum launched a major rulemaking process that led to Interior’s revisions of the 3809 Regulations on November 21, 2000, becoming effective on January 20, 2001.¹⁰⁹

72. On their face, these regulations acknowledged that they had limited applicability to pending plans of operations submitted under the 1980 3809 Regulations.¹¹⁰ Nonetheless, there are two aspects of this rulemaking worth noting as they underscore the reasonable investment-backed expectations that Glamis had when it pursued the Imperial Project. First, the rulemaking confirmed again that complete backfilling should not be mandated. Second, while the rulemaking sought to create a broad new discretionary authority under the “unnecessary and undue degradation” standard to deny development of mining claims on federal lands, this expansion was quickly overruled and rescinded.

¹⁰⁷ Hearing Before the Senate Subcomm. on Mineral Resources Development & Production of the Comm. on Energy & Natural Res. on S.775, Hardrock Mining Reform Act of 1993, at 43 (May 4, 1993).

¹⁰⁸ Memorandum from Interior Secretary Bruce Babbitt to Asst. Secretary, Land and Minerals, and Acting Director BLM, at 2 (Jan. 6, 1997), Ex. 80.

¹⁰⁹ See 65 Fed. Reg. 69,998 (Nov. 21, 2000).

¹¹⁰ See 43 C.F.R. § 3809.400(b) (“If your unapproved plan of operations is pending on January 20, 2001, then the plan content requirements and performance standards that were in effect immediately before that date apply to your pending plan of operations . . .”).

**(1) Congress Made Clear That BLM Should Reject
A Backfilling Presumption In The Revised 3809
Regulations**

73. During the 2000 and 2001 FLPMA rulemaking, BLM toyed with the idea of making some unspecified level of backfilling a rebuttable *presumptive* requirement. Ultimately, with a little Congressional prodding, Interior rejected this approach.¹¹¹ Specifically, in the FY 2000 appropriations bill for Interior, Congress directed BLM to ensure that its proposed regulations were not inconsistent with a National Academy of Science/National Research Council (“NAS/NRC”) Report on *Hardrock Mining on Federal Lands* published in 1999.¹¹²

74. The 1999 NAS/NRC Report relied on an earlier NAS/NRC report by the Committee On Surface Mining and Reclamation, issued in 1979, which stated that a requirement to restore coal open pits to their “approximate original contour” should not apply to hardrock (metallic) and other non-coal mining operations because it is “*generally not technically feasible . . . or has limited value because it is impractical, inappropriate, or economically unsound . . .*”¹¹³ Furthermore, the 1999 Report agreed with these earlier 1979 NAS/NRC conclusions and stated that:

[T]o restore the original contour where massive ore bodies have been mined by the open-pit method could incur costs roughly equal to the original costs of mining. Although technically possible, such backfilling of a large open pit would be of uncertain environmental and social benefit, and it would be economically impractical to mine some deposits under the current cost structures.¹¹⁴

¹¹¹ See 65 Fed. Reg. 70,047, 70,051 (Nov. 21, 2000).

¹¹² Pub. L. No. 106-113, 113 Stat. 1501A-210 (1999).

¹¹³ NAS/NRC, *HARDROCK MINING ON FEDERAL LANDS* 82 (1999) (quoting NAS/NRC, *SURFACE MINING OF NON-COAL MINERALS* xxviii (1979)), Ex. 169.

¹¹⁴ *Id.*

75. On June 13, 2000, the Western Governors Association expressed strong support for the conclusions in the 1999 NAS/NRC report, as well as significant concerns about Secretary Babbitt's pending rulemaking effort. In a formal WGA Policy Resolution, the Western Governors stated that the 1999 "NRC Report *Hardrock Mining on Federal Lands* . . . generally supports the states' position that better implementation of existing regulations would yield the most benefit and that no new, federal, one-size-fits-all regulations are needed."¹¹⁵

(2) The "Unnecessary Or Undue" Degradation Standard Is Substantially Revised In The 2001 Regulations, But Soon Rejected As Unreasonable And Unfair

76. A second aspect of the 2000 through 2001 FLPMA rulemaking was an attempt to incorporate a radically new interpretation of FLPMA's "unnecessary or undue degradation" standard – without any change in the underlying statutory authority – effectively to grant Interior discretionary authority to deny any mining plan of operations that would cause "substantial irreparable harm" ("SIH") to a range of "significant scientific, cultural, or environmental resource values of the public lands that cannot be mitigated."¹¹⁶ This interpretation would have completely reversed Congress' and Interior's long-held interpretation that FLPMA did not provide discretionary authority to deny a mine operation implementing all appropriate economically feasible mitigation measures. The purported authority for this new position was the very Solicitor's legal opinion that was prepared specifically to provide a legal rationale to

¹¹⁵ WGA Policy Resolution 00-013, *Regulation of Mining*, 2 (June 13, 2000), Ex. 209.

¹¹⁶ 65 Fed. Reg. 69,998, 70,122 (Nov. 21, 2000). Importantly, the SIH provision was not included in the proposed rule and was inserted into the final rule in a last minute effort to circumvent the public notice and comment provisions provided by the Administrative Procedure Act, meaning that the regulated industry was not aware of the intended SIH until it became subject to it. *See, e.g.*, 66 Fed. Reg. 54,834, 54,837 (Oct. 30, 2001).

deny the Imperial Project plan of operations even under the preexisting 1980 3809 Regulations. As discussed at ¶¶ 342-345 below, this opinion was later discredited and rescinded.

77. Interior’s own analysis of the SIH or “mine-veto” provision admitted that this new authority would be highly subjective and could be “extensively applied,” especially in the context of Native American “sacred site” claims:

[T]he determination of what constitutes substantial irreparable harm, significant resources, and effective mitigation is not always straightforward to BLM or the public. Of specific concern are activities that will potentially affect Native American sacred or religious values. *One can argue that religious significance, substantial irreparable harm, and effective mitigation are determined by those that hold those beliefs, not by BLM.* Analyzing the implementing and impact of this provision as it applies to sacred and religious values is further complicated by the fact that *most of the Native American religions are based on or incorporate the concept that each individual determines what is significant for herself/himself.* Because of these concerns, we assume that this provision as it relates to sacred and religious values will be extensively applied.¹¹⁷

78. Both the procedural deficiencies in promulgating such a radically different interpretation of “unnecessary and undue degradation” and the extreme negative effects such a subjective standard would have on mining investment in the West led BLM, acting under the direction of the new Interior Secretary Gale Norton to eliminate this new interpretation in the Fall of 2001. It explained¹¹⁸:

The final rule amends the definition of the term “unnecessary or undue degradation” by removing paragraph (4) which included in the definition conditions, activities, or practices that occur on mining claims or millsites . . . and result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be mitigated (the “SIH” standard). This paragraph, which was included in the final rule without first appearing in either of BLM’s proposals which preceded the November 2000 final rules, gave BLM

¹¹⁷ BLM, *Final EIS, Surface Management Regulations for Locatable Mineral Operations*, Vol. 1, at 126-27 (Oct. 2000), Ex. 211 (emphasis added).

¹¹⁸ See 66 Fed. Reg. 54,834 (Oct. 30, 2001).

authority to deny plans of operation even if all of the other standards could be satisfied. *Of all the provisions in the 2000 rules, this one paragraph had more projected economic impacts than all of the other sections combined. It is this provision that the Nevada Governor most strenuously objects to, and various plaintiffs [the State of Nevada and the National Mining Ass'n, et al.] have challenged. BLM has concluded that, as a matter of basic fairness, we should not have adopted this truly significant provision without first providing affected entities an opportunity to comment both as to its substance and as to its potential impacts. Because the potential impacts of the SIH standard are so dramatic, BLM is reluctant to continue to include such a provision at all. BLM is also concerned that it would be very difficult to implement the standard fairly as it relates to significant cultural resource values. In addition, the Interior Department Solicitor [William Myers] has issued an opinion (M-37007) addressing the legal authority of the SIH standard.*¹¹⁹

79. In fact, BLM has never resurrected or re-proposed the “substantial irreparable harm” standard which was excised from the 3809 rules in late 2001. Thus, the Glamis Imperial Project was the *only* project denied because of the asserted authority to deny mining operations that complied with all laws and regulations and the prudent operator mitigation standard. And, that denial was premised not on lawfully enacted regulations, but rather through a legal opinion that purported to find a discretionary mine veto authority where none has existed before or since.

4. California Laws And Regulations

80. California’s laws and regulations – from those specifically pertaining to mining to more general environmental policies – also created an environment friendly to mining and one which, before 2002, always had complemented federal policies that encourage and protect mining investments.

a. The California Surface Mining And Reclamation Act Sought To Further California’s Long Mining Heritage

81. Although the Glamis Imperial Project is located on federal public lands managed by BLM, the United States permits some limited and reasonable regulation under California

¹¹⁹ *Id.* at 54,837 (emphasis added).

State law. The contours between federal and state regulations is complex, particularly in the area of land use and the environment, but under U.S. Supreme Court precedent, states may implement reasonable environmental regulations and impose permit requirements on activities subject to federal law, so long as there is not an actual conflict between state and federal law.¹²⁰ California has done so in the mining area with the California Surface Mining and Reclamation Act and the California Environmental Quality Act.

82. In 1975, the California Legislature enacted the Surface Mining and Reclamation Act (“SMARA”), Pub. Res. Code §§ 2710 *et seq.*, which was intended to encourage “[t]he production and conservation of minerals . . . , while giving consideration to values relating to recreation, watershed, wildlife, range and forage, and aesthetic enjoyment.”¹²¹ Indeed, California’s legislators recognized as its first finding that “*the extraction of minerals is essential to the continued economic well-being of the state and to the needs of the society*, and that the reclamation of mined land is necessary to prevent or minimize adverse effects on the environment and to protect the public health and safety.”¹²²

**(1) Before The Measures At Issue Here, California’s
Mine Reclamation Standards Had Never
Imposed Complete Backfilling Requirements**

83. Under SMARA, before initiating mining operations, an operator generally must submit a reclamation plan and financial assurances to the county in which the mining will be

¹²⁰ *Granite Rock v. California Coastal Comm’n*, 480 U.S. 572, 589, 594 (1987); *see also South Dakota Mining Ass’n v. Lawrence County*, 155 F.3d 1005 (8th Cir. 1998) (holding that county ordinance prohibiting open-pit mining on federal lands conflicted with purpose of the federal Mining Law).

¹²¹ Cal. Pub. Res. § 2712(b) (West 1984).

¹²² *Id.* § 2711(a) (emphasis added).

conducted.¹²³ The subsequent permit-review process is integrated with the state’s environmental review process under CEQA (discussed below at ¶¶ 89-92).

84. SMARA defines “reclamation” as “the combined process of land treatment that minimizes water degradation, air pollution, damage to aquatic or wildlife habitat, flooding, erosion, and other adverse effects . . . and *may* require backfilling, grading revegetation, soil compaction, stabilization, or other measures.”¹²⁴ Pursuant to SMARA, the State Mining and Geology Board (“SMGB”), whose members are appointed by the Governor, is empowered to issue regulations specifying minimum statewide reclamation standards. “These standards shall apply . . . only to the extent that they are consistent with the planned or actual subsequent use or uses of the mining site.”¹²⁵

85. The SMGB had promulgated regulations specifying reclamation standards, but for over 25 years and until December 12, 2002, the SMGB’s minimum reclamation standards relating to backfilling did not provide that backfilling would be mandatory for any type of mine operation.¹²⁶ Indeed, the SMGB regulations only expressly contemplated backfilling in connection with standard construction and natural resource conservation projects and provided such backfilling must conform with the following standards:

(a) Where backfilling is proposed for urban uses (e.g., roads, building sites, or other improvements sensitive to settlement), the fill material shall be compacted in accordance with the Uniform Building Code . . . , the local grading ordinance, or other methods approved by the lead agency as appropriate for the approved end use.

¹²³ *Id.* §§ 2710 *et seq.*

¹²⁴ *Id.* § 2733 (emphasis added).

¹²⁵ *Id.*

¹²⁶ Cal. Code Regs. Tit. 14, § 3704.

(b) Where backfilling is required for resource conservation purposes (e.g., agriculture, fish and wildlife habitat, and wildlife conservation), fill material shall be backfilled to the standards required for resource conservation use involved.¹²⁷

86. The SMGB's regulations also specify certain "minimum acceptable practices" to be followed in surface mining operations.¹²⁸ These practices concern soil erosion control, water quality, protection of fish and wildlife habitat, disposal of mine rock, erosion and drainage, re-soiling, and re-vegetation.¹²⁹ None of the specified minimum practices suggest backfilling.

87. Not one of the many major metallic open-pit mines that operated in the California Desert area in the 1980s and 1990s, and through December 2002, were subjected to complete backfilling requirements.¹³⁰ Moreover, innumerable large-scale California mines (over 1,000), producing industrial mineral materials ranging from sand and gravel to limestone and borates, continue to freely operate today using mostly open-pit methods and none of the metallic ore mines conform to any mandatory backfilling standards.¹³¹

**(2) Nor Did Imperial County – The "Lead Agency"
– Ever Impose Mandatory Backfilling
Requirements**

88. SMARA provides that the applicable California county is normally the "lead agency" in charge of approving reclamation plans and financial assurances.¹³² Lead agencies in California, such as Imperial County, have adopted ordinances relating to the review process for a

¹²⁷ *Id.*

¹²⁸ *Id.* § 3503.

¹²⁹ *Id.*

¹³⁰ *See* Leshendok Report, ¶¶ 101-103, 165.

¹³¹ *See id.* ¶¶ 114, 165.

¹³² SMARA defines a "lead agency" as "the city, county, San Francisco Bay Conservation and Development Commission, or the board which has the principal responsibility for approving a surface mining operation or reclamation plan" Cal. Pub. Res. § 2728.

proposed reclamation plan and financial assurances.¹³³ Imperial County’s ordinances do not, and have never, imposed mandatory backfilling requirements to implement SMARA. The ordinances define “reclamation” as

The combined process of land treatment that minimizes water degradation, air pollution, damage to aquatic or wildlife habitat, flooding, erosion, and other adverse effects from surface mining operations, including adverse surface effects incidental to underground mines, so that mined lands are reclaimed to a usable condition which is readily adaptable for alternate land uses and create no danger to public health or safety. The process may extend to affected lands surrounding mined lands, and *may* require backfilling, grading, re-soiling,¹³⁴ re-vegetation, soil compaction, stabilization, and other measures.¹³⁴

Supporting the view adopted by these longstanding ordinances, in March 2003, Imperial County opposed the mandatory backfill standards adopted by the State Mining and Geology Board to block the Glamis Imperial Project, as discussed more fully at ¶ 380.¹³⁵

b. The California Environmental Quality Act Acknowledges That Projects May Be Approved Despite Significant Unmitigated Impacts

89. The California Environmental Quality Act (“CEQA”), Pub. Res. Code §§ 21000 *et seq.*, applies to projects undertaken, funded or requiring issuance of a permit by a public agency.¹³⁶ It requires public agencies to consider feasible alternatives or mitigation measures to lessen significant environmental impacts,¹³⁷ a statutory directive fulfilled by preparing an Environmental Impact Report (“EIR”) whenever a proposed project may have significant effects on the environment.

¹³³ *Id.* § 2774(a).

¹³⁴ Imperial County, CA., Code § 92001.01 (emphasis added).

¹³⁵ Letter from Jurg Heuberger, Planning Director, Imperial County Planning and Building Department, to John G. Parrish, Executive Officer, State Mining and Geology Board, at 2-3 (Mar. 17, 2003), Ex. 278.

¹³⁶ Pub. Res. Code § 21080(a).

¹³⁷ *Id.* § 21002.

90. Importantly, CEQA declares that it is California’s policy that if “economic, social, or other conditions make infeasible . . . project alternatives or . . . mitigation measures, individual projects may be approved in spite of one or more significant effects thereof.”¹³⁸

91. Under CEQA’s implementing regulations, the “lead agency” reviewing surface mining permits for metallic minerals pursuant to SMARA must produce an EIR that considers the environmental effects of the operation.¹³⁹ After analyzing the final EIR, the lead agency decides whether or how to approve or carry out the project.¹⁴⁰ Where both NEPA (federal) and CEQA (state) are triggered, a joint Environmental Impact Statement/Environmental Impact Report (“EIS/EIR”) is often prepared by the relevant federal and state agencies, as was done for Glamis’ Imperial Project.

92. Like the statute itself, CEQA’s implementing regulations make it clear that “[i]n deciding whether changes in a project are feasible, an agency may consider specific economic, environmental, legal, social, and technological factors.”¹⁴¹ Furthermore, “[a] public agency may approve a project *even through* the project would cause a significant effect on the environment if the agency makes a fully informed and publicly disclosed decision”¹⁴²

¹³⁸

Id.

¹³⁹

Cal. Code Regs. Tit. 14, § 15081.5(a)(4).

¹⁴⁰

Id. § 15092.

¹⁴¹

Id. § 15021(b).

¹⁴²

Id. § 15043 (emphasis added).

C. The Physical Landscape: The Recent And Past History Of Mining In The California Desert Provided Glamis With Confidence That The Imperial Project Would Be Approved

93. The Imperial Project is located in the CDCA, a 25-million acre multiple-use planning area created by Congress in 1976 pursuant to FLPMA¹⁴³ Of the 25 million acres, nearly half is owned and managed by the federal government.¹⁴⁴ The area encompasses much of Southern California and includes nearly 25 percent of the state's land base.¹⁴⁵ In addition to its impressive size, in the 1990s, the CDCA also served as an important economic engine for Southern California, with mining traditionally playing a multi-billion dollar role.¹⁴⁶ In fact, the CDCA has a long and rich mining history, one that is tied inextricably to the successful development of the Gold Rush State. Desert mining is not just a historical footnote, however, as Congress expressly recognized in 1976 when it devised management and land-use planning criteria for the CDCA, explicitly preserving mining as an appropriate activity within that portion of the California Desert.

94. In this section, we address first the extensive land-use planning exercise that followed Congress' creation of the CDCA and culminated in Congress' enactment of the California Desert Protection Act of 1994. Significantly, that Act set aside for preservation millions of acres, but left the Imperial Project site open for mining. Second, we address the numerous other open-pit gold (and other metallic) mines operating in the CDCA and beyond.

¹⁴³ 43 U.S.C. § 1781.

¹⁴⁴ *CDCA Plan*, at 5 (1980) (at MV037126), Ex. 12.

¹⁴⁵ See Figure 1, *supra*, page 14; BLM, *The California Desert: Why Mining is Important*, at 7 (Apr. 1991), Ex. 33.

¹⁴⁶ See, e.g., BLM, *The California Desert: Why Mining is Important*, at 8 (Apr. 1991), Ex. 33.

These operations demonstrate the reasonableness of the proposed Imperial Project and of Glamis' expectation of approval to exploit its mining claims.

1. Congress' Multiple-Use Objectives For The CDCA Were Achieved Through An Extensive Land-Use Planning Process

95. In furtherance of its "multiple-use" objectives, FLPMA required that BLM establish a comprehensive land-use management plan for the CDCA by 1980, based on a detailed study of the various economic and socioeconomic resources in the region.¹⁴⁷ In particular, FLPMA directed the BLM to:

[P]repare and implement a long-range plan for the management, use, development, and protection of the public lands within the California Desert Conservation Area. Such plan shall take into account the principles of multiple use and sustained yield *in providing for resource use and development, including*, but not limited to, maintenance of environmental quality, rights-of-way, and *mineral development*.¹⁴⁸

96. Armed with \$40,000,000 in funding¹⁴⁹ BLM set to work immediately on preparing the CDCA Plan. "The process started with the hiring of expert desert scientists; the establishment of the Desert Planning Staff Office; *and the beginning of one of the most intense resource inventories ever undertaken.*"¹⁵⁰ To assist in its planning efforts, BLM separated the California Desert into 106 planning units.¹⁵¹ It then analyzed each unit for cultural resources, Native American concerns, wildlife, vegetation, wilderness, grazing, wild horses and burros, recreation, and GEMs – Geology, Energy and Minerals.¹⁵²

¹⁴⁷ 43 U.S.C. § 1781(d).

¹⁴⁸ *Id.* (emphasis added).

¹⁴⁹ *Id.* § 1781(j) (for fiscal years 1977 to 1981).

¹⁵⁰ *Final EIS and Proposed Plan for the CDCA*, at E-3 (Sept. 1980) (at MV037527), Ex. 14 (emphasis added).

¹⁵¹ *Id.* at App. A, p. 119 (at MV038007).

¹⁵² *Id.* at App. A, pp. 119-20 (at MV038007 to MV038008).

97. The Glamis Imperial Project is located in Planning Unit 102(c),¹⁵³ an area that was known to contain “a wide variety of mineral resources,” including “more than five prospects for placer gold in the alluvium north and east of the Cargo Muchachos.”¹⁵⁴ Given the characteristics of that Planning Unit, the area was recommended by BLM for a land-status designation that protected “wildlife and vegetation, . . . and other natural and cultural values, *while allowing vehicle access for mineral exploration and development.*”¹⁵⁵

a. BLM’s Land-Use Classifications Recognized the Importance Of Mining In The CDCA

98. As required by FLPMA, BLM finalized the CDCA Plan in 1980.¹⁵⁶ At its core, the plan was intended to be “regional in scope,” considering “the social and economic factors and land resources in a broad spectrum” and providing for “multiple use and sustained yield” of the California Desert’s resources, while expressly recognizing that “[a]ll official action taken under this Plan shall be subject to valid existing [mineral] rights as provided for in” FLPMA.¹⁵⁷ As discussed above at ¶¶ 41-42, valid existing rights refers to the continued right to assert mineral claims on lands, based on the discovery of a valuable mineral deposit under the Mining Law of 1872, in the face of a withdrawal of those lands for purposes such as preservation.

99. The Plan established four land-use classifications that apply to nearly every acre (save 300,000) of the 12.1 million acres in the CDCA under BLM’s management. These classifications include Class C (Controlled Use) (Wilderness), Class L (Limited Use), Class M (Moderate Use), and Class I (Intensive Use). The Glamis Imperial Project is located on Class L

¹⁵³ *Id.* at App. A, pp. 481 (at MV038341).

¹⁵⁴ *Id.* at App. A, p. 480 (at MV038340)

¹⁵⁵ *Id.* at App. A, p. 479 (at MV038339) (emphasis added).

¹⁵⁶ *See generally CDCA Plan*, (1980) (at MV037119), Ex. 12.

¹⁵⁷ *Id.* at 11 (at MV037130).

lands,¹⁵⁸ a categorization that generally provides for “lower-intensity, carefully controlled multiple use of resources. . . .” As far as mining claims are concerned, however, the Plan subjects Class L, M and I lands to essentially the same management standards¹⁵⁹:

13. MINERAL EXPLORATION AND DEVELOPMENT	. . . All designated wilderness areas may be withdrawn from mineral entry at sometime following withdrawal, no new mining claims may be located and no new permits, leases, or material sales contracts may be issued subject to deadlines established by Congress . . .	<p>Locatable Minerals</p> <p>Location of mining claims is nondiscretionary. Operations on mining claims are subject to the 43 C.F.R. 3809 Regulations and applicable State and local law.</p> <p>NEPA requirements will be met.</p> <p>BLM will review plans of operations for potential impacts on sensitive resources identified on lands in this class. <i>Mitigation, subject to technical and economic feasibility, will be required.</i></p>
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100. As this chart from the CDCA Plan shows, the location of mining claims, whether in Class L, M, or I lands, is “nondiscretionary,” meaning that the government cannot prevent one from entering the public lands for purposes of locating mineral claims. This is consistent with the Mining Law of 1872 and MMPA, which encourage private citizens to go out onto public lands and prospect for and develop valuable mineral deposits.

101. The “sensitive resources” mentioned above in the context of FLPMA’s management guidelines for mineral exploration and development on Class L, M, and I lands – that may trigger heightened BLM scrutiny – include endangered species and historic properties, *e.g.*, cultural resources, as described in the preamble to the 1980 3809 Regulations (discussed at ¶ 67). As the preamble further recognizes, however, that possible damage to cultural resources does not provide BLM a ground on which to deny a mining plan of operations. Specifically,

¹⁵⁸ See *Final EIS/EIS for the Glamis Imperial Project*, at 1-15 (Sept. 2000), Ex. 210.

¹⁵⁹ *CDCA Plan*, at 18 (1980) (at MV037137), Ex. 12 (emphasis added); see also Leshendok Report, ¶ 21.

BLM stated: “*If, upon compliance with the National Historic Preservation Act, the cultural resources cannot be salvaged or damage to them mitigated, the plan must be approved.*”¹⁶⁰

102. Furthermore and consistent with the preamble’s language, the CDCA Plan provides that, with respect to mining claims on Class L lands, BLM

will focus only on the proposed operation and the mitigation requirements necessary to prevent unnecessary or undue degradation of the area of operations. Site-specific inventories are required, and if necessary, Section 7 consultation procedures for rare, threatened, or endangered species; and Section 106 compliance procedures for cultural resources will be followed. With the possible exception of receiving a jeopardy opinion from the U.S. Fish and Wildlife Service on federally listed species, *no mining operation under these regulations may be denied* unless a proven case of noncompliance with these regulations is demonstrated.¹⁶¹

Thus, under the 3809 Regulations and the CDCA Plan, a mining plan of operations could not be denied based solely on the impact to cultural resources or historic properties identified through the NHPA consultation process.

b. Cultural-Resource Surveys Played An Integral Role In BLM’s Development Of The CDCA Land-Use Classifications

103. As part of the CDCA planning process, BLM undertook an extensive cultural-resource survey of the region, but the cultural survey effort had begun well before the passage of FLPMA:

The process of cultural resource data collection, inventory, analysis, and report preparation geared toward desert planning has been ongoing since

¹⁶⁰ 45 Fed Reg. 78,902, 78,905 (Nov. 26, 1980) (emphasis added).

¹⁶¹ *CDCA Plan*, at 102 (1980) (at MV037220), Ex. 12 (emphasis added). The Glamis Imperial Project did receive a biological opinion from the U.S. Fish and Wildlife Service on March 28, 2000, which concluded that “it is the Service’s biological opinion that the Glamis Imperial Project, as proposed, is not likely to jeopardize the continued existence of the desert tortoise. Critical habitat for this species has been designated in the Chuckwalla unit (Imperial and Riverside counties), however, this action does not affect that area and no destruction or adverse modification of critical habitat is anticipated.” U.S. Fish and Wildlife Service Biological Opinion, at 14 (Mar. 28, 2000), *available in Final EIS/EIR for the Glamis Imperial Project*, at App. S (Sept. 2000), Ex. 210.

1969. . . . The major objective of the prehistoric and historic field studies is the location of cultural resources through a systematic sampling program in such a manner that the cultural resource specialists would be able to confidently predict other archaeological (prehistoric-historic) locations.¹⁶²

Survey efforts intensified after FLPMA's enactment, and included what cultural-resource expert, Dr. Lynne Sebastian, has identified as an "unprecedented effort "in the late 1980s" by a federal agency to consult with the Native American people in Southern California about places of concern to them" within the CDCA.¹⁶³

104. Analysis of cultural resources pursuant to FLPMA was based on consultations and interviews with several Native American tribes located in or near the CDCA, including the Quechan Tribe.¹⁶⁴

¹⁶⁵ The Tribe agreed, and in early 1978, BLM archeologists interviewed at least five elders of the Quechan Tribe in their native dialect.¹⁶⁶

¹⁶² *Final EIS and Proposed Plan for the CDCA*, at App. D, p. 9 (Sept. 1980) (at MV038471), Ex. 14.

¹⁶³ Sebastian Report, at 23; *see also id.* at 20 ("the substantial effort that BLM devoted to tribal consultation during the development of the California Desert Conservation Area Plan in the late 1970s . . . was unprecedented").

¹⁶⁴ *See* Memorandum from Lead Archaeologist to Desert Plan Director, at 1 (Feb. 17, 1978) (at MV040986), Ex. 2 (

); *see also* Letter from Neil Pfulb, California Desert Plan Program to Fritz Brown, Chairman of the Quechan Tribe (via cc) (Feb. 27, 1978) (at MV040989), Ex. 3.

¹⁶⁵ Memorandum from Eric Ritter to Neil Pfulb re Coordination Meeting with Chairman Brown of the Quechan Tribe (Mar. 3, 1978) (at MV040991), Ex. 6.

¹⁶⁶ Ethnographic Interview Notes No. 1 from March 1, 1978 (at MV041135), Ex. 4, No. 2 from March 1, 1978 (at MV041138), Ex. 5, No. 3 from March 12, 1978 (at MV041144), Ex. 9, No. 4 from March 9, 1978 (at MV041146), Ex. 7, and No. 8 from March 10, 1978 (at MV041154), Ex. 8.

105.

106.

107.

¹⁶⁷ Ethnographic Interview Note No. 1, at 2 (at MV041136), Ex. 4.

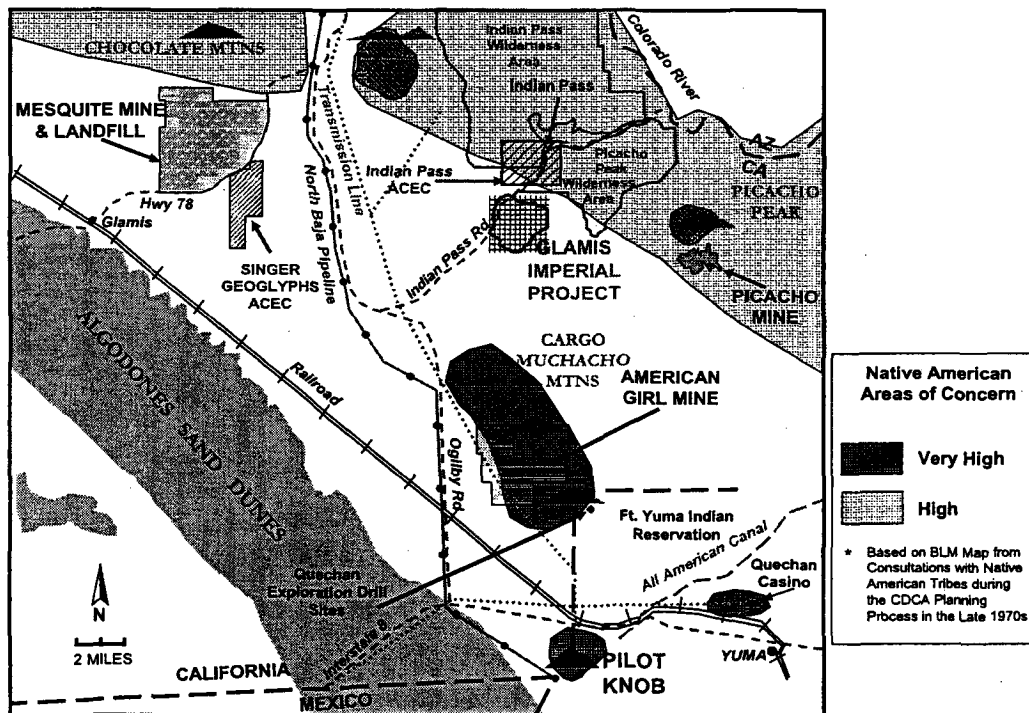
¹⁶⁸ Ethnographic Interview Note No. 2, at 5 (at MV041142), Ex. 5
– see Coordination Form, Interview with Quechan Elder (Sept. 28, 1977) (at MV040985), Ex. 1
)

¹⁶⁹ See, e.g., Coordination Form, Interview with Quechan Elder (Sept. 28, 1977) (at MV040985), Ex. 1;
Ethnographic Interview Note No. 3, at 1 (at MV041144), Ex. 9; Ethnographic Interview Note No. 8, at 1 (at
MV041154), Ex. 8.

¹⁷⁰ See Figure 4, *infra*, at page 53.

In contrast, the same is not true of the American Girl Mine and the Picacho Mine, as well as the Quechan Tribal gaming casino (developed between 1996 and 1997).¹⁷² In fact, the Quechan Tribe's own government-funded exploration activities in search of bulk mineable gold deposits in the early 1990s (discussed at ¶¶ 146-152 below) were conducted on the Quechan Tribal reservation very near the border of a "very high" area of concern encompassing the Cargo Muchacho Mountains, as depicted on the following schematic:

"NATIVE AMERICAN AREAS OF CONCERN"* (Figure 4)



171 BLM Map, *Native American Areas of Concern* (at MV036455), Ex. 309.

172 See Statement of Dan Purvance, ¶¶ 2-4, 19.

c. BLM Took Care In Establishing “Areas Of Critical Environmental Concern” Throughout The CDCA, Specifically To Protect Historic Resources And Scenic Values

108. Another important aspect of the CDCA Plan is that it established 75 special management areas, called “Areas of Critical Environmental Concern” (“ACECs”), in the California Desert to “protect and prevent irreparable damage to important historic, cultural, or scenic values.”¹⁷³ BLM established one ACEC in the area called “Indian Pass,” about one mile north of, but not encompassing, Glamis’ Imperial Project.¹⁷⁴ This designation was made because of certain “prehistoric values” in the Indian Pass area (including desert trails, inscribed cobbles, ceramic scatters, cleared circle, and lithic scatters).¹⁷⁵

109. Once the Indian Pass ACEC was established, BLM imposed certain additional management requirements in that area, including: (1) signage and user/vehicle access restrictions; (2) increased BLM field presence; and (3) restrictions on resource and firewood collection.¹⁷⁶ The 1980 CDCA Plan required BLM to take special steps to establish a site-specific management plan for the Indian Pass ACEC, which BLM published in 1987,¹⁷⁷ the very same year that Glamis first acquired its property interests in the Imperial Project mining claims.

110. According to the BLM’s 1987 Indian Pass ACEC Management Plan, the actual Native American cultural-resource values associated with the designated ACEC were “poorly known.”¹⁷⁸ This was despite the fact that the Plan was widely distributed for public comment

¹⁷³ *CDCA Plan*, at 123 (1980) (at MV037241), Ex. 12.

¹⁷⁴ *See Final EIS/EIR for the Glamis Imperial Project*, at 1-4 (Sept. 2000), Ex. 210; *see also* Figure 4 above.

¹⁷⁵ *CDCA Plan*, at tbl. 15 (at MV037243), Ex. 12; *see also Indian Pass Area of Critical Environmental Concern Management Plan*, at 1 (June 19, 1987), Ex. 17.

¹⁷⁶ *Id.* at tbl. 15.

¹⁷⁷ *See generally Indian Pass Area of Critical Environmental Concern Management Plan*, Ex. 17.

¹⁷⁸ *Id.* at 8.

and input, including to the Quechan Tribal historian, Lorey Cachora.¹⁷⁹ Indeed, at the time, the BLM expressly recognized that the ACEC had no special contemporary function:

Native American values associated with the ACEC are poorly known. The general region is associated with various rites and rituals. The original quantity of rock art and features once present within the ACEC indicates that the area was special. *There is no evidence that the area is used today by contemporary Native Americans*¹⁸⁰

BLM's statement represents an important and objective finding at a time by the United States when no mine proposal was pending for the Imperial Project and Glamis' mineral exploration was not yet occurring in earnest.

d. BLM's Decades-Long Planning Effort Culminated In The Passage Of The California Desert Protection Act Of 1994, Which Set Aside Millions of Acres Within The CDCA for Preservation And Confirmed That Other Lands Were Open For Multiple Uses Including Mining

111. In addition to establishing ACECs for special management, FLPMA also required BLM to study, inventory and recommend for preservation areas within the CDCA that qualified for protection under the Wilderness Act of 1964 (that is, high wilderness value roadless areas of at least 5,000 acres devoid of major man-made impacts and providing outstanding opportunities for solitude or recreation).¹⁸¹ To accomplish this mandate, BLM embarked on a three-part strategy, shortly after passage of FLPMA, which involved: (1) the identification of all roadless public land areas greater than 5,000 acres within the CDCA that also meet the statutory definition of "wilderness;" (2) the comprehensive study of each of these areas to determine their

¹⁷⁹ *See id.* at 8, 14 and 17.

¹⁸⁰ *Id.* at 8 (emphasis added).

¹⁸¹ 43 U.S.C. § 1782(a).

suitability or non-suitability as wilderness; and (3) the recommendation to Congress of areas that could qualify for wilderness designation.¹⁸²

112. In November 1978, BLM identified two potential wilderness areas north of the Imperial Project area for possible recommendation to Congress as permanent wilderness. These areas were designated “Area 355” (Indian Pass) and “Area 355A” (Picacho Peak).¹⁸³ After further study, both were included in the 1980 CDCA Plan as two of 45 potential wilderness study areas (“WSAs”) that the federal government could later consider for permanent protection.¹⁸⁴ Each of these areas was selected for their possession of a variety of “wilderness” values, including scenic (rugged terrain), cultural (historic Native American use), recreational (rockhounding, hunting) and wildlife (bighorn sheep) values.¹⁸⁵ As for their cultural values, each area was used historically by the Coyote Clan of the Quechan Indian Tribe, with the Indian Pass WSA containing “significant Native American sacred, mythological, and Quechan clan resources.”¹⁸⁶

113. In 1991, following BLM’s identification of possible wilderness areas and after nearly another decade of examination of CDCA lands – much of which focused on satisfying FLPMA’s directive to study the potential mineral resources of the proposed wilderness areas¹⁸⁷ – the Interior Secretary formally recommended to Congress the designation and protection of 62

¹⁸² See BLM, *California Desert Conservation Area Inventory and Study Program*, at 1 (Apr. 19, 1978), Ex. 10.

¹⁸³ BLM, *California Desert Conservation Area Wilderness Inventory Phase, Draft Descriptive Narratives*, at 180 (Nov. 1, 1978), Ex. 11.

¹⁸⁴ *CDCA Plan*, at 53-54 (MV037173), Ex. 12.

¹⁸⁵ *Final EIS and Proposed Plan for the CDCA*, at App. B, pp. 639-48 (Sept. 1980) (at MV038365 to MV038374), Ex. 14.

¹⁸⁶ *Id.* at App. B, pp. 641 and 646 (at MV038367 and MV03872), Ex. 14.

¹⁸⁷ See *CDCA Plan*, at 55 (1980) (at MV037174), Ex. 12; U.S. Geological Survey Bulletin 1711 *Mineral Resources of the Indian Pass and Picacho Peak Wilderness Study Areas, Imperial County, California*, at A1, Ex. 15.

wilderness study areas within the CDCA, including the Indian Pass and Picacho Peak wilderness study areas, discussed above.¹⁸⁸ The California State BLM Office issued a report entitled “*The California Desert: Why Mining is Important*”¹⁸⁹ to accompany the Secretary’s recommendation. It emphasized the importance of valuable mineral resources in the area, as well as warned about the adverse economic effects that could result from extensive withdrawals of land from mineral extraction:

Withdrawing large portions of the California Desert from mineral exploration and development for preservation as national parks or wilderness would be costly. The desert is recognized as a geologic storehouse of mineral wealth and contains a variety of mineral deposits that are important to both local and national economies, as well as, the nation’s security.

Because the California Desert is so highly mineralized, withdrawing large amounts of land from mineral exploration would have significant consequences. . . . Impacts to the economy of Southern California are obvious with up to \$3 billion at stake, annually. Industry demand to explore the lands remaining open to mineral exploration will increase in an attempt to replenish reserves as production decreases. . . . Substantial public land[-]management expenses will be incurred through valid existing rights determinations . . . and land acquisition costs. . . . Import dependence will increase.¹⁹⁰

114. In October 1994, after considering all of the cultural, wilderness and other resource values that had been raised in the decades-long land-use planning process, Congress enacted the California Desert Protection Act.¹⁹¹ The Act expressly withdrew from *any* development millions of acres in the CDCA, including the Indian Pass Wilderness and Picacho

¹⁸⁸ See Record of Decision, *California Wilderness Study Report* (June 12, 1991), Ex. 35.

¹⁸⁹ See BLM, *The California Desert: Why Mining is Important* (Apr. 1991), Ex. 33.

¹⁹⁰ *Id.* at 15-16.

¹⁹¹ See California Desert Protection Act of 1994, Pub. L. 103-433 (Oct. 31, 1994), 108 Stat. 4471.

Peak Wilderness.¹⁹² Congress made clear, however, that the *only* lands off-limits to mining (and other uses) were those expressly designated by the Act. Indeed, Congress warned against even the slightest expansion of those areas:

No Buffer Zones – The Congress does not intend for the designation of wilderness areas in section 102 of this title to lead to the *creation of protective perimeters or buffer zones* around any such wilderness area. The fact that nonwilderness activities or uses can be seen or heard from the areas within a wilderness area shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area.¹⁹³

115. The Act’s legislative history sheds further light on this “No Buffer Zone” provision, providing that “the fact that a mining operation can be seen or heard from a point within a wilderness area *is not sufficient to impose restrictions on that mining operation* that are not the result of provisions in other applicable law.”¹⁹⁴ In short, all remaining federal lands that were not included in designated wilderness areas and national parks – such as the Imperial Project area – were to remain open to multiple-use development, including mining.

116. Aside from creating wilderness areas, the 1994 California Desert Protection Act also ensured that the vast new wilderness and park designations did not restrict Native American access to such areas. Specifically, the Act provided: “In recognition of the past use of the National Park System units and wilderness areas . . . [designated] under this Act by Indian people for traditional cultural and religious purposes, the Secretary shall ensure access to such

¹⁹² *Id.* § 102(27), (49), 108 Stat. at 4476, 4478 (designating 7.7 million acres as wilderness and another 3 million acres added to the National Park System); *see also* Statement by President William J. Clinton (Oct. 31, 1994); U.S. Code Cong. & Admin. News, 103rd Congress, 2d Sess., v.6, at 3624-1 (1994).

¹⁹³ *Id.* § 103(d), 108 Stat. at 4481 (emphasis added).

¹⁹⁴ H.R. Rep. 103-498, at 55 (May 10, 1994) (emphasis added).

park system units and wilderness areas by Indian people for such traditional cultural and religious purposes.”¹⁹⁵

e. The Glamis Imperial Project Area Remained Open To Mineral Entry and Development After Completion Of The Congressionally Directed CDCA Planning Efforts And Passage Of The 1994 Act

117. Of particular significance with respect to the decades-long planning process recounted in the paragraphs above, the area of Glamis’ contemplated Imperial Project was neither included in any proposed or final designated wilderness area nor in any ACEC designation.¹⁹⁶ Rather, the Project was at all times located in an area left open for mineral entry and development, subject only to reasonable regulation. Given BLM’s extensive and precise planning in the CDCA, generally, and around the Imperial Project site specifically, a reasonably prudent mining operator should have been able to rely on these governmental processes in making sound exploration and mineral development investments in the CDCA.

2. California’s Golden Heritage – Metallic Mines In The CDCA

118. Not only did Glamis consider BLM’s extensive land-use planning process while considering how to develop its mining claims. It also considered its own and others’ experiences in the CDCA, which has a long and diverse mining history.

119. As described by BLM in 1980, the “CDCA was [once] a major producer of gold from high-grade vein systems, placers, and as a byproduct of base metal mining,” but “is now being actively explored by companies for large tonnage low-grade deposits”¹⁹⁷ (like the Imperial

¹⁹⁵ 108 Stat. at 4498; *see also* 16 U.S.C. § 410aaa-75.

¹⁹⁶ *See* Statement of K. McArthur ¶¶ 11-12; *see also* *Final EIS/EIR for the Glamis Imperial Project*, at 1-4 (Sept. 2000), Ex. 210; Figure 4, *supra*, page 53.

¹⁹⁷ *Final EIS and Proposed Plan for the CDCA*, at App. G, p. 116 (Sept. 1980, revised Jan. 1982) (at MV038702), Ex. 14.

Project deposits). At that time, BLM stated that the “reserves of gold in the CDCA [were] inferred to be large.”¹⁹⁸

120. As described by BLM in “*The California Desert: Why Mining is Important*,” the “California desert area is one of the most highly mineralized areas of the world.”¹⁹⁹ In fact, “81 mineral commodities that are mined, have been mined, or have the potential to be mined” exist in the California Desert.²⁰⁰ This environment has supported a vibrant mining industry, which in turn has provided a multi-billion dollar economic engine for the State of California and the United States.²⁰¹

121. And yet the “mining industry does not begin mining operations [in the CDCA] without careful thought. Mining activities represent extensive exploration efforts, planning and long-term, high-risk investments of considerable funds.”²⁰² These investments are prompted by society’s “demand for mineral commodities.”²⁰³ As explained by BLM, “[m]ining is a requirement of our lifestyle. . . . The mining industry exists because people want its products. Few people do not benefit from mining and fewer would prefer a lifestyle void of these benefits. A world without mining equates to a world without houses, telephones, televisions, automobiles, money, toothpaste or indoor plumbing.”²⁰⁴

¹⁹⁸ *Id.*

¹⁹⁹ BLM, *The California Desert: Why Mining is Important*, at 5 (Apr. 1991), Ex. 33.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 8 (in 1989 alone, for example, mining in the CDCA produced \$1.75 billion in mineral commodities, which translated into a \$3.09 billion contribution to the Southern California economy).

²⁰² *Id.* at 5.

²⁰³ *Id.*

²⁰⁴ *Id.*

a. “Gold! Gold!”²⁰⁵

122. Of all the available minerals in the California Desert, its citizens attach special significance to gold. As former Governor Edmund G. Brown stated on April 23, 1965, when designating gold as California’s official state mineral, “Selection of gold as our state mineral is acknowledgement of the intimate part it has played in the history of our people and of the fact that mining is a major California economic activity.”²⁰⁶

123. One cannot overlook the fact that much of this economic activity occurs on federal lands in California, such as in the CDCA. In 1989 (about the time that Glamis was putting additional resources into its mineral exploration program for its Imperial Project claims), production of gold in the CDCA represented 10 percent of the total national gold production – a figure that BLM predicted would increase “substantially” in the future through continued exploration and development.²⁰⁷ Indeed, in 1998, when the State of California celebrated its “Gold Discovery to Statehood Sesquicentennial,” nearly half of the active gold mines in the state were located in the CDCA.²⁰⁸

124. California also recognizes the evolution of the importance of gold in today’s high-technology economy: “Gold’s most important use is in computers, weaponry and aerospace. It is used where consistent, reliable performance under all conditions is essential. The electronics

²⁰⁵ California Department of Conservation Geological Survey, *Mineral Resources*, at http://www.consrv.ca.gov/cgs/geologic_resources/gold/index.htm (quoting Sam Brannan proclaiming the discovery of gold at Sutter’s Sawmill on the South Fork of the American River in 1848), Ex. 302.

²⁰⁶ *Id.*

²⁰⁷ BLM, *The California Desert: Why Mining is Important*, at 7 (Apr. 1991), Ex. 33.

²⁰⁸ Map of California Historic Gold Mines (1998), Ex. 97; *see also* Leshendok Report, ¶¶ 80, 114.

industry had tried to find substitute metals and alloys, but gold's exceptional resistance to corrosion and tarnish is still unequalled."²⁰⁹

125. California is not alone in placing special importance on gold. Gold is unique among mineral commodities in that it continues to play an important function in the world monetary system. Although the U.S. dollar was formally taken off the "gold standard" in 1971, the U.S. Government remains the largest governmental holder of gold in the world with reserves of over 8,135 tons.²¹⁰ Thus, gold has both historic, economic, and cultural value to the State of California and the United States. And it remains important on a more global scale.²¹¹

b. CDCA Gold Mines Approved After Passage Of FLPMA

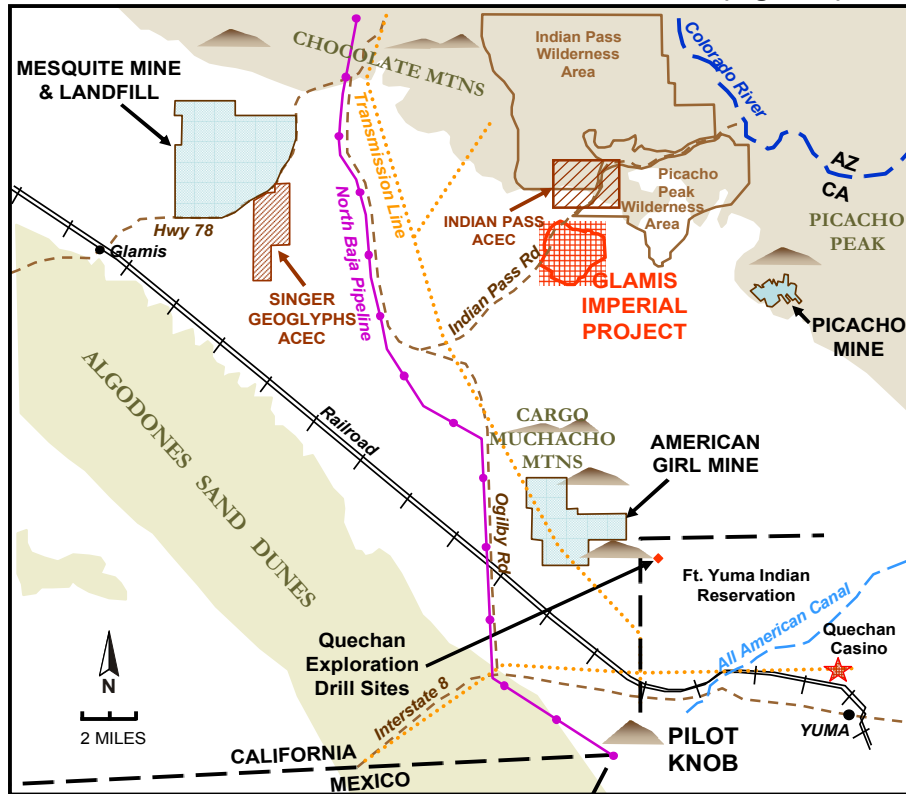
126. Consistent with its mining heritage, and in express reliance on BLM's congressionally mandated land-use planning efforts, several large open-pit gold mines within the CDCA were proposed, permitted, developed and began operations during the 1980s and 1990s. Several of these mines existed within a dozen miles of the proposed Imperial Project, as depicted in the following schematic:

²⁰⁹ California Department of Conservation Geological Survey, *Note 12 – Gold, California State Mineral*, at 1 (revised Apr. 2002), Ex. 221.

²¹⁰ See World Gold Council, *World Official Gold Holdings*, at 1 (March 2006), at <http://www.gold.org/value/stats/statistics/archive/index.php>, Ex. 300. In 1999, at a hearing of the U.S. House Committee on Banking and Financial Services, former Federal Reserve Chairman Alan Greenspan was asked whether the United States should sell its gold reserves. Chairman Greenspan replied that the United States maintains its gold reserves because "gold is always accepted and is the ultimate means of payment and is perceived to be an element of stability in currency . . . and that historically has always been the reason why governments hold gold." U.S. House of Representatives, Committee on Banking and Financial Services, *The Architecture of International Finance*, Testimony of Alan Greenspan, at 74 (May 20, 1999), now in legal sources. Former U.S. Treasury Secretary Rubin, also present at that hearing, fully agreed with Mr. Greenspan on this point. *Id.*

²¹¹ The International Monetary Fund ("IMF") is the third largest official holder of gold in the world with over 3,217 tons in reserve. See *World Official Gold Holdings*, at 1, Ex. 300. Collectively, the Central Banks of the world's nations and the IMF hold more than 30,000 tons of gold. *Id.* To put that figure in context, all of the gold mined in the world in 2005 totaled only 2,494 tons. See World Gold Council, *Production Statistics*, at http://www.gold.org/value/stats/statistics/gold_demand/index.html, Ex. 300.

IMPERIAL COUNTY DEVELOPMENT ACTIVITIES (Figure 5)



(1) The Mesquite Mine

127. BLM permitted the Mesquite Mine in 1985 on Class M lands within the CDCA ten miles to the west of Glamis’ Imperial Project.²¹² The mine operated throughout the 1990s as California’s largest gold producer, with a total land disturbance roughly three times the size of the Imperial Project (4,000 acres vs. 1,362 acres).²¹³ Like the proposed Imperial Project, gold-bearing ore was extracted from three large open pits and processed onsite using the heap-leach

²¹² See, e.g., *Final Plan of Operations for the Proposed Mesquite Mine Expansion*, at 3 (Nov. 23, 1998) (at CON005866), Ex. 158; see also Leshendok Report, ¶¶ 80, 87.

²¹³ See Leshendok Report, ¶¶ 87, 96. As explained at ¶¶ 230-238 below, Mr. Leshendok compared the proposed Imperial Project to other similarly situated open-pit mines in the California Desert and greater Basin and Range Geologic Province.

process.²¹⁴ Given its success, a major expansion of the mine was proposed in 1998²¹⁵ and approved by BLM as its “preferred alternative” in 2002.²¹⁶

128. At no time was complete backfilling of all open pits required at the Mesquite Mine.²¹⁷ Instead, BLM imposed “mitigation measures” designed to “ensure that all reasonable means to avoid or reduce environmental impacts have been adopted into the project,”²¹⁸ including requiring the mine operator to partially backfill the “pits to the maximum extent practicable,” re-contour and re-seed disturbed areas, scarify compacted soils, and leave the mine pit walls as steep as possible near the projected water table “to minimize the development of vegetation that could serve as dietary pathways for ingestion of harmful compounds by birds and animals. . . .”²¹⁹ Special management measures were also required for protecting and enhancing desert tortoise habitat.²²⁰

129. Like much of the CDCA, the Mesquite Mine area contains numerous Native American historic trails and related cultural features.²²¹ In fact, it directly abuts the Singer Geoglyph ACEC, a special management area established by BLM in 1986 to protect unique Native American cultural artifacts.²²²

²¹⁴ See, e.g., *Final Plan of Operations for the Proposed Mesquite Mine Expansion*, at 3-4 (Nov. 23, 1998) (at CON005866 to CON005867), Ex. 158.

²¹⁵ See *id.* at 1 (at CON005864).

²¹⁶ See Record of Decision, *Mesquite Mine Expansion*, at 4 (July 16, 2002) (at CON005232), Ex. 236 (identifying the expansion of the Big Chief and East Rainbow open pits as BLM’s preferred alternative).

²¹⁷ See, e.g., *Mesquite Mine Closure and Reclamation Plan*, at B-26 to B-27 (Nov. 1998) (at CON005928 to CON005929), Ex. 153 (“backfilling of the remaining open pits may not be economically or practically feasible”).

²¹⁸ See Record of Decision, *Mesquite Mine Expansion*, at 8 (July 16, 2002) (at CON005236), Ex. 236.

²¹⁹ See *id.* at 22 (at CON005250).

²²⁰ See *id.* at 23-29 (at CON005251 to CON005257).

²²¹ See Sebastian Report, at 36-37.

²²² See Sebastian Report, at 37-38; see also Leshendok Report, ¶¶ 90-91.

(2) The American Girl Mine

130. Another noteworthy major gold-mining complex, the American Girl Mine and related projects, operated on Class M lands within the CDCA just eight miles to the southeast of the proposed Glamis Imperial Project.²²³ The mine is located in the Cargo Muchacho Mining District, the oldest mining district in California,²²⁴ and includes seven open pits and related heap-leach processing facilities, resulting in a total land disturbance approximately half the size of the Imperial Project (709 vs. 1,362 disturbed acres).²²⁵ BLM approved multiple operating proposals for the American Girl Mine complex throughout the 1980s and 1990s, the latest approval for the Oro Cruz open pit expansion coming in 1995.²²⁶

131. As with other mines in the area, BLM did not impose complete backfilling requirements at the American Girl Mine.²²⁷ Instead, it required the imposition of mitigation measures to “enhance re-establishment of a productive ecosystem by re-establishing wildlife habitat and achieving visual compatibility with the surrounding landscape.”²²⁸ Some of these measures included grading roads to match the natural contours “to the maximum extent practicable,” constructing waste rock piles and excavating the open pits to achieve slope angles designed to minimize soil movement, partially backfilling the “Queen Pit” to the “maximum extent practicable,” leaving the pit ramps accessible for use by wildlife, and re-establishing

²²³ See, e.g., *Final EIS for the Oro Cruz Operation of the American Girl Mining Project*, at 1 (Nov. 1994), Ex. 56; see also Leshendok Report, ¶¶ 80, 92.

²²⁴ See *Final EA/EIR for the Proposed American Girl Mining Project*, at ES-7 (Nov. 1988) (at CON007329), Ex. 24.

²²⁵ See Leshendok Report, ¶¶ 92, 96.

²²⁶ See *Final EIS for the Oro Cruz Operation of the American Girl Mining Project*, at 1 (Nov. 1994), Ex. 56; see also Leshendok Report, ¶ 92.

²²⁷ See, e.g., *Final EIS for the Oro Cruz Operation of the American Girl Mining Project*, at S-3, S-11 (Nov. 1994), Ex. 56 (rejecting complete backfilling as a project alternative).

²²⁸ Record of Decision, *Oro Cruz Operation*, at 8 (Jan. 30, 1995) (at GLA028302), Ex. 61.

vegetation that that did not require long-term maintenance.²²⁹ Special management measures were also required for protecting and enhancing desert tortoise habitat.²³⁰

132. Much of the American Girl mining complex existed in the Cargo Muchacho Mountains within what BLM identified in the late 1970s as being an area of “very high” Native American concern.²³¹ In fact, BLM expressly allowed impacts to sites eligible for the National Register of Historic Places as part of the mining plan approval process.²³²

(3) The Picacho Mine

133. Most importantly, a third major open-pit gold mine operated on CDCA Class L lands just eight miles to the east of the Glamis Imperial Project²³³ in an area of “high” Native American concern as identified by BLM in the late 1970s.²³⁴ That mine, the Picacho Mine, was operated by Glamis throughout the 1980s and 1990s. Its success played an integral role in the company’s decision to invest significant financial resources and human capital in pursuing the Imperial Project, the operation of which was projected to be very similar to the Picacho Mine operations.²³⁵

²²⁹ *Id.* at Ex. A, pp. 2-4 (at GLA028306 to GLA028308).

²³⁰ *Id.* at Ex. A, pp. 6-10 (at GLA028310 to GLA028314).

²³¹ *See* Figure 4, *supra*, at page 53.

²³² *See Final EA/EIR for the Proposed American Girl Mining Project*, at ES-9 to ES-10 (Nov. 1988) (at CON007331 to CON007332), Ex. 24.

²³³ *See Final Supplemental EIR for the Proposed Phase 2 Dulcinea Pit Expansion at the Picacho Mine*, at 1-3 (Oct. 1991) (at CON007136), Ex. 40.

²³⁴ *See* Figure 4, *supra*, at page 53.

²³⁵ *See* Statement of K. McArthur, ¶¶ 3-4; *see also* Leshendok Report, ¶ 86.

134. Glamis had no difficulty securing BLM's or any other agency's approval for that mine, in compliance with applicable federal, state and local laws and ordinances.²³⁶ In fact, based in part on its experience at the Picacho Mine, the company received an "Excellence in Reclamation Award" from the California Mining Association in 1997 for its innovative reclamation planning and techniques in a desert environment – an honor that was also acknowledged on May 13, 1998 by the California Legislature, Member Resolution No. 1130.²³⁷ Glamis' recognized "innovative" techniques included: (1) "land-sculpting" the straight engineered slopes to mimic desert patterns of shape and texture as a reclamation technique to reduce the visual impacts of man-made mining features, (2) re-contouring to soften the hard-edged slopes during the final grading of ore heaps and overburden stockpiles, with bulldozer operators becoming "artists" who create natural-looking landforms from the reclaimed stockpiles, (3) selecting soil to help waste-rock stockpiles to visually blend in with the desert backdrop, and (4) backfilling three of four pits at its Picacho Mine to reduce the "footprint" impact of the mine and the mine's impact on future habitat and recreational use.²³⁸ None of the recognized "innovative" reclamation techniques included complete backfilling of all open pits.²³⁹

²³⁶ See Leshendok Report, ¶ 84.

²³⁷ Congressman Battin, California Legislature Assembly Member Resolution No. 1138 (May 13, 1998) (MV005677), Ex. 114; *see also* Leshendok Report, ¶ 85.

²³⁸ Congressman Battin, California Legislature Assembly Member Resolution No. 1138 (May 13, 1998) (MV005677), Ex. 114.

²³⁹ See Statement of K. McArthur, ¶ 2; *see Final Supplemental EIR for the Proposed Phase 2 Dulcinea Pit Expansion at the Picacho Mine*, App. G, at 6 (Oct. 1991) (at CON006701), Ex. 41.

(4) Other Gold Mines In The CDCA

135. In addition to the Mesquite, American Girl, and Picacho mines discussed above, at least four other large, open-pit gold mines either operated and/or were approved to operate on CDCA lands in the 1980s and 1990s in the general vicinity of the Glamis Imperial Project – the Briggs, Castle Mountain, Soledad Mountain and Rand mines.²⁴⁰ The proposed Glamis Imperial Project was not unusually large in comparison to these other approved and operating open-pit gold mine, as depicted by the following table:²⁴¹

<i>Mining Project</i>	<i>Status</i>	<i>CDCA Class</i>	<i>Acres Disturbed</i>	<i>Open pit #</i>
Mesquite	Active	Class M	4,000	5
Rand	Active	Class M	1,272	3
American Girl	Closed	Class M	709	7
Soledad Mt.	Approved	Class M	930	1
Picacho	Closed	Class L	349	4
Briggs	Active	Class L	505	3
Castle Mt.	Active	Class L	1,375	3
Glamis	Proposed	Class L	1,362	3

136. Of these, the Rand Mine is of particular significance here, as it was another mine operated by Glamis throughout the 1980s and 1990s.²⁴² The Rand Mine was located in Kern County on Class M lands within the CDCA²⁴³ and was comparable in size to the Imperial Project

²⁴⁰ See Leshendok Report, ¶¶ 95-96. In fact, a total of twelve open-pit gold mines were identified in the CDCA in the 2000 Final EIS/EIR for the Glamis Imperial Project, six of which – like the Imperial Project – were located on Class L lands. See *id.* ¶ 80; see also Federal Land Mining & Related Project Decisions in the CDCA (GLA052882), Ex. 305 (listing 12 project approvals between 1985 and 1997).

²⁴¹ Leshendok Report, ¶ 96.

²⁴² See *Final EIS/EIR for the Rand Project*, at ES-6 (Apr. 1995), Ex. 64.

²⁴³ See *id.* at 1-9.

in terms of total land disturbance (1,272 acres vs. 1,362 acres).²⁴⁴ In 1995, the company obtained its last operating approval for that mine, when BLM selected a major expansion of Glamis' existing open-pit, heap leach facilities as its "preferred alternative" pursuant to NEPA.²⁴⁵ Major open-pit mining operations ceased in 2003 at the Rand Mine, but gold was still being produced at the Mine using heap-leach processing methods through 2005.²⁴⁶

137. As with the other mines in the CDCA, BLM and Kern County, California never imposed complete backfilling requirements at the Rand Mine.²⁴⁷ In fact, as recently as 1995, such measures were expressly rejected by BLM and Kern County as a viable alternative for the proposed expansion, after "[p]articular attention was given to the issue of backfilling waste material within the project pits,"²⁴⁸ because "the potential loss of natural resources and economic disadvantages of maximum pit backfilling appear to be substantially greater than the potential environmental advantages" of that option.²⁴⁹ As explained, "backfilling essentially doubles the costs of loading and hauling material, potentially making an otherwise profitable mine operation uneconomical to develop and operate. Backfilling would also foreclose opportunities for future mining of pit walls and floors."²⁵⁰ Thus, instead of complete backfilling, BLM and Kern County required standard reclamation practices to be followed at the Rand Mine, "including stabilization and revegetation of disturbed areas, control of cuts and fills, salvage of certain native species on

²⁴⁴ See Leshendok Report, ¶¶ 81, 96.

²⁴⁵ See *Final EIS/EIR for the Rand Project*, at 3-2, Ex. 64.

²⁴⁶ See Leshendok Report, ¶¶ 81, 96.

²⁴⁷ See Record of Decision, *Rand Project*, at 3 (June 9, 1995) (at GLA028083), Ex. 67 ("Backfilling of project pits is neither proposed or required.").

²⁴⁸ *Id.* at 6 (at GLA028086).

²⁴⁹ See *Final EIS/EIR for the Rand Project*, at 3-19 (Apr. 1995), Ex. 64. For a discussion of complete backfilling analyses performed for other mines in the California Desert, see ¶¶ 385-390 *infra*.

²⁵⁰ See Record of Decision, *Rand Project*, at 6 (June 9, 1995) (at GLA028086), Ex. 67.

the site, and development of a vegetation and monitoring program,”²⁵¹ in addition to the standard measures to protect the desert tortoise.²⁵²

(5) Other California Open-Pit Mines

138. Glamis’ reasonable expectations have also been formed by its knowledge of other mine development activity within the CDCA. While gold is certainly an important commodity in the California Desert, the CDCA contains dozens of other mineral commodities contributing to the billion dollar mineral industry in the desert.²⁵³ For example, the largest open-pit mine in California is operated in the CDCA in Kern County by Rio Tinto Borax.²⁵⁴ The mine has operated for decades and it supplies nearly half of the world’s demand for borate, which is used extensively by the timber and agriculture industry and is a key ingredient in many detergents, flame retardants, ceramics, glass, fiberglass, and other products.²⁵⁵

139. According to the California Department of Conservation, in 2004, there were about 1,156 active mines producing non-fuel minerals in California, compared to about 955 in 1997.²⁵⁶ California also ranked first among all the states in non-fuel mineral production, and it led the nation in production of sand and gravel and about thirty (30) types of industrial minerals.²⁵⁷ There are no readily available public statistics of just how many of industrial mineral and aggregate mines are open-pit operations, but according to mining regulatory expert Mr. Thomas V. Leshendok, “a reasonable estimate would be that most of the mining operations

²⁵¹ *Id.*

²⁵² *Id.* at 5 (at GLA028085).

²⁵³ See BLM, *The California Desert: Why Mining is Important*, at 8 (Apr. 1991), Ex. 33.

²⁵⁴ See Leshendok Report, ¶ 114; Borax, *Borax Company Background*, at <http://www.borax.com/borax1.html>.

²⁵⁵ Borax, *Borates in Use*, at <http://www.borax.com/borates2.htm>.

²⁵⁶ Leshendok Report, ¶ 114 (citing California Department of Conservation statistics).

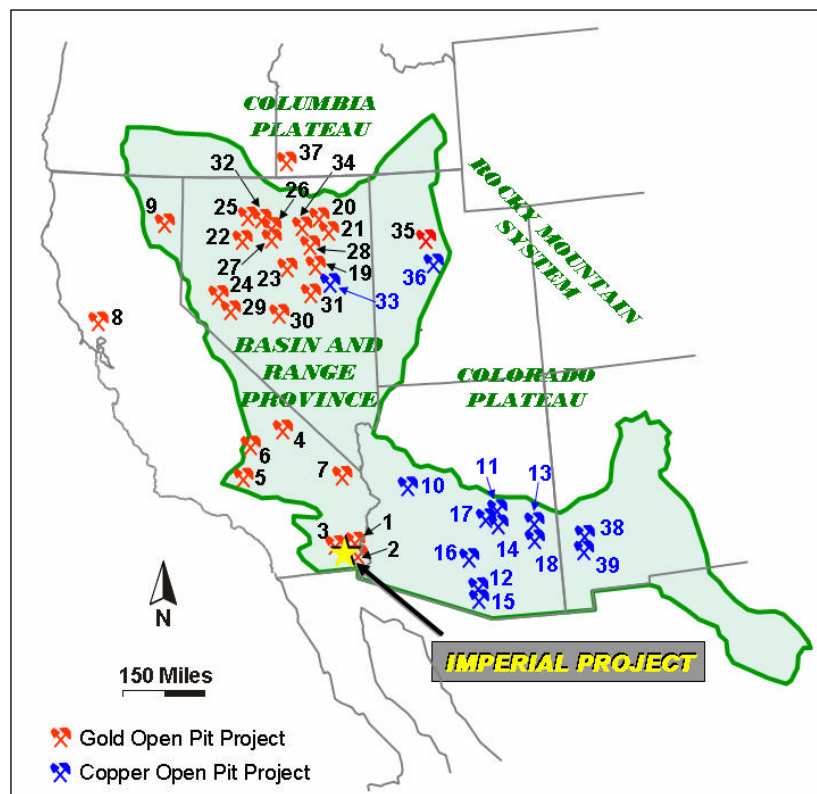
²⁵⁷ *Id.*

include open pit operations. Open pit mining is a common method of mining industrial minerals throughout the U.S.²⁵⁸

c. Other Metallic Open-Pit Mines In The “Basin and Range Geologic Province”

140. The California Desert mines – including Glamis’ proposed Imperial Project – do not exist in isolation but are actually part of the broader Basin and Range Geologic Province, a region that is described by the U.S. Geological Survey as an area of similar topographic and landform patterns.²⁵⁹ This Province covers parts of California, Arizona, Nevada, Utah and Idaho as depicted on the following schematic:²⁶⁰

Major Mines in the Basin and Range Geologic Province in 2004 (Figure 6)



²⁵⁸ *Id.*

²⁵⁹ *Id.* ¶ 118.

²⁶⁰ *Id.* ¶ 118 and Att. 4.

141. The Basin and Range Province is the third largest gold producing area in the world, after South Africa and Australia.²⁶¹ In fact, in 2002, nineteen of the thirty largest gold producing mines in the United States were open-pit mines within the Basin and Range Geologic Province.²⁶² The size of the open-pit metallic mines in the Basin and Range Province range from the Bingham Canyon Mine near Salt Lake City, Utah, with a main pit roughly 2.5 miles wide, to open pits of just several acres. In fact, Bingham Canyon is the largest man-made excavation on earth and is primarily an open-pit copper mine, but in 2002, for example, it was also the 6th largest producer of gold in the United States.²⁶³

142. In addition to the California Desert mines, major open-pit metallic mining activity takes place in the adjacent State of Nevada. For example, there were 33 producing open-pit gold and copper mining operations in Nevada in 1997, including three owned and operated by Glamis.²⁶⁴ In fact, Glamis recently sought and gained approval of BLM and the State of Nevada for a major expansion of its Marigold Mine in Humboldt County, Nevada. In a 2003 Final EIS for the Marigold Millenium Expansion Project, the Glamis Marigold Mining Company proposed expanding the existing project (1349 acres disturbed) by 717 new acres while adding two new pits.²⁶⁵ BLM approved the Marigold Millenium Expansion in February 2004, bringing the total number of permitted pits at the Marigold Mine to seven, some of which would be partially backfilled.²⁶⁶ Glamis Gold Ltd. has also operated the Dee (Elko County, Nevada) and Daisy

²⁶¹ *Id.* ¶ 118 (citing statistics from the Nevada Division of Minerals).

²⁶² *Id.* ¶ 120 (citing Indexmundi, *Leading Gold-Producing Mines in the United States in 2002*, at http://www.indexmundi.com/en/commodities/minerals/gold/gold_table03).

²⁶³ *Id.* ¶ 119 (citing Indexmundi, *Leading Gold-Producing Mines in the United States in 2002*, at http://www.indexmundi.com/en/commodities/minerals/gold/gold_table03).

²⁶⁴ *Id.* ¶ 123 (citing statistics from the Nevada Bureau of Mines and Geology).

²⁶⁵ *Id.* ¶ 123 (citing personal communication with David L. Hyatt, Vice President, Glamis Gold).

²⁶⁶ *Id.*

(Esmeralda County, Nevada) open-pit gold mines in Nevada, where the open pits were partially backfilled.²⁶⁷

143. Like its experience at the Picacho Mine, Glamis proved its ability as an environmentally sound mining company by winning reclamation awards at two of its Nevada mines. In 1998, for example, the State of Nevada awarded the Marigold Mine a “Nevada Excellence in Mine Reclamation Award” for wildlife habitat enhancement.²⁶⁸ In 2001, the State of Nevada awarded the Dee Gold Mine a “Nevada Excellence in Mine Reclamation Award” for its overall mine reclamation.²⁶⁹ As discussed, neither of these mines required nor implemented complete backfilling. In fact, in a 1997 review of all gold-mining operations in Nevada, BLM determined that “[n]o major mine pits in Nevada have been completely backfilled.”²⁷⁰

144. As the discussion above demonstrates, open-pit mining of metallic and other non-fuel industrial minerals without complete backfilling has been a conventional and accepted practice for many decades in the United States, particularly in the Basin and Range Geologic Province. Glamis’ Imperial Project was entirely consistent with the other operating mines in this Province, including five of its own projects (Rand, Picacho, Marigold, Dee and Daisy).

d. The Quechan Tribe’s Gold Exploration

145. Contributing to Glamis’ reasonable investment-backed expectations during its initial development of the Imperial Project was the Quechan Tribe’s own development activity in the CDCA region. In fact, at the same time that Glamis was beginning to invest significant

²⁶⁷ *Id.*

²⁶⁸ *Id.* ¶ 123 (citing Nevada Commission on Minerals).

²⁶⁹ *Id.*

²⁷⁰ *Id.* ¶ 123 (quoting Memorandum from the Deputy State Director, Minerals Management Division, to Nevada State Director, Bureau of Land Management, re Backfilling of Open Mining Pits in Nevada, at 1 (Oct. 9, 1998)).

resources in exploring and developing its Imperial Project mining claims, the Quechan Tribe undertook an aggressive drilling and mineral exploration program on its reservation just 10 miles to the southeast of the Project site, relatively close to Pilot Knob. As described above (at ¶ 106), Pilot Knob was one of the few specific locations identified as important by the Quechan during the cultural-resource consultations with BLM during formulation of the CDCA Plan pursuant to FLPMA.

146. In 1988, the Quechan Tribe sought federal funding from Interior's Bureau of Indian Affairs ("BIA") to evaluate potential bulk mineable gold deposits on the Fort Yuma Indian Reservation. It submitted a grant application to Interior's BIA, seeking \$110,000 to fund an exploration drilling program.²⁷¹ The BIA approved funding in 1989 and supported an extensive field-reconnaissance and drilling program between 1990 and 1992, as discussed more fully below.

147. In its "Statement of Need" for the grant application, the Tribe justified exploration in typical economic terms, explaining that a more

detailed investigation is needed to determine the potential for gold mineralization and possible mining of that resource. Such detailed information on gold mineralization will enable the Quechan Tribe to evaluate options and negotiate from a position of strength in discussions of coventures with mining companies. *The Quechan Tribe has a great need for economic development of natural resources such as gold and sand and gravel In addition to the need for Tribal income, the Quechan Tribe has a serious unemployment problem and a critical need for the new jobs that economic development could provide.*²⁷²

148. The Tribe's application also contained a formal Resolution of the Quechan Indian Tribe from February 1988, which was approved unanimously, seeking federal funding for a

²⁷¹ See Quechan Indian Tribe, *PL 93-638 Grant Application for Gold Resource Evaluation on the Fort Yuma Indian Reservation* (Feb. 18, 1988), Ex. 21.

²⁷² *Id.* at 1 (emphasis added).

mineral exploration program “to determine whether significant gold deposits exist on the ‘Reservation.’”²⁷³ The Resolution indicated that the Fort Yuma Reservation was located “just to the South of several *recently-discovered, large, bulk mineable gold deposits*, and both geological and geophysical data suggest that features associated with *the gold deposits may trend through the Reservation . . .*”²⁷⁴ One of those “neighboring gold deposits” was identified as being located near Indian Pass in the Tribe’s grant application.²⁷⁵ This deposit represented what was eventually recognized as part of the Imperial Project mining claims. Another identified deposit was one near the Picacho Mine. The Tribe’s application expressed no objections to any of these neighboring gold development projects.

149. In the cover letter accompanying the Quechan BIA grant application, the President of the Tribe indicated that the Tribe was looking forward to exploring “this exciting new economic development possibility.”²⁷⁶ The Tribe’s optimism was also reflected in the “Statement of Benefits” accompanying the grant application:

The Quechan Tribe, as a result of this contract, will have an accurate assessment of *the presence of bulk-mineable gold resources on the Fort Yuma Reservation. . . .* The Tribe, with this resource information, will be able to make informed decisions regarding the development of its indicated gold resources, if any. Further, this information will help the Tribe to negotiate from a position of strength if it chooses to enter into joint venture or leasing agreements. *If successful development of gold resources follows as a result of this study, the Tribe will realize the benefits of additional jobs for reservation residents and additional income to the Tribe.*²⁷⁷

²⁷³ Quechan Indian Tribe, *Resolution R-12-88*, at 1 (Feb. 11, 1988), Ex. 20.

²⁷⁴ *Id.* (emphasis added).

²⁷⁵ *Grant Application for Gold Resource Evaluation on the Fort Yuma Indian Reservation*, at App. A and Fig. 1, Ex. 21.

²⁷⁶ Letter from Lorraine W. White to Superintendent, BIA Fort Yuma Agency, at 1 (Feb. 18, 1988), Ex. 21.

²⁷⁷ *Grant Application for Gold Resource Evaluation on the Fort Yuma Indian Reservation*, at 4, Ex. 21 (emphasis added).

150. On May 23, 1988, the BIA's Phoenix Area Director recommended approval of the Tribe's proposed mineral exploration program because "[g]eological and geophysical data suggests features associated with the gold deposits in and around the Cargo Muchacho and Chocolate Mountains, may trend through the Fort Yuma Indian Reservation. A detailed investigation is needed to evaluate the potential for development of this valuable resource"²⁷⁸ The BIA also explained that "[w]e support the tribe in this endeavor as the project may lead toward development of an economic base on the Reservation."²⁷⁹ Following the BIA's Phoenix Area Director's recommendation, on April 11, 1989, the federal government approved a grant in the amount of \$110,000 for the Tribe to carry out its proposed mineral exploration project.²⁸⁰

151. The Tribe, however, experienced significant delays in completing its exploration activities in the timeframe provided by BIA. After BIA first denied an extension of time for the Tribe to complete its investigation, the Tribal President made a final plea on September 10, 1991 for more time to finish the proposed drilling activities:

The final phase, which we are now prepared to begin, will conclude this program and bring to focus the actual amounts of commercially retrievable gold available to my people for future development. However, with the extension of the grant being denied and the economic situation of the Quechan People, I fear that the monies spent, the time invested and the opportunities that could have been realized from this project, will never come to focus. . . . It is with great concern and consideration that I seek approval of the extension for this grant.²⁸¹

²⁷⁸ Memorandum from the Phoenix Area Director to the BIA Chief of Tribal and Administrative Accounting Services re Quechan Tribe – Request for Funds for Gold Resource Evaluation (May 23, 1988), Ex. 22.

²⁷⁹ *Id.*

²⁸⁰ Memorandum from the Deputy Assistant Secretary of Indian Affairs (Trust and Economic Development) to the Phoenix Area Director (Apr. 11, 1989), Ex. 27.

²⁸¹ *See* Letter from Fritz Brown, Quechan Indian Tribe President, to Linus Brown, Contracting Officer, Bureau of Indian Affairs (Sept. 10, 1991), Ex. 38.

Again, at this stage, there was no suggestion that cultural concerns or sacred sites would inhibit mining operations if gold were to be discovered.

152. In response to this request, the BIA extended the Tribe's grant through March 1992.²⁸² This enabled the Tribe to complete its exploration drilling program, which it did in February 1992.²⁸³ The Tribe's drilling activities did not pan out, however, as explained by MagmaChem, the company that the Tribe retained to conduct the associated investigation: "In summary, a detailed investigation of gold and other metal potential on the Fort Yuma Indian reservation strongly indicated that there is little economic potential for commercial gold or other types of deposits on the reservation."²⁸⁴

153. Claimant has not been able to identify any evidence that cultural-resource surveys or environmental reviews were ever carried out as part of the Quechan Tribal drilling program, despite a "federal action" and "undertaking" that typically would have triggered NEPA review and NHPA consultation. In fact, there is evidence that the drilling project on the Tribe's reservation failed to comply for many years with even the most basic of conservation practices – the reclamation of drill holes.²⁸⁵

154. Despite the Tribe's apparent willingness to develop a bulk-mineable gold deposit on its own reservation within the CDCA (and close to an identified "very high" area of "Native American Concern," as identified during the 1980 CDCA planning process²⁸⁶), by late 1998, the

²⁸² *Amendment to Grant Agreement* (Sept. 27, 1989), Ex. 28.

²⁸³ Memorandum from Stanley Keith, MagmaChem, to Dan Purvance, Glamis Gold, at 1 (July 7, 1999) (at GLA075959), Ex. 196.

²⁸⁴ *Id.* at 2.

²⁸⁵ Memorandum from Dan Purvance, Glamis Gold, to Steve Baumann, Glamis Gold (Feb. 12, 1998) (at GLA075954), Ex. 104 (with attached photographs of the unreclaimed drill holes six years after the drilling program was completed); *see also* Statement of D. Purvance, ¶ 13.

²⁸⁶ *See* Figure 4, *supra*, at page 53.

Tribe abruptly reversed its position with respect to the other mines in the CDCA. It was around that time when the Tribe passed a Resolution opposing “any permitting and any land development including the proposed Glamis Imperial Gold Mine on the aforementioned tribal sacred grounds based on social, cultural, spiritual, and environmental impacts.”²⁸⁷

3. Other Development Activities Within The CDCA

155. In addition to the presence of many metallic and non-metallic mining projects in the CDCA, the CDCA is also home to several other large non-mining development projects, including two massive projects within a dozen miles of the proposed Imperial Project. For example, in 1996, to beneficially reuse much of the land area at and near the Mesquite Mine, the BLM and Imperial County reviewed and approved the development of a massive regional landfill.²⁸⁸ The landfill (referred to as the “largest landfill in history”²⁸⁹ and the “largest man made structure in the world”²⁹⁰) is now in the process of being designed to handle nearly 20,000 tons of municipal solid waste daily from Southern California. Its approved location is only about ten miles from the Glamis Imperial Project.²⁹¹ Significantly, in order to accommodate the development of this landfill, BLM agreed to reclassify and adjust the boundaries of a portion of the Singer Geoglyph ACEC, which is immediately adjacent to the Mesquite Mine and was established to protect significant Native American cultural resources in the area.²⁹²

²⁸⁷ Quechan Indian Tribe, *Resolution R-125-98* (Nov. 3, 1998), Ex. 154.

²⁸⁸ See Leshendok Report, ¶ 90 (citing BLM Record of Decision, *Mesquite Regional Landfill* (Mar. 1996)).

²⁸⁹ *Id.* (quoting statistics provided by the *California Integrated Waste Management Board and the Solid Waste Digest*).

²⁹⁰ *Id.* (quoting Earthjustice news release from Nov. 9, 2000).

²⁹¹ See Figure 5, *supra*, at page 63.

²⁹² See Record of Decision, *Boundary Modification of the Singer Geoglyphs Area of Critical Environmental Concern, Mesquite Regional Landfill*, at 5 (Sept. 20, 1996) (at MV006354), Ex. 76.

156. In addition, in April 2002, the Federal Energy Regulatory Commission and Interior approved a natural gas pipeline only several miles to the west of the Glamis Imperial Project, which required digging a 6 to 12-foot deep trench along an 80-foot wide right-of-way for a distance of 80 miles.²⁹³ This pipeline disturbed nearly 1,000 acres and impacted dozens of identified Native American cultural resource sites, including many historic trail segments and 46 sites deemed eligible for listing under the NHPA.²⁹⁴ The project was approved over the Quechan Tribe's objections that its adverse impacts on cultural resources "cannot be mitigated."²⁹⁵

III. Glamis Initiated Review Of Its Plan Of Operations For The Imperial Project With Reasonable And Legitimate Expectations Of Approval

157. From the vantage point of an investor such as Glamis, there was no reason to believe that a mining operation on Class L lands, outside of any designated ACEC or Wilderness Area, would not be able to conform its operations to satisfy the mitigation requirements typically imposed by BLM or any other relevant governmental agency. Glamis' successful development and profitable operation of the Picacho and the Rand Mines in the CDCA helped form the basis for its reasonable belief that it was capable of satisfying all federal and state requirements.²⁹⁶ In fact, in light of its success at the Picacho Mine and its familiarity with the successful mining of low-grade ores in the CDCA region in the late 1980s, Glamis began searching for a second deposit in Imperial County.²⁹⁷ It located a mineral deposit in the Imperial Project area and, with

²⁹³ See, e.g., Record of Decision, *North Baja Pipeline Project*, at 3-4 (Apr. 2002), Ex. 229; see also Leshendok Report, ¶ 116. A major expansion of this pipeline was recently proposed in August 2005. See Notice of Intent, *North Baja Pipeline Expansion Project* (Aug. 30, 2005), Ex. 298.

²⁹⁴ Leshendok Report ¶ 116 (citing *Final EIS/EIR for the North Baja Pipeline Project*, at 4-64 (Jan. 11, 2002); see also Sebastian Report, at 9.

²⁹⁵ Leshendok Report ¶ 116 *Id.* (citing *Final EIS/EIR for the North Baja Pipeline Project*, at 4-67 (Jan. 11, 2002).

²⁹⁶ Statement of K. McArthur, ¶ 4.

²⁹⁷ *Id.*

BLM's approval, soon began exploration drilling there. In late 1994, after undertaking various cultural surveys of the area, at BLM's direction, Glamis submitted its Imperial Project plan of operations, with every reasonable expectation that it would be approved after the required review and consultations.

A. Glamis Identified A Valuable Gold Deposit At The Imperial Project Site

158. Having carried out a successful mining operation nearby at the Picacho Mine, Glamis prospected and found an additional gold deposit just several miles from its existing operations, where it began acquiring mineral property interests in the Imperial Project area.²⁹⁸ Based on its experience in the area, the company reasonably expected to be able to develop fully its mineral interests under applicable federal and state laws.

1. Between 1987 And 1993, With BLM Approvals, Glamis Explored The Imperial Project Site And Developed Its Valuable Mining Claims And Mill Sites

159. Glamis acquired its initial mining claims in the Imperial Project in 1987 from Gold Fields Mining Corporation, who had been exploring the Imperial Project area since 1980.²⁹⁹ In 1987, to facilitate mineral exploration, Glamis contributed its mineral interests to a joint venture, the Imperial County Joint Venture, in which it held a majority interest.³⁰⁰ Shortly thereafter, the company initiated a comprehensive exploration program.³⁰¹ This included the submission and approval of several exploration drilling plans of operation, including a BLM

²⁹⁸ *Id.*

²⁹⁹ *See Exploration Agreement and Option to Purchase Between Gold Fields Mining Corporation and Glamis Gold Inc.* (June 5, 1987) (GLA092215), Ex. 18; Imperial County Joint Venture, *Indian Pass Area Summary Report*, at 1 (June 1988), Ex. 23.

³⁰⁰ Statement of K. McArthur, ¶¶ 4-5.

³⁰¹ *See Leshendok Report*, ¶ 35; *see also* Imperial County Joint Venture, *Indian Pass Area Summary Report* (June 1988), Ex. 23.

approval in November 1988.³⁰² The approval allowed small-scale drilling along Indian Pass road. According to BLM, as long as Glamis complied with its proposed mitigation measures, the drilling program would “not cause undue or unnecessary degradation of the Federal Lands.”³⁰³ As BLM acknowledged in January 1989, Glamis did comply with those mitigation measures.³⁰⁴

160. Based on the favorable results of its early exploration, in the Summer of 1991, Glamis undertook a more extensive drilling program. As with its earlier drilling activities, in July and September 1991, Glamis submitted a drilling plan of operations and received approval letters from BLM. BLM again stipulated that no undue or unnecessary degradation of public lands would occur as long as Glamis complied with proposed mitigation measures.³⁰⁵ In fact, BLM also prepared an Environmental Assessment (“EA”) of the drilling program (an assessment conducted to determine if a full Environmental Impact Statement is warranted under NEPA, or if a “Finding of No Significant Impact” can be issued for the activity).³⁰⁶ The EA and related “Finding of No Significant Impact” determined that the drilling activities would not result in significant impacts to environmental or archaeological resources in the area.³⁰⁷ As with its earlier drilling activities, Glamis did reclaim the land in full compliance with BLM’s reclamation criteria, even earning praise from BLM, which stated the “reclamation of the[] sites was found to

³⁰² See Letter from Ben Koski, BLM Area Manager, to David Hamre, Chemgold (Nov. 10, 1988) (GLA043820), Ex. 25.

³⁰³ *Id.* at 1 (at GLA043820).

³⁰⁴ See Letter from Ben Koski, BLM Area Manager, to David Hamre, Chemgold (Jan. 6, 1989) (at GLA043822), Ex. 26.

³⁰⁵ See Letter from Ben Koski, BLM Area Manager, to Tom Garigan, Imperial Gold (July 1, 1991) (GLA043813), Ex. 37; Letter from Ben Koski, BLM Area Manager, to Tom Garigan, Imperial Gold (Sept. 19, 1991) (GLA043818), Ex. 39.

³⁰⁶ See *Environmental Assessment No. CA-067-EA91-041* (July 1, 1991) (at GLA091605), Ex. 36.

³⁰⁷ *Id.*

exceed Bureau standards for reclamation. Our BLM geologist stated that if the sites were not staked, he would not have found them.”³⁰⁸

161. Between 1987 and 1993, Glamis spent nearly \$2 million on the Imperial Project. The company incurred most of its costs in the acquisition of its mining claims and in its early exploration drilling program.³⁰⁹ In fact, because Glamis’ mineral exploration program “looked very promising,” the company bought out the remaining interests of its joint partner in 1994 to become the sole owner of the mining claims and mill sites in the Imperial Project area.³¹⁰

162. In a 1994 “environmental due-diligence review” of the Imperial Project, Mr. Kevin McArthur, the current Chief Executive Officer of Glamis, explained, “I personally performed the entire environmental review, and based on my findings, there are no environmental/regulatory reasons to delay transaction closing.”³¹¹ “No significant flaws, negative issues, citations or violations were discovered. No negative comments or statements were made by any agencies.”³¹² Glamis’ decision to buy out the joint venture in 1994 cost the company nearly two times as much as the company’s investment in the Project up to that point.

³⁰⁸ See Letter from Ben Koski, BLM Area Manager, to Tom Garigan, Imperial Gold (Apr. 2, 1992) (GLA072819), Ex. 42; see also Letter from Ben Koski, BLM Area Manager, to Tom Garigan, Imperial Gold (June 17, 1992) (GLA072818), Ex. 44.

³⁰⁹ See Statement of J. Utley, Att. A; see also Statement of K. McArthur, ¶ 6.

³¹⁰ Statement of K. McArthur ¶ 45.

³¹¹ Memorandum from C.K. McArthur to A.D. Rovig re Imperial Project Environmental Review, at 1 (Feb. 15, 1994) (at GLA023957), Ex. 49.

³¹² *Id.*

2. 1991 Cultural-Resource Surveys Performed In Connection With Glamis' Drilling And Exploration Activity Did Not Reveal Any Unique Cultural Features That Would Distinguish The Imperial Project Site From The Rest Of The Surrounding Area

163. As part of Glamis' expanded drilling and exploration program, in June 1991, an intensive cultural-resource investigation of the Imperial Project area was conducted.³¹³ The Quechan Nation Tribal historian, Lorey Cachora, participated extensively in the investigation as a member of the survey team.³¹⁴ The resulting report made no finding that Native Americans considered the area encompassing Glamis' drilling and exploration activities to be sacred. The report relied, in part, on earlier cultural-resource studies conducted in 1987 and 1988, to declare that "[n]o sites eligible for the National Register of Historic Places were previously recorded in the study area. Cultural resources consist of lithic . . . scatters and chipping stations."³¹⁵ Based on these references to earlier studies and on the fact the Quechan Tribal historian participated in the survey, Glamis officials felt assured that the 1991 cultural-resource study was a thorough and accurate reflection of the state of cultural values in the Imperial Project area.³¹⁶

164. Glamis was also justified in moving forward with its development of the Imperial Project mineral claims based on the fact that no appeals were filed with the Interior Board of Land Appeals over BLM's early approvals of Glamis' drilling activities. The right to appeal

³¹³ See Brian F. Mooney Associates, *Cultural Resource Survey and Assessment of the BEMA Indian Rose Project Area* (June 1991) (GLA032317), Ex. 34.

³¹⁴ *Id.* at 14 (at GLA032332). Mr. Cachora's involvement in the establishment of the Indian Pass ACEC Management Plan in 1987, is discussed at ¶ 110.

³¹⁵ *Id.*

³¹⁶ Statement of K. McArthur, ¶ 7.

BLM's decision – used often by mining opponents to voice grievances³¹⁷ – could have been exercised by any affected party in the area, including the Quechan Tribe.³¹⁸ The Quechan Tribe had actual knowledge of mineral exploration activities near Indian Pass since at least 1988, as reflected by the Tribe's grant request that year to Interior's Bureau of Indian Affairs for funding of the Tribe's mineral exploration. As explained at ¶ 148 above, in its grant request, the Tribe identified a large gold deposit near Indian Pass (the site of the Imperial Project) as part of its justification for wanting to explore for gold deposits on its lands. It expressed no opposition to further mineral exploration and development there at that time and for nearly a decade thereafter while Glamis proceeded with extensive drilling activities.

B. In 1994, Glamis Submitted Its Plan Of Operations With The Reasonable Expectation Of Approval

165. Based on Glamis' initial success with exploration drilling of the Imperial Project site, as well as the fact that associated cultural-resource surveys did not raise any concerns, the company began developing its strategy for submitting a plan of operations to BLM and Imperial County, California. Before doing so, however, the company wanted to ensure that the Project remained located outside of any special management areas created by Federal law or regulation. After it could be assured that the Imperial Project site was safe for development, Glamis submitted a reasonable plan of operations in 1994, just as it had for other mines in the area, and just as other prudent operators in the area had done. During its development of the Imperial

³¹⁷ See Leshendok Report, ¶ 125; see also *Timbisha Shoshone Tribe of Death Valley*, 136 IBLA 35 (1996) (appeal of proposed mining plan of operations for an open-pit mine in the CDCA submitted by Timbisha Shoshone Tribe).

³¹⁸ See, e.g., Leshendok Report, ¶ 125; Statement of D. Purvance, ¶ 8. In retrospect, such an appeal would have been incongruous given the Tribe's own recent mineral exploration drilling activity on the edge of the Cargo Muchachos Mountains, an area identified by its elders as a highly important location in the region.

Project plan of operations, and immediately after submitting it to BLM and Imperial County, Glamis continued to gain confidence in the site's mineral prospects.

1. Glamis First Verified That The Imperial Project Site Remained Outside Any ACEC Or Land To Be Withdrawn By The California Desert Legislation

166. Notwithstanding the company's initial favorable drilling results on the ground and encouraging approvals and reviews by the relevant governmental agencies, Glamis remained cautious about its plans for the Imperial Project, as there was still pending federal legislation relating to the CDCA Wilderness Study Areas provided for by FLPMA.³¹⁹ Accordingly, Glamis actively monitored legislative developments, especially those arising out of the Office of U.S. Senator Dianne Feinstein, the chief sponsor of the legislation, to seek assurances that the Imperial Project site would remain outside the boundaries of any designated Wilderness Areas.³²⁰ Glamis already had every reason to believe that the Imperial Project would lay outside the final Wilderness Areas. As discussed at ¶¶ 117 above, the Imperial Project area had always been outside the wilderness study areas identified in 1978 by BLM and recommended for wilderness protection in 1991 by Interior. Thus, as expected, when Congress finally designated formal wilderness areas on October 31, 1994, with the passage of the California Desert Protection Act, the Imperial Project was not adversely affected.³²¹

167. Soon after passage of that California Desert Protection Act, BLM carried out a "field staking" of the newly designated Wilderness Area boundaries.³²² Mr. McArthur of Glamis

³¹⁹ Statement of K. McArthur, ¶¶ 9-12.

³²⁰ *Id.*, ¶ 19; see also Memorandum from K. McArthur to A.D. Rovig (July 12, 1993) (GLA053794), Ex. 46; Letter from Senator Feinstein to K. McArthur (Sept. 14, 1993) (GLA053687), Ex. 48.

³²¹ See *Final EIS/EIR for the Glamis Imperial Project*, at 1-4 (Sept. 2000), Ex. 210; Figure 4, *supra*, at page 53.

³²² See Letter from K. McArthur, Glamis, to Tom Zale, BLM (Apr. 24, 1995) (GLA037534), Ex. 66 (referencing BLM's field staking activities for the Picacho Peak Wilderness area).

communicated by letter with BLM about some minor discrepancies in the staked boundary, but at no time was the Imperial Project ever within the staked Wilderness Areas.³²³ As Mr. McArthur explained in a July 24, 1995 letter to the BLM, “I personally worked with . . . Senator Feinstein’s office to ensure that California Wilderness would not adversely affect operations at our Picacho Mine nor at our proposed Imperial Project. . . . Although I was uncomfortable with the proximity to our Imperial Project, I saw no reason to object to the location, because the legislation precludes establishment of buffer zones.”³²⁴

2. Glamis’ Plan Of Operations Was A Reasonable Proposal For Sound Mine Development

168. On December 6, 1994, Glamis submitted its Imperial Project plan of operations to BLM and Imperial County Planning/Building Department (“ICPBD”) (the “lead agency” for purposes of securing state SMARA mining approval). The plan included the same types of mining and associated activities proposed in other mining plans of operation that were submitted and approved in the CDCA, including Glamis’ plans of operation for the Picacho and Rand mines.³²⁵ Even Glamis’ proposed reclamation measures were in line with those proposed and implemented at other mining projects in the area.

a. The Imperial Project Plan Of Operations Made Provision For Conventional Mining Activities And Included A Detailed Plan Of Operations

169. Glamis filed its complete proposed mining plan of operations and reclamation plan (contained in the plan of operations) with BLM and the ICPBD just several weeks after it

³²³ *Id.*

³²⁴ Letter from K. McArthur, Glamis, to Robert Anderson, BLM, at 1 (July 24, 1995) (at GLA037529), Ex. 68.

³²⁵ Statement of K. McArthur, ¶ 3.

received the good news about the scope of CDCA lands withdrawn under the California Desert Conservation Act.³²⁶

170. The plan of operations set forth just what the Imperial Project would entail: (1) mining gold and silver ore; (2) constructing and operating facilities to administer the operation and maintain all mining and related equipment; (3) processing the ore and stockpiling the waste rock; (4) developing and producing the ground water for use in processing operations and dust control; (5) constructing an electric transmission line to provide electrical power to the operations; (6) conducting geologic evaluation activities; (7) implementing environmental-impact reduction measures; (8) and implementing reclamation measures.³²⁷

171. As for reclamation and mitigation measures, the plan of operations identified specific activities which, as amended through the permitting process, included sequential backfilling and reclamation of two of the three pits.³²⁸ Following BLM's guidance, these proposed measures represented the extent of the reclamation that was both technically and economically feasible.³²⁹

172. In early 1995, acting as the prudent mining operator it had become with much experience in the CDCA, Glamis began developing internal feasibility studies of the long-term prospects for operating the Imperial Project. The first such study was prepared on April 6, 1995 and concluded that the Imperial Project "operations will provide positive economic returns, and

³²⁶ See *Imperial Project Plan of Operations* (Nov. 1994) (GLA056565), Ex. 55; *Imperial Project Reclamation Plan* (Nov. 1994) (GLA056609), Ex. 55.

³²⁷ See generally *Imperial Project Plan of Operations* (Nov. 1994) (GLA056565), Ex. 55; see also Leshendok Report, ¶¶ 44-48.

³²⁸ See *Imperial Project Plan of Operations*, at Attach. B, pp. 19-35 (Nov. 1994) (at GLA056631 to GLA056647), Ex. 55; see also Leshendok Report, ¶¶ 55-60.

³²⁹ See Leshendok Report, ¶¶ 55-60.

that further investigations and expenditures are warranted. . . .³³⁰ Glamis did just that, incurring over \$3.25 million in expenditures in 1995 alone, with a heavy focus on engineering and design, drilling, and environmental permitting.³³¹

173. Because Glamis' development of the Imperial Project was timed to begin just as mining operations at the Picacho Mine were winding down, the company planned to transfer experienced staff and resources from the latter mine to the Imperial Project,³³² which helped keep cost projections down. This model of operations exemplified how Glamis was able to become as a low-cost, mid-tier gold producer that could take the relatively low-grade deposits typical of the region and profitably operate them at high rates of return.³³³

b. Glamis' Reclamation Plan Provided Reasonable Mitigation That Was Comparable To The Mitigation Provided At Other Mines In The California Desert

174. As discussed, the Imperial Project plan of operations identified numerous, specific mitigation and reclamation activities, including sequential backfilling and reclamation of two of the three pits.³³⁴ The proposed mitigation and reclamation activities were typical of those adopted by mining operations in the CDCA.

175. Glamis had every reason to believe that its proposed mitigation and reclamation measures satisfied all of the government's requirements. In fact, during the time that BLM and ICPBD were reviewing Glamis' plan of operations, including the reclamation and mitigation

³³⁰ *Imperial Project Internal Feasibility Study*, at ES 1 (Apr. 6, 1995) (at GLA030640), Ex. 65.

³³¹ Statement of J. Utley, Att. A.

³³² Statement of K. McArthur, ¶ 14.

³³³ *See, e.g., PowerPoint Presentation for Glamis Gold Ltd.* (1998) (at ELGA08812), Ex. 310 (“Corporate Blueprint – Glamis Gold Ltd. is a low cost, high volume gold producer, operating in an environmentally sound manner for the benefit of its shareholders, employees and communities.”).

³³⁴ *See Imperial Project Plan of Operations*, at App. B, pp. 19-35 (at GLA056631 to GLA056647), Ex. 55; *see also* Leshendok Report, ¶¶ 55-60.

measures, Glamis' enjoyed a reputation as a company willing and capable of using proper and well-crafted mitigation and reclamation techniques. BLM's California State Office and Imperial County generally regarded Glamis as "being [a] good steward[] and sharing the Bureau of Land Management's . . . responsibilities for proper use, development and planned reclamation of desert lands."³³⁵ BLM's high regard for Glamis' method of operations, as well as its favorable outlook for mining operations in Imperial County, was described in a high-level memorandum in early 1995 by BLM's California State Office for Acting BLM Director, Mike Dombeck:

PREPARED FOR: Director Dombeck Visit to CA 1/10/95 Internal Working Document

SUBJECT: Gold Mines in the El Centro Resource Area

ISSUE SUMMARY: Three open pit/heap leach gold mines are currently in operation in the El Centro Resource Area. Santa Fe Pacific Gold Corporation operates the Mesquite Mine, American Girl Mining Joint Venture, Inc. operates the American Girl Project, and Chemgold, Inc. operated the Picacho Mine. Collectively, these mines produce nearly 300,000 ounces of gold annually

SECRETARIAL STATEMENT/DOI POSITION: Santa Fe, American Girl, and *Chemgold [Glamis] have each set examples by being good stewards and sharing the Bureau of Land Management's (BLM) responsibilities for proper use, development and planned reclamation of desert lands*

BACKGROUND: Prior to approval in the late 1980's, rigorous environmental review was completed for the mining operations which occur on public lands. Stipulations were applied as conditions of approval to protect various archeological sites, wildlife (particularly desert tortoises and birds), and other natural resource values

More recently, Chemgold submitted a plan of operation for a proposed mine involving three open pits, a waste rock dump, a cyanide heap leach pad and ancillary facilities on unpatented mining claims Partial backfilling and total containment of cyanide solutions are incorporated into the proposal. An EIS will be initiated for this proposal in early 1995.

POSITION OF MAJOR CONSTITUENTS: *Local government agencies and officials support existing and proposed mining operations in Imperial County.*

CONTACT: Ed Haste, [BLM] California State Director³³⁶

³³⁵ BLM, *Gold Mines in El Centro Resource Area* (Jan. 10, 1995) (B00177), Ex. 60.

³³⁶ *Id.* (emphasis added).

Thus, from Glamis' legitimate standpoint, the Imperial Project plan of operations would be reviewed just as its own and other similar plans of operations had been.

c. Glamis' Permitting Strategy Was Consistent With General Mining Practice

176. During the same period it was formulating its Imperial Project plan of operations, Glamis also developed a permit acquisition strategy for the Imperial Project in order to address the standard litany of permits it would need to eventually operate the mine, such as air, water, power and other resource permits. In May 1994, Glamis decided to engage a consulting firm to develop this strategy.³³⁷ On the list of required permits, Glamis' consultant noted the preeminence of NEPA and CEQA in the permit acquisition sequence: "Federal and state agencies are not authorized to approve most permits for the project until the NEPA or CEQA process is complete."³³⁸ This view was widely accepted as standard operating procedure for mineral development projects on public lands.³³⁹ Little did Glamis know at that time that the NEPA and CEQA process would not be completed for over six years, when in September 2000, the Final EIS/EIR for the Project was issued, identifying Interior's selection of the "no action" Project alternative – after the standard review process was highjacked by senior political operatives at the Interior Department.

³³⁷ *Suggested Permit Acquisition Strategy for the Imperial Project* (May 1994) (GLA043425), Ex. 51.

³³⁸ *Id.* at 6 (at GLA043433).

³³⁹ *See, e.g.*, Leshendok Report, ¶¶ 22, 33,49, 134.

3. Glamis Reached Out To BLM And Imperial County To Assure Prompt And Thorough Review In Accordance With The Law And Regulations

177. As required by its regulations and guidelines, BLM coordinated with the ICPBD in reviewing Glamis' plan of operations.³⁴⁰ Glamis wanted to make certain that it complied with all applicable federal and state laws and regulations to ensure the speedy review and approval by both BLM and ICPBD of its Imperial Project plan of operations. In a cover letter accompanying submission of its plan, Glamis noted that the document had been revised to address BLM's comments on a preliminary draft and that, subject to BLM approvals, Glamis hoped to begin operating the mine in late 1996, a schedule that strategically aligned "with the anticipated phase-out of mining activities at Chemgold's nearby Picacho Mine."³⁴¹

178. Glamis also met with BLM and Imperial County officials on December 6, 1994 to discuss the plan of operations, at which time BLM indicated that "the greatest project opposition will come from the wildlife and hunting sector."³⁴² Identification of these potential opponents was no surprise to Glamis, which had already undertaken a thorough cultural-resource survey of the area in 1991, turning up no evidence that the Imperial Project site contained any unique cultural values as compared with sites surrounding similar mining operations in the CDCA.

179. At the meeting with government officials, BLM also explained to Glamis that it was "considering requiring compensation for the irreparable damage left by un-backfilled pits,"

³⁴⁰ See Leshendok Report, ¶ 7, 36; *see also* Memorandum of Agreement between BLM and County of Imperial and Chemgold (Mar. 20, 1995) (GLA028368), Ex. 63 (establishing procedures to prepare a joint environmental impact statement/environmental impact report ("EIS/EIR") in compliance with both NEPA and CEQA).

³⁴¹ See Letter from K. McArthur, Glamis, to Ben Koski, BLM, at 1 (Dec. 6, 1994) (at GLA073094), Ex. 57.

³⁴² Memo to File from K. McArthur, at 2 (Dec. 7, 1994) (at GLA073092), Ex. 58.

but noted that the lead BLM field office in the area – El Centro – usually considered desert tortoise habitat compensation as a solution to this issue.³⁴³

4. Glamis Continued To Drill And Explore The Imperial Site To Increase Its Confidence Of A Valuable Yield

180. While BLM and ICPBD's review of its plan of operations was ongoing, Glamis continued its exploration drilling program to evaluate more fully the mineral prospects associated with its Imperial mining claims. In fact, between March 5, 1993 and August 2, 1996, the company received eight exploration and drilling program approval decisions from BLM, all of which stated that as long as Glamis continued to meet BLM's reclamation standards, no unnecessary or undue degradation would occur.³⁴⁴ As with its earlier exploration activities, described at ¶¶ 159-160, Glamis did in fact continue to meet BLM's reclamation standards.³⁴⁵ By 1996, over roughly a decade, Glamis and its predecessors had drilled approximately 400 mineral exploration holes in the Imperial Project vicinity.³⁴⁶ Neither the Quechan Tribe nor others filed complaints or administrative appeals to any of the mineral exploration approvals.³⁴⁷

³⁴³ *Id.* (at GLA073091).

³⁴⁴ See E-mail from Glen Miller, BLM, to Barbara Fugate & Karen Hawbecker, Interior Solicitor's Office (June 12, 2001) (D-00023-0017-0001), Ex. 214 (listing seven of the approval letters); see also Letter from Ben Koski to Tom Garagan (Mar. 5, 1993) (GLA072822), Ex. 45; Letter from Ben Koski to Kevin McArthur (June 29, 1994) (GLA042250), Ex. 52; Letter from Ben Koski to Kevin McArthur (Oct. 7, 1994) (GLA043803), Ex. 54; Letter from Ben Koski to Kevin McArthur (Dec. 20, 1994) (GLA043795), Ex. 59; Letter from Ben Koski to Kevin McArthur (Feb. 8, 1995) (GLA073767), Ex. 62; Letter from Ben Koski to Kevin McArthur (Aug. 8, 1995) (GLA043766), Ex. 69; Letter from Terry Reed to Dan Purvance (May 31, 1996) (GLA043741), Ex. 73; Letter from Terry Reed to Dan Purvance (Aug. 2, 1996) (GLA043778), Ex. 75.

³⁴⁵ See, e.g., Letter from Ben Koski, BLM, to Tom Garagan, Glamis (Aug. 23, 1993) (GLA042325), Ex. 47 (“All of the holes inspected were reclaimed to BLM standards. The entire area of operations was left neat and clean. Your efforts spent in reclamation are appreciated.”).

³⁴⁶ Statement of D. Purvance, ¶ 8.

³⁴⁷ *Id.*, ¶¶ 6, 8.

181. Between 1995 and 1996, Glamis incurred additional expenditures commensurate with its continued drilling program. As explained at ¶ 172, the company over \$3 million in 1995, including sums spent for drilling and environmental permitting.³⁴⁸ That same year, Glamis also spent additional sums on another significant cultural-resource survey in the Imperial Project area (discussed below at ¶¶ 188-190). This survey was once again, as in 1991, performed with the active involvement of the Quechan Tribal historian, Mr. Cachora.³⁴⁹

182. In 1996, Glamis invested another \$2.8 million in the Imperial Project, with nearly \$0.5 million spent on environmental permitting, \$0.4 million on preparing a final feasibility analysis, and over \$0.7 million on a down payment on a \$7 million mining shovel and related equipment.³⁵⁰ Glamis prepared a final feasibility report in April 1996, which again confirmed the economic viability of the Imperial Project.³⁵¹

C. BLM's And Imperial County's Initial Review Indicated That The Imperial Project Was On Track For Approval, Confirming Glamis' Reasonable Investment-Backed Expectations

183. BLM and Imperial County released the first Draft Environmental Impact Statement/Environmental Impact Report (“EIS/EIR”) in November 1996, giving Glamis the further satisfaction of knowing that there was likely no unacceptable environmental impacts expected from the proposed Imperial Project with proper mitigation measures in place. With respect to cultural resources, the Draft EIS/EIR identified potentially significant impacts, but BLM and Imperial County raised no concerns at that time that further identification of cultural

³⁴⁸ Statement of J. Utley, Att. A; *see also* Statement of K. McArthur, ¶ 6.

³⁴⁹ Sebastian Report, at 28; Statement of D. Purvance, ¶ 7.

³⁵⁰ Statement of J. Utley, Att. A.

³⁵¹ *Imperial Project, Final Feasibility Study*, at ES-1 (Apr. 1996) (at GLA061554), Ex. 70 (“The results of this document indicate that the project is financially sound and will provide positive economic returns over its
(continued...)”)

impacts could cause BLM to deviate from longstanding law and practice to deny operation of a mine that met all regulatory provisions and the “prudent operator” standard for mitigation. Indeed, the fact that the Draft EIS/EIR named the proposed Project its “preferred alternative,” notwithstanding the review of cultural impacts, provided Glamis with the reasonable expectation that its plan of operations remained on track for approval.

1. The 1996 Draft EIS/EIR Selected Glamis’ Plan Of Operations As The Preferred Alternative

184. On March 24, 1995, BLM published in the *Federal Register* notice of its intent to prepare an EIS/EIR for the Imperial Project. As discussed, and as Glamis was well aware, the typical sequence for obtaining the requisite approvals to undertake mining activities on federal lands began with the environmental review processes under NEPA and CEQA.³⁵² Glamis expected that once this process confirmed that its Project would meet the level of mitigation mandated by the “prudent operator” standard, the company could begin to obtain any additional permits and approvals it would need to go forward.

a. With Respect To Virtually All Environmental And Public Safety Values, The 1996 EIS/EIR Found The Impact To Be “Not Significant”

185. The 1996 Draft EIS/EIR, prepared by BLM and Imperial County, analyzed the impacts of the proposed Imperial Project according to several parameters, making findings with respect to the likely level of significance of the Project’s impacts on each such parameter. For almost every subject examined, the Draft EIS/EIR concluded that there was virtually no likely significant impact if the Project were to go forward with appropriate mitigation measures. The

(...continued)

life. . . . The current project will provide a Net Present Value at an 8% discount rate of over \$43.5 million, with a 22.4% Rate of Return.”).

³⁵² See discussion at ¶ 176.

topics assessed included impacts to geology and mineral resources, soil resources, surface waters, ground waters, air resources, and biological resources.³⁵³

186. These findings were made despite the fact that, just months earlier, after viewing an internal administrative draft of the 1996 Draft EIS/EIR, the Quechan Tribe expressed “environmental” concerns relating to potential impacts to the “Picacho wash area” on the Quechan Tribal Reservation (approximately 12 miles south of the Imperial Project area).³⁵⁴ Specifically, the Tribe was concerned that soil erosion from the Project might somehow affect the Tribe’s ability commercially to exploit this area of the Reservation. According to one tribal member, this particular geographic region was “actively sought after by Hollywood. A number of pictures have been shot in this area of the Reservation. Therefore, I must be very careful to ensure that this resource in not damaged by activity located to the north of the Reservation.”³⁵⁵ Importantly, at that time in 1996, the Tribe did not identify a “Trail of Dreams” as being within the Imperial Project area, nor did it raise any general concerns that the project would interrupt important trail systems or disturb Quechan dream travel.

³⁵³ *Draft EIS/EIR for the Glamis Imperial Project*, at S-13 to S-28 (Nov. 1996), Ex. 78.

³⁵⁴ Letter from Earl E. Hawes, Quechan Environmental Programs, to Terry Reed, BLM Area Manager, at 1 (May 14, 1996) (at MV001354), Ex. 72.

³⁵⁵ *Id.*

b. With Respect To Cultural Values, The 1996 Draft EIS/EIR Concluded That The Significance Of the Impact – After Mitigation – Could Not Yet Be Determined

187. The only parameter for which the 1996 Draft EIS/EIR could not state definitively the likely level of impact due to the proposed Project was “cultural and paleontological resources.” According to the Draft EIS/EIR, once mitigation measures were implemented for these resources, such as a treatment program to recover scientific information and the designation of a project representative to oversee Project compliance with the stipulations for cultural resources, the Project’s likely impact still could not yet be determined.³⁵⁶

188. From Glamis’ perspective, even with this finding, it had no reason to believe that cultural values – or any other value, for that matter – would pose an obstacle to eventual Project approval. Its confidence was bolstered by the fact that, in addition to the 1991 study it performed at BLM and Imperial County’s direction (discussed at ¶¶ 163-164), it had financed another cultural-resource study in 1995.

189. The 1995 cultural-resource study was carried out with the active participation of multiple agency resource specialists as well as, once again, the Quechan Tribal historian, Lorey Cachora.³⁵⁷ And as in the preparation of the 1991 cultural-resources report, during investigation for the 1995 survey, no claims were made that the Imperial Project area was of premiere importance to the Quechan Tribe or that Tribal Members were using or had ever used the area for “dream travel” or “spiritual travel.”³⁵⁸

³⁵⁶ *Draft EIS/EIR for the Glamis Imperial Project*, at S-29 (Nov. 1996), Ex. 78.

³⁵⁷ Statement of D. Purvance, ¶ 7.

³⁵⁸ *Id.*

190. The results of the 1995 survey were released in a report entitled “*Cultural Resources of Indian Pass: An Inventory and Evaluation for the Imperial Project.*”³⁵⁹ The report made no reference to a “Trail of Dreams” and concluded that the “Running Man” geoglyph (over a mile from the mine area) is likely “a very recent historic addition” to the Project area.³⁶⁰ This conclusion was based, in part, on detailed observations of the area made from 1939 through 1942. During that period, no “Running Man” geoglyph was ever recorded.³⁶¹ The 1995 survey’s authors believed that if the Running Man geoglyph did exist at that early time, it almost certainly would have been documented.³⁶² In sum, the 1995 report determined that the Running Man geoglyph was of “questionable significance.”³⁶³ It suggested that “this element should be *critically assessed* in any further analysis of the site.”³⁶⁴ And the report, as included in the 1996 Draft EIS/EIR, suggested that there be further consultations with the Quechan Tribe.³⁶⁵

191. In hindsight, it was not all that surprising that the 1996 Draft EIS/EIR found uncertainties regarding the likely impact of the Project on cultural resources. In early 1996, BLM – in departure from usual practice – granted the Tribe’s request to review an advanced copy of an internal administrative draft of the EIS.³⁶⁶ Usually a Draft EIS is sent to other agencies, interested parties and the public for review at the same time.³⁶⁷ In the case of the

³⁵⁹ See Schaefer and Schulz, ASM Affiliates, *Cultural Resources of Indian Pass: An Inventory and Evaluation for the Imperial Project, Imperial County, California* (June 1996), Ex. 74.

³⁶⁰ *Id.* at 44.

³⁶¹ *Id.* at 51-53.

³⁶² *Id.* at 51.

³⁶³ *Id.* at 65.

³⁶⁴ *Id.* (emphasis added).

³⁶⁵ *Id.* at 56.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

Imperial Project, the first Draft EIS was not publicly released until more than half a year later.³⁶⁸ In May 1996, after the Tribe was allowed an advance review of BLM's internal administrative EIS/EIR, it provided comments directly to the agency. Its comments included a suggestion that BLM perform another resource survey of the Project area, focusing on physical artifacts that would assist in developing an appropriate mitigation plan.³⁶⁹

192. Despite the earlier studies of the Imperial Project area in 1991 and 1995 (discussed at ¶¶ 163-164 and 188-190), and the unprecedented planning process to support the development of the 1980 CDCA Plan and 1987 Indian Pass Management Plan, BLM nonetheless agreed to undertake an additional cultural-resource study of the Project area. The Tribe's comments also prompted BLM to undertake an ethnographic review of the Project area, discussed more fully at ¶¶ 198-200 below.³⁷⁰

193. Importantly, even after the 1996 Draft EIS/EIR did not formally conclude the Project's impact on identified cultural values and after BLM agreed to undertake yet additional reviews of the Project site, BLM and Imperial County identified approval of the Imperial Project, with some additional mitigation and environmental conditions, as the agency's "preferred alternative."³⁷¹ This assessment affirmed Glamis' view that its plan of operations fully conformed to all existing federal and state rules and regulations, including BLM's economically feasible reclamation requirements, which were applicable to mining within the CDCA.³⁷²

³⁶⁸ BLM publicly released its first draft EIS in November 1996. *See Draft EIS/EIR for the Glamis Imperial Project* (Nov. 1996), Ex. 78.

³⁶⁹ Letter from Pauline Owl, Chairwoman of the Quechan Cultural Committee, to Terry Reed, at 1 (May 14, 1996) (at MV001357), Ex. 72.

³⁷⁰ Sebastian Report, at 29-30.

³⁷¹ *See Draft EIS/EIR for the Glamis Imperial Project*, at 2-57 (Nov. 1996), Ex. 78.

³⁷² *See, e.g.*, Statement of K. McArthur, ¶ 17; *see also* Leshendok Report, ¶¶ 150-161.

c. Glamis Remained Confident Of Approval After The 1996 Draft EIS/EIR Identified The Project As The Preferred Alternative

194. Because of the 1996 Draft EIS/EIR's clear continued support for the Imperial Project and based on its own reviews and experience in the CDCA, at the time Glamis submitted its plan of operations to BLM and the ICPBD, the company had every reasonable expectation that the Project would be approved and permitted. The proposed Project was located in an area open for mineral exploration and development, and other mines in the area had no problems securing all required permits and were operating profitably. Glamis' own practice at the Rand and Picacho Mines demonstrated that the company knew how to permit and operate a mine in the CDCA. Finally, the proposed mining plan of operations was consistent with all applicable BLM regulations, and initial federal and state environmental reviews were all favorable.³⁷³

2. After Further Analysis and Review, The 1997 Draft EIS/EIR Also Selected Glamis' Plan Of Operation As The Preferred Alternative

195. BLM's promise to the Quechan to conduct an even further cultural resources analysis of the area encompassing the Imperial Project site, as well as certain changes made to Glamis' plan of operations (resulting from additional exploration and study), led BLM to the unusual step of issuing a second Draft EIS/EIR. The second Draft EIS/EIR, released in November 1997, resolved the earlier Draft EIS/EIR's inconclusive finding with respect to cultural values. It found that the proposed Imperial Project (as well as an alternative that would include complete backfilling of open pits) would likely have a "significant" and "unavoidable" impact on "the Quechan's ability to use the Indian Pass-Running Man . . . [area] for traditional

³⁷³ See Leshendok Report, ¶¶ 150-161.

cultural education programs.”³⁷⁴ Nonetheless, even with this finding (discussed further below), the 1997 Draft EIS/EIR continued to identify the proposed Project as BLM and Imperial County’s preferred alternative. This again contributed to Glamis’ legitimate expectation that its plan of operations would soon be approved.

a. BLM Assured Glamis That Additional Cultural Review Was A Defensive Measure But Would Not Stop Approval Of The Plan Of Operations

196. In May 1997, at a meeting between Glamis, BLM and Imperial County officials, BLM explained to Glamis that the agency was spending a lot of time on cultural-resource issues in order to build a defensible record should its final decision on the Project be appealed to the Interior Board of Land Appeals (“IBLA”). As a Glamis participant recorded the meeting:

The BLM knows that they must approve our project under the mining law of 1872. They believe that should the ROD be appealed to the IBLA, the extra effort being put forth on the cultural resource issues will insure the IBLA will not remand the decision back to them after the ROD is issued due to lack of cultural detail. *They [BLM] have been informed that the Quechan have been contacting individuals in the Department of Interior in Washington making allegations about the inadequate studies and neglect of their cultural sites.* This has the BLM in El Centro looking at all the cultural studies from a defensive standpoint to insure they would win any possible appeal of their decision.³⁷⁵

197. Even though the BLM correctly recognized that “the 1872 law will take precedence” in any direct conflicts with cultural-resource concerns, because BLM wanted to ensure that it would win any possible appeal of their decision to approve the Imperial Project

³⁷⁴ Draft EIS/EIR for Glamis Imperial Project, at S-48 and S-49 (Nov. 1997), Ex. 78.

³⁷⁵ Memorandum from Steve Baumann to A. D. Rovig re Imperial Project Schedule, at 3 (May 8, 1997) (at GLA038714), Ex. 83 (emphasis added).

plan of operations, it acknowledged that the mine approval “process will take significantly longer than the original schedule called for.”³⁷⁶

b. BLM Engaged An Ethnographer To Pacify Mine Opponents And Evaluate Quechan Cultural Sites For Potential Mitigation Measures

198. After agreeing to the Tribe’s request for additional surveys of the Imperial Project area, BLM hired an ethnographer by the name of Dr. Michael Baksh, of Tierra Environmental Services, to consult with Quechan Tribal members. His work, which apparently began shortly after the release of the first publicly available Draft EIS in November 1996, consisted of a series of interviews with tribal members between December 12, 1996 and September 9, 1997.³⁷⁷ His goal was to help BLM identify appropriate mitigation measures for the Imperial Project and to

assist the BLM in its significance evaluation of sites and their eligibility for the [National Register] . . . , and *to identify mitigation measures that Native Americans believe would be appropriate to minimize Proposed Action-related impacts to sensitive cultural resources.*³⁷⁸

199. During his interviews, Dr. Baksh discussed the Imperial Project area further with Lorey Cachora, the same Quechan Tribal historian who had participated in the cultural-resource surveys performed of the area in 1991 and 1995 (discussed at ¶¶ 163 and 188-190 above). At a February 1997 meeting, the Quechan Cultural Committee, of which Lorey Cachora was a member, told Dr. Baksh that the Project vicinity was a component within a larger culturally-

³⁷⁶ *Id.* at 2 (at GLA038713).

³⁷⁷ Dr. Michael Baksh, *Native American Consultation For The Glamis Imperial Project*, at 14 (Sept. 22, 1997), Ex. 90. This report was included as an appendix to the 1997 Draft EIS/EIR for the Imperial Project. *See DRAFT EIS/EIR for the Glamis Imperial Project*, App. L, at app. C (Nov. 1997), Ex. 90.

³⁷⁸ Meeting with Quechan re Imperial Project at 4 (Dec. 16, 1997) (at MV001295), Ex. 95 (emphasis added).

sensitive region of Quechan Tribal importance.³⁷⁹ The next month, Mr. Cachora again told Dr. Baksh his view that the whole area along the Colorado River is sacred.³⁸⁰

200. Finally, in September 1997, Dr. Baksh spoke with Mr. Cachora about a package of potentially appropriate mitigation measures for the Imperial Project. According to Dr. Baksh, Mr. Cachora found the following mitigation measures appropriate: (1) the nomination of other sites like Picacho Peak, Pilot Knob, etc. as traditional cultural properties; (2) the preparation of a video documentary as part of an education program; and (3) improvements to the cultural museum; (4) the acquisition and protection of land with sensitive sites; (5) and the preparation of additional studies including those for sensitive off-site locations.³⁸¹ In the end, despite his extensive further inquiry, Dr. Baksh concluded that “specific explanations relating to the extreme cultural significance of many of the cultural resources in the [Project] area were hard to come by.”³⁸²

c. A More Intensive Cultural-Resource Study – Flawed As It Was – Predictably Increased The Number Of Identified Artifacts, But Led To Few Concrete Conclusions

201. In addition to the ethnographic review conducted by Dr. Baksh, by early 1997, BLM hired consultants to perform a “Class III” cultural-resource survey to locate and catalogue physical artifacts – something that the Quechan had requested in order to formulate appropriate

³⁷⁹ Dr. Michael Baksh, *Native American Consultation For The Glamis Imperial Project*, at 17 (Sept. 22, 1997), Ex. 90.

³⁸⁰ *Id.* at 20.

³⁸¹ *Id.* at 27-28.

³⁸² *Id.* at 31.

mitigation measures.³⁸³ Again, this was part of BLM's attempt make its final EIS/EIR capable of withstanding challenges concerning the Project's impacts on cultural resources.

**(1) The 1997 KEA Study Was The First To Mention
The "ATCC" And The "Trail Of Dreams"**

202. According to BLM, the purpose of the new inventory was to verify cultural resources within the Project's Area of Potential Effects ("APE"),³⁸⁴ an area fully encompassing the Imperial Project site and that covered approximately 2,423 acres.³⁸⁵ Once completed, the inventory was to be used to develop a report that would include recommendations on the treatment of historic properties determined to be eligible for inclusion in the National Register of Historic Places.³⁸⁶ The report, in turn, would be used "as the basis for consultation" to develop appropriate mitigation measures with the SHPO and the ACHP.³⁸⁷

203. As anticipated, BLM's Class III survey, which was conducted by KEA Environmental, Inc. ("KEA"), culminated in a report released in December 1997, entitled "*Where Trails Cross: Cultural Resources Inventory and Evaluation for the Imperial Project.*"³⁸⁸

³⁸³ Letter from Terry Reed, BLM, to Michael Jackson, President Quechan Tribe (May 30, 1997) (MV018118), Ex. 85.

³⁸⁴ *Id.*

³⁸⁵ Letter from Ed Hastey, California BLM State Director, to Cheryl Widell, State Historic Preservation Officer (Feb. 26, 1998) (D-00158-0001-0053), Ex. 106. According to one BLM document, the APE included the Imperial Project and process area with a 500-foot buffer around the area, the access corridor and well area with 50-foot and 150-foot buffers, and a related transmission line corridor with a 100-foot buffer. *Issue Paper Addressing Native American and Cultural Resource Values at the Imperial Project*, at 1 (at MV023228), Ex. 308.

³⁸⁶ Letter from Terry Reed, BLM, to Michael Jackson, President Quechan Tribe (May 30, 1997) (MV018118), Ex. 85.

³⁸⁷ *Id.*

³⁸⁸ KEA Environmental, *Where Trails Cross: Cultural Resource Inventory and Evaluation for the Imperial Project*, (Dec. 1997) (GLA034266), Ex. 93; *see also* Letter from Ed Hastey, California BLM State Director, to John Fowler, Executive Director ACHP, at 1 (Aug. 25, 1998) (at D-00050-0001-0002), Ex. 139. A draft of "*Where Trails Cross*" was attached to the November 1997 Draft EIS/EIR for the Imperial Project at Appendix L. *See Draft EIS/EIR for the Glamis Imperial Project*, App. L (Nov. 1997), Ex. 90.

204. In order to define the scope of its study, and ostensibly to assist in determining whether the Project area contained a site eligible for listing on the National Register of Historic Places, BLM asked its KEA consultants “to describe and evaluate an area of traditional cultural concern (ATCC) that is in the project vicinity.”³⁹⁰ This ATCC concept had no precedent in BLM and NHPA procedures and guidance.³⁹¹

205.

³⁸⁹ Sebastian Report, at 30.

³⁹⁰ Letter from Ed Haste, California BLM State Director, to Cheryl Widell, State Historic Preservation Officer, at 4 (Feb. 26, 1998) (at D-00158-0001-0056), Ex. 106. The ATCC was defined in an attempt to identify “traditional cultural property,” which may be eligible for registry in the National Register. *See, e.g.*, Sebastian Report, at 17, 47.

³⁹¹ Sebastian Report, at 8; *see also id.* at 47.

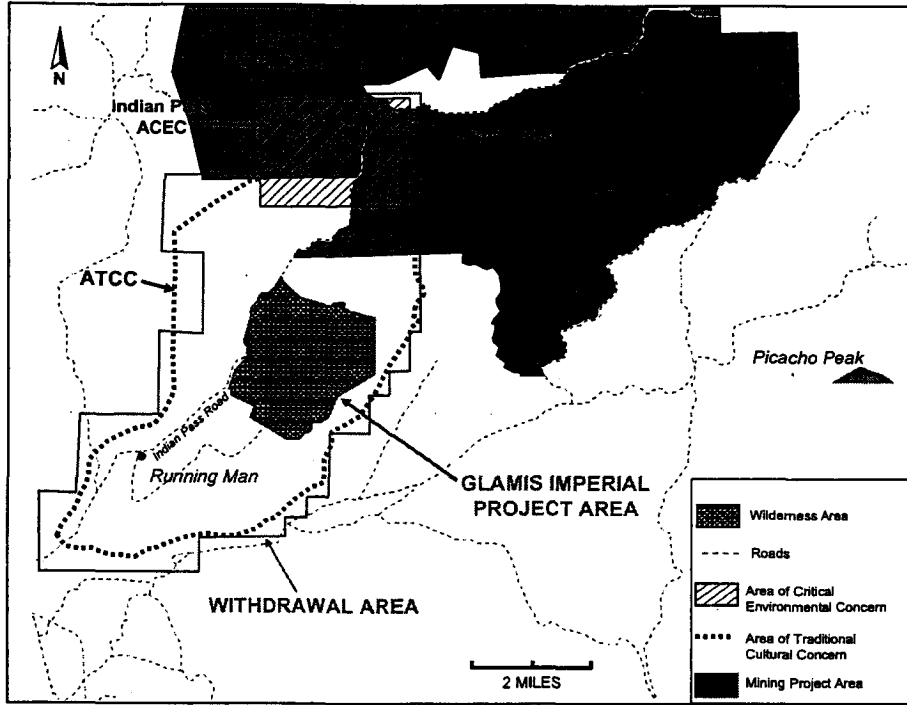
³⁹² *See* Figure 7, *infra*, at page 105.

³⁹³ Dr. Sebastian has suggested that these sites could have been examined independently as traditional cultural properties. *See* Sebastian Report, at 49.

³⁹⁴

Id. at 8; *see also id.* at 47-48.

IMPERIAL PROJECT AREA (Figure 7)



206.

207.

395 *Id.* at 9.
396 *Id.* at 30.
397 *Id.*

208.

Dr. Sebastian,

a former state historic preservation officer with extensive experience analyzing Native American cultural resources,]

⁴⁰¹ Moreover, even if the Imperial Mine would affect the “Trail of Dreams,” Dr. Sebastian has pointed out that the Project would not be the first one to have an impact on the Trail:

Whatever its physical route, given its end points, the Trail of Dreams would cover a straight line distance of more than 170 miles and be interrupted or truncated by many forms of modern development, including interstate highways and railroads. It was not established in the cultural resource studies that *any* actual segment of the Trail of Dreams would be

³⁹⁸ *Id.* at 10.

³⁹⁹ *Id.* at 10. In fact, shortly after the Imperial Project denial, a large, ground-disturbing project in the vicinity of the Imperial Project, the North Baja Pipeline, was approved in 2002 even though Native American consultation and archaeological fieldwork identified 19 trail segments that would be truncated by construction, including parts of the Trail of Dreams and parts of the *Xam Kwatcan* Trail. *Id.* at 40-41; *see also id.* at 42-43. Moreover, according to Dr. Sebastian, surveys done for the Pipeline revealed that the Quechan requested that the pipeline route be moved as far away from Pilot Knob as possible. Despite this request and recommendation, however, BLM approved a route that runs directly along the base of Pilot Knob. *Id.* at 52.

⁴⁰⁰ *Id.* at 10; *see also id.* at 34-35.

⁴⁰¹ *Id.* at 35.

destroyed by the mine, and no explanation has ever been given as to why a breach in the trail caused by the Imperial Project would render the trail no longer usable for traditional practitioners when multiple other breaches had not had this effect.⁴⁰²

(2) There Was No Basis For The Artificially Drawn ATCC And No Basis For Subjecting The Imperial Project Site To More Strenuous Survey Methods

209. BLM's decision to define the boundaries of an "ATCC" directly around the Imperial Project site, despite the Tribe's repeated insistence that its sacred lands encompassed much more than that BLM-defined region, was a product of BLM's attempt to evaluate the area as a Traditional Cultural Property ("TCP") that was eligible for listing on the National Register of Historic Places.⁴⁰³ Instead of examining existing sites in the area to determine their historic values, BLM sought to focus attention solely on the mine area (discussed at ¶ 224 below).

210. BLM later even acknowledged that the 1997 Draft EIS/EIR, in which the *Where Trails Cross* report appeared, "did not determine the ultimate boundaries of the TCP, but focused on the identification and evaluation of an area of traditional cultural concern (ATCC) in the Imperial Project vicinity."⁴⁰⁴

211.

⁴⁰² *Id.* at 11.

⁴⁰³ *Id.* at 17, 69.

⁴⁰⁴ *Environmental Assessment for Indian Pass Withdrawal*, at 3 (Apr. 25, 2000) (at MV004379), Ex. 208.

⁴⁰⁵ Sebastian Report, at 8.

Outside of BLM's desire to ensure that it accurately considered the cultural resources in the Imperial Project area, its basis for directing KEA to define and study an ATCC made little sense.

212. The ATCC concept marked a departure from BLM's usual process for identifying sites eligible for listing on the National Register, as discussed at ¶ 224 above. Nonetheless, Glamis had no legitimate reason to believe that identification of the ATCC would create any delays in its development of the Imperial Project.

d. Recognizing That The Impact On Cultural Values Does Not Provide A Basis For Denial, BLM And Imperial County Issued A Second Draft EIS/EIR Recommending Glamis' Plan Of Operations As The Preferred Alternative

213.

Glamis remained confident that the Imperial Project would proceed subject only to economically feasible mitigation. The company was even willing to implement additional mitigation measures in the form of (1) "a detailed mitigation plan" for

⁴⁰⁶ Sebastian Report, at 7, 8, 46, 60. The Tribe's traditional territory generally covers much of the lands depicted in Figure 2, *supra*, at page 14; see Letter from Courtney Coyle (Quechan Tribe) to BLM, at 3 (Jan. 29, 1999) (at ACHP00393), Ex. 179 (stating that "Quechan sacred lands include the Indian Pass area and clearly encompass the proposed Imperial Project site, but also extend towards the north up to Blythe, towards the south connecting with Pilot Knob, towards the west and the Cargo Muchacho Mountains and east to the Colorado River and along portions of what is now western Arizona.").

KEA Environmental, *Where Trails Cross: Cultural Resource Inventory and Evaluation for the Imperial Project*, at 287 (Dec. 1997) (at GLA034266), Ex. 93; Sebastian Report, at 8.

⁴⁰⁷ *Id.* at 8, 47.

cultural resources developed through the NEPA process,⁴⁰⁸ (2) funding for a baseline study of the geoglyphs and other features in the Indian Pass area (north of the Imperial Project), and (3) funding for a three-year endowment for the Quechan Tribal historian – Lorey Cachora – to study the Indian Pass area and surrounding lands extensively.⁴⁰⁹ Glamis proposed to institute these measures on top of the steps already undertaken to address the new cultural-resource concerns, including substantially reworking the Imperial Project design to eliminate several original features, adjusting the Project boundaries, and redesigning other elements of the Project to avoid impacts to “many cleared circles, rock rings, geoglyphs, trail segments, pot drops” and other artifacts.⁴¹⁰

214. BLM’s and Imperial County’s next Draft EIS/EIR of the plan of operations, released in November 1997, shortly after the first draft of KEA’s *Where Trails Cross* Report came out, also supported Glamis’ continued expectations of ultimate Project approval. The revised Draft EIS/EIR further analyzed the environmental effects of the proposed Imperial Project and placed increased emphasis on Native American cultural resources.⁴¹¹

215. With respect to virtually all environmental parameters examined in the 1997 Draft EIS/EIR, as in the 1996 Draft, no significant impacts were anticipated to stem from the proposed Project. The new draft did identify as “significant” impacts to the desert tortoise and visual

⁴⁰⁸ Letter from Steve Baumann, Chemgold, to Pauline Owl, Quechan Cultural Committee Chairman (Mar. 24, 1997) (at GLA041861), Ex. 81.

⁴⁰⁹ Letter from Steve Baumann, Chemgold, to Pauline Owl, Quechan Cultural Committee Chairman (Sept. 5, 1997) (at GLA041862), Ex. 88; *see also* Letter from Steve Baumann, Chemgold, to Mike Jackson, President Quechan Tribe (Sept. 5, 1997) (GLA041864), Ex. 87.

⁴¹⁰ Letter from Steve Baumann, Chemgold, to Pauline Owl, Quechan Cultural Committee Chairman (Sept. 5, 1997) (at GLA041862), Ex. 88.

⁴¹¹ *See Draft EIS/EIR of the Glamis Imperial Project* (Nov. 1997), Ex. 90.

resources, as well as to certain Quechan educational values.⁴¹² Still, mirroring the prior conclusion of the 1996 Draft EIS/EIR, the 1997 Draft again selected approval of the Imperial Project, as proposed, as its “preferred alternative”:

The No Action (no project) Alternative forms the baseline from which the impacts of all other alternatives can be measured. Such action would likely not be consistent with the 1872 Mining Act and BLM implementing regulations. It would also generally not be consistent with the BLM multiple use mission and policy of making public lands available for a variety of uses, as long as these uses are conducted in an environmentally sound manner, since the subject lands were not withdrawn for any special use and were open, unappropriated lands when unpatented mining claims were staked. If the No Action Alternative is implemented, the area of the Proposed Action would remain as is

Thus, the BLM Preferred Alternative is the alternative that best fulfills the agency’s statutory mission and responsibilities . . . giving consideration to economic, environmental, technical and other factors. BLM has determined that, with the addition of the applicable mitigation measures listed in Chapter 4, the Proposed Action is the BLM’s Preferred Alternative.⁴¹³

Based on the second Draft EIS/EIR’s continued support for the Imperial Project and the extensive public participation process that led to its release,⁴¹⁴ the government gave Glamis no reason to suspect that BLM’s subsequent consultations with the California SHPO and ACHP under the NHPA would unduly delay or thwart approval of the Imperial Project plan of operations.

⁴¹² See, e.g., *id.* at S-38 to S-39, S-48 to S-49.

⁴¹³ *Id.* at 2-63 (emphasis added).

⁴¹⁴ For example, the EIS/EIR process began in March and April 1995, when BLM and Imperial County published their respective notices of intent to prepare an EIS/EIR for the Imperial Project. The agencies then distributed a draft EIS/EIR in November 1996. A comment period for that draft ended in March 1997, and included two public hearings during that time. After a review of the comments received, BLM and ICPBD jointly announced on June 11, 1997 that a new draft EIS/EIR would be prepared to incorporate new information and concerns identified by the comments. On August 1, 1997, BLM published a “Notice of Withdrawal” of the November 1996 draft EIS/EIR, as well as a notice of intent to prepare a new draft, which it then distributed in November 1997. See, e.g., *Final EIS/EIR for the Glamis Imperial Project*, at 1-6 to 1-7 (Sept. 2000), Ex. 210.

**e. Glamis Continued Reasonably To Expect Approval
And Issuance Of A Decision Allowing It To Commence
Mining At The Imperial Site**

216. During the period between issuance of the 1996 Draft EIS/EIR and issuance of the 1997 Draft EIS/EIR, Glamis continued to view the Imperial Project as a cornerstone of the company's future success. For example, Glamis made substantial additional investments in environmental and cultural-resource reviews throughout 1997, incurring over \$1 million in additional costs for its environmental permitting efforts.⁴¹⁵ Glamis also completed its acquisition of a mining shovel at an additional expense of \$6.3 million,⁴¹⁶ bringing its total expenditures on that piece of equipment (through November 1997) to \$7.5 million. Acquisition of the shovel meant that Glamis would have to spend an additional \$15,000 a month in storage costs, alone, to house the shovel until mining operations could commence.⁴¹⁷ Thus, through 1997, Glamis had invested over \$18.6 million in the Project and remained committed to pursuing its development through completion.⁴¹⁸

217. Glamis' positive outlook for the Imperial Project continued well into 1998, as reported by Glamis' CEO, Kevin McArthur, in a May 1998 presentation to the company's board of directors: "As a natural extension of Picacho's 18-year mine life, the Imperial Project nears permitting completion. Located 8 miles from Picacho, I expect Imperial to eventually become

⁴¹⁵ Statement of J. Utley, Att. A.

⁴¹⁶ *Id.*; *see also* Statement of K. McArthur, ¶ 8.

⁴¹⁷ Memorandum from Steve Baumann to Kevin McArthur re Equipment Commitments (Nov. 4, 1997) (at GLA038248), Ex. 91.

⁴¹⁸ Statement of J. Utley, Att. A.

the foundation of the company's success. Right now we are drawing the inevitable opposition from special-interest groups, but we expect permits late this year.”⁴¹⁹

IV. In Light Of The Mining Law And Longstanding Interpretation Of Federal Land-Use Regulation, As Well As The Past Decades Of Mining Activities In The California Desert, Glamis' Investment-Backed Expectations Of Approval Of The Imperial Project Were Reasonable

218. As explained in the sections above, Glamis' past experience mining in the CDCA and working with BLM and Imperial County, as well its experience gaining necessary permits leading up to development of its Imperial Project, led it reasonably to believe that final approval of its Imperial Project plan of operations would be forthcoming. In addition to the fact that the company's expectations were legitimate from the standpoint of an investor in its position, they were also reasonable from the standpoint of those most familiar with the mining permit process under federal and state law, in addition to the associated cultural-resource review process under federal legislation. This section discusses the recent findings of two very highly qualified experts in the mining and cultural resources regulatory policy areas, who have undertaken

⁴¹⁹ *Annual Meeting Notes of K. McArthur*, at 2 (May 8, 1998) (at ELGA08789), Ex. 113. Significantly, the company's outlook remained optimistic despite the downward trend in the gold price in 1997 and 1998. Consistent with its "corporate blueprint" as being "a low cost, high volume gold producer, operating in an environmentally sound manner for the benefit of its shareholders, employees and communities" (see *PowerPoint Presentation for Glamis Gold Ltd.* (1998) (at ELGA08812), Ex. 310), Glamis devised ways of lowering its costs and exploring other methods of moving the Imperial Project forward until the gold price recovered. For example, as explained by Kevin McArthur in a memorandum to the board of directors in early 1998: "At today's gold price, a 'small mine' concept is being reviewed at Imperial. . . . As gold price improves, we will be poised to grow Imperial to a large 'world class' mine." Memorandum from Kevin McArthur to Chester Millar, at 2 (Feb. 27, 1998) (at ELGA08844), Ex. 107. The company was forced to make some difficult cost-saving moves, however, due to the depressed gold price and longer-than-expected permitting delays at Imperial, including reducing its work force at the Picacho Mine in late 1997 (see Memorandum from Steven Baumann to Chemgold Staff (Aug. 14, 1997) (at GLA037312), Ex. 86) and consolidating its administrative offices in Reno, Nevada by closing its Vancouver, Canada office. See, e.g., *Annual Meeting Notes of K. McArthur* (May 8, 1998) (referencing the closure of the Vancouver office and "consolidating the administration of the company in Reno" in 1997 as a cost-saving move) (at ELGA08789), Ex. 113. In any case, the company stayed positive about the prospects for proposed mine, recognizing that the "Imperial Project continues to be a good project with a little help in the price of gold." Memorandum from Steven Baumann to Kevin McArthur re Imperial Project \$300 Pit Economics (June 29, 1998) (at GLA036988), Ex. 127; see also Memorandum from Steven Baumann to Kevin McArthur re Imperial Project \$300 Pit Economics (July 27, 1998) (GLA036977), Ex. 136.

extensive analyses of Glamis' expectations in light of the law and regulations as applied to similar projects in the CDCA. Both experts conclude, from their different perspectives, that Glamis' investment-backed expectations were objectively reasonable.

A. A Reasonable Investor Would Conclude That The Identified Cultural Resources At Or Near The Imperial Project Site Were Not Sufficiently Distinct To Justify Prohibiting The Mine

219. Dr. Lynne Sebastian has analyzed how Respondent carried out its obligations under Section 106 of the NHPA for the Imperial Project, as well as the procedures used during Section 106 reviews for other mining projects in the CDCA, in order to determine whether Glamis' expectation that its Imperial Project plan of operations would be approved was reasonable. Dr. Sebastian holds a Ph.D. in Anthropology and is a former State Historic Preservation Officer for the State of New Mexico.⁴²⁰ Since 1990, she has served as an adjunct professor of Anthropology at the University of New Mexico.⁴²¹ Not only does Dr. Sebastian have extensive personal experience and a rich education in cultural-resource management issues, her knowledge of cultural-resource issues is recognized by Respondent itself, which repeatedly has hired Dr. Sebastian to train federal government officials in the area of Section 106 compliance.⁴²²

220. Dr. Sebastian's main conclusions are that Glamis' expectation that its plan of operations would be approved was reasonable and that the company's reasonable expectation was defeated by BLM (together with its consultants), the ACHP,⁴²³ Interior,⁴²⁴ and the State of

⁴²⁰ Sebastian Report, at 14.

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.* at 13.

⁴²⁴ *Id.* at 7-8, 68.

California⁴²⁵, which relied on flawed premises and analyses of the affected cultural resources.

According to Dr. Sebastian:

Glamis had a reasonable expectation that their plan of operations for the Imperial Project would be approved, based on the standard Section 106 process for such projects and on the results of other Section 106 reviews in the California Desert region.

Different Section 106 procedures and standards were applied to the proposed Imperial Project than were applied to other large, ground-disturbing developments in the California Desert, both before and after the Glamis plan of operations was denied by Secretary Babbitt.

The Section 106 process in the Glamis case was not only unlike the process applied to previous and subsequent undertakings, but was inconsistent with the Advisory Council on Historic Preservation's regulation at 36 CFR Part 800, the BLM's nationwide programmatic agreement for Section 106, and the California protocol for compliance with the National Historic Preservation Act.⁴²⁶

221. Dr. Sebastian's conclusions are based on several factual findings. First, with respect to the apparent importance of cultural values in the Imperial Project area, Dr. Sebastian has found that no previous tribal consultations identified the Imperial Project area as being of particular cultural or religious significance.⁴²⁷]

222. Second, archaeological surveys done in the Project area have revealed that the sites, features and artifacts in the area were "*identical in type and similar in density to*

⁴²⁵ *Id.* at 13-14.

⁴²⁶ *Id.* at 5.

⁴²⁷ *Id.* at 6.

⁴²⁸ *Id.*

archeological sites, features and artifacts recorded throughout the region.”⁴²⁹ According to Dr. Sebastian, segments of Native American trails are ubiquitous in the desert⁴³⁰ and the trail segments near Indian Pass are not extraordinary in length, orientation, or physical condition.⁴³¹ Moreover, although tribal members have identified various other features around the Project site as important, such as prayer circles,⁴³² these features are also not unique to the Imperial site.⁴³³ They exist along a vast network of trails encompassing hundreds of square miles within the Quechan’s traditional territory.⁴³⁴

223. Third, with respect to the significance of the Project area as compared to other parts of the CDCA, Dr. Sebastian has found that although the Imperial Project area has been portrayed as a location of unique sacred or cultural values, ethnographic information indicates that the Project area is but a very tiny part of an enormous, unified traditional cultural landscape, covering millions of acres considered by the Quechan tribe as sacred.⁴³⁵ There simply is no unique feature on the Project site to distinguish it from this vast surrounding area that encompasses other open-pit mines and significant other structures.

⁴²⁹ *Id.* at 6-7 (emphasis added).

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.* at 56.

⁴³³ *Id.*

⁴³⁴ *Id.* at 8, 56-57. Dr. Sebastian believes that “[m]any, probably most, development projects authorized by the BLM in the California desert have impacted them.” *Id.* at 11.

⁴³⁵ *Id.* at 7-8. This is supported by the fact that the Quechan repeatedly stated that it was their vast traditional territory that was important and that they were determined to stop all further encroachment in the vast region. *Id.*

224. Fourth, instead of evaluating the effects of the Project on individual features of the Quechan traditional cultural landscape, which was the approach taken for other development projects in the region, or evaluating the effects of the Project on the whole traditional cultural landscape, Dr. Sebastian has found that BLM chose to evaluate effects on an arbitrarily defined region immediately surrounding the mine, “imbuing it with much of the significance of the entire landscape.”⁴³⁶ In other words, the Imperial Project site was expected to take on the significance of the Tribe’s entire traditional cultural property.⁴³⁷

225. Fifth, because BLM chose to evaluate the effects of the proposed mine on a very small and arbitrarily defined portion of an enormous landscape, Dr. Sebastian has determined that the perceived impacts of the Project were unexpectedly magnified.⁴³⁸ For example, in the Final EIS/EIR released in 2000, BLM found that the “project mine and processing area is proposed to be located in the central portion of the [ATCC] and would physically destroy between 15% and 20% of the area encompassed by it.”⁴³⁹ According to Dr. Sebastian, this conclusion is nonsense:

[BLM’s] findings, with their apparent precision, are meaningless. Of *course* the proposed mine is in the center of the ATCC. The location of the proposed mine was *the basis* for defining the location of the so-called

⁴³⁶ *Id.*

⁴³⁷ *Id.* At one of the consultation meetings with BLM consultants, Mr. Cachora expressed a desire to obtain a copy of all archaeological reports and an aerial photograph of the region from Pilot Knob to the point north of the Imperial Project and extending east into Arizona so that he could show the consultants “how sites in the *entire area* are tied together.” *Id.* at 47 (citation omitted) (emphasis added). Moreover, when one of the BLM consultants specifically asked Mr. Cachora whether it would be reasonable to define a “traditional cultural property” extending from the Running Man site to Indian Pass (the eventual boundaries for the ATCC), Mr. Cachora reiterated the need for “an aerial photograph of the . . . area to show why the *entire area* is important. Maybe the *entire area* should be a TCP.” *Id.* at 48 (citation omitted) (emphasis added).

⁴³⁸ *Id.* at 7-8. As discussed above at ¶¶ 204-206, when BLM directed KEA to undertake a cultural-resource survey in 1997, it defined a study area known as the ATCC, which directly encompassed the Imperial Project site. Once BLM defined the ATCC and treated it as though it was a legitimate historic property, BLM took the liberty of drawing some “absurd” conclusions. *Id.* at 8-9, 56.

⁴³⁹ *Id.* at 8-9 (citation omitted).

ATCC. The fact that the project would impact 15-20% of this administratively defined area tells us nothing about the effect of the undertaking on actual culturally defined historic properties that, according to the Quechan, are regional in scale.⁴⁴⁰

226.

According to Dr. Sebastian, surveys conducted as part of the Mesquite Mine in 1987 used a 20-meter transect interval⁴⁴⁴ and a 10-meter transect interval⁴⁴⁵ and another survey performed for a landfill at the Mesquite Mine in 1993 used 20-meter transect spacing.⁴⁴⁶ Moreover, at least one subsequent resource study done for a proposed development project in the CDCA has employed a less intensive survey technique, making KEA's exhaustive survey all the more atypical and unexpected.⁴⁴⁷ As Dr. Sebastian has concluded, this technique would necessarily identify more

⁴⁴⁰ *Id.* at 9. In addition, the ACHP later treated this administratively defined area as if it were an actual historic property, arguing that the mine would "effectively destroy" this "historic resource." *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Id.*; *see also id.* at 30 ("The field work for the resurvey was performed using 5 meter spacing, an intensive level of scrutiny not normally used for large block surveys."); *see also* Letter from Ed Hastey to Cheryl Widell, at 2 (Feb. 26, 1998) (at D-00158-0001-0054), Ex. 106.

⁴⁴³ Sebastian Report, at 10.

⁴⁴⁴ *Id.* at 37.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* at 38.

⁴⁴⁷ *See id.* at 9. According to Dr. Sebastian, "At least one large subsequent project in the California desert (the North Baja Pipeline) used the previous standard of 20 meter transect interval. Even though the area through which the pipeline passed was identified as culturally sensitive . . . and the tribes expressed concerns about the project, no resurvey or redefinition of the archeological sites was required. . . . BLM and the State of California approved [the Pipeline] in 2002." *Id.*

artifacts but not demonstrate a greater density of resources than elsewhere in the desert.⁴⁴⁸

227. As discussed at ¶ 206 above, Dr. Sebastian has determined that throughout the Imperial Project survey,

228. Seventh, in contrast to the Imperial Project, Dr. Sebastian has found that Respondent approved all previous and subsequent large, ground-disturbing projects in the vicinity of the Imperial Project with the requirement that measures to avoid and minimize adverse effects on historic properties be completed.⁴⁵¹ This included the North Baja Pipeline Project, which was approved in 2002 notwithstanding the fact that highly significant traditional cultural places, including the *Xam Kwatcan* Trail, would be directly and adversely effected, and that others, such as Pilot Knob, would be indirectly and adversely effected.⁴⁵²

229. Finally, Dr. Sebastian has found that the ACHP's Section 106 process for the Imperial Project differed procedurally and substantively from the processes applied to previous and subsequent undertakings in the general area.⁴⁵³ For example, ACHP consultations with

⁴⁴⁸ See *id.* at 10 (“If one were to lay out an oval 8 miles long and 5 miles wide in the Picacho Basin or around one of the other passes in the Chocolate Mountains or in many, many other places within the traditional Quechan territory, then survey it for archeological features at 5 meter intervals . . . , the results could be expected to be much the same as those for the Imperial Project area.”).

⁴⁴⁹ *Id.* at 30.

⁴⁵⁰ Sebastian Report, at 30 (citing survey methods from 1997 KEA Report).

Sebastian Report, at 10.

⁴⁵¹ Sebastian Report, at 12.

⁴⁵² *Id.*

⁴⁵³ *Id.* at 13.

BLM about measures to avoid or minimize adverse effects of the proposed Imperial Project were truncated by the ACHP's decision in 1999 to provide a formal comment to the Secretary of Interior, even though none of the criteria established as triggering such comment in 36 CFR 800.6(a) and (b) had been met.⁴⁵⁴

B. A Reasonable Investor Would Conclude That Glamis' Imperial Project Plan of Operations Satisfied The Applicable 3809 Regulations And That, Consistent With Comparable Mining Operations, Would Have Been Approved

230. The reasonableness of Glamis' expectations that its proposed Imperial Project, without complete backfilling, would be approved under prevailing mining regulations has also been confirmed by Mr. Thomas V. Leshendok. Mr. Leshendok is a former BLM Nevada Deputy State Director for Minerals with over thirty years of government experience – including federal land management in one of the most active metallic mining districts in the country. In 2004, he was presented with Interior's Meritorious Service Award by Interior Secretary Gale A. Norton, and commended by U.S. Senator Harry Reid for his lifetime of government service dedicated to responsible stewardship of federal lands.⁴⁵⁵ From 1998 through 2001, he served as a member of

⁴⁵⁴ *Id.*

⁴⁵⁵ See Leshendok Report, Attachment 8. As stated by Senator Reid: "I rise today to congratulate Mr. Tom Leshendok on his selection by the Department of Interior for the Meritorious Service Award. It is my honor to recognize the contributions of this dedicated public servant. Mr. Leshendok's career has spanned more than three decades and several Federal agencies, including the U.S. Geological Survey, the Minerals Management Service, the Environmental Protection Agency, and the Bureau of Land Management. In each of these positions, he has contributed tremendously to the effective and responsible management of our public lands and natural resources. Mr. Leshendok's work as Deputy State Director of Minerals for the Nevada BLM was particularly important to the economy and welfare of my State. Not only does the BLM administer almost 48 million acres of public land in Nevada, it also oversees the production of 72 percent of our Nation's gold and silver. As the leader of the BLM's largest mining law administration program, Mr. Leshendok was responsible for the leasing and development of geothermal, oil, and gas resources, the Abandoned Mine Lands program, and hazardous material detection and remediation. . . . Please join me in thanking Tom Leshendok for his strong commitment to public service and congratulating him on his selection for the Department of Interior's Meritorious Service Award." 150 Congressional Record S7100 (June 21, 2004)), Ex. 295.

Interior's Task Force that developed and drafted the revisions to the BLM's 3809 surface management regulations.

231. Mr. Leshendok has analyzed the review process applied to the Imperial Project's plan of operations, as well as the review processes carried out for similar mining operations in the area, using Glamis' documents and public records from BLM and Imperial County.⁴⁵⁶ His many years of BLM experience permit him to view the Imperial Project in the larger context of mining regulation and to identify the glaring inconsistencies that mark Respondent's unfair treatment of Glamis' Imperial Project.

232. Mr. Leshendok has concluded that Glamis had a reasonable expectation that the Imperial Project's plan of operation would be approved. According to him,

Based upon the pattern and practices of submission and acceptance of plans of operation in the California Desert Conservation Area and on public lands in other similar locations and the adequacy of the plan of operations, there was a reasonable expectation that the Glamis Imperial plan of operations for open pit gold mining should have been approved.⁴⁵⁷

233. Mr. Leshendok's conclusions are based on several factual premises. According to Mr. Leshendok, Glamis' Imperial Project plan of operations was consistent with many other similar open-pit gold mining operations in the California Desert Conservation Area:

The sequence and substance of Glamis's acquisition of mineral rights, exploration, predevelopment activities, plan preparation, review, application of technically and economically feasible mitigation measures and proposed operating and reclamation practices were consistent with the pattern and practices of other active open pit gold mining plans approved within the California Desert Conservation Area by BLM, the Counties and State.⁴⁵⁸

⁴⁵⁶ A complete list of Mr. Leshendok's sources is provided as Attachment 7 to his Report.

⁴⁵⁷ Leshendok Report, Executive Summary.

⁴⁵⁸ *Id.*

234. Moreover, as further described by Mr. Leshendok, Glamis’ Imperial Project plan of operations met the requirements of the existing mining regulations:

The proposed Glamis Imperial Project plan of operations was in accordance with the applicable 43 CFR 3809 regulations, based on a review of the proposed plan of operations for open pit mining operations in context with the applicable Federal regulations for regulating surface management, reclamation and protection of the environment; the analysis of the proposed plan of operations in the joint Federal and State/County Environmental Impact Statement/Environmental Impact Reports; comparisons with other similar open pit gold mining operations in the California Desert Conservation Area, other locations in California and areas of adjoining states with similar environmental characteristics⁴⁵⁹

235. In fact, Mr. Leshendock has found that at least seven similar open-pit gold mines were approved for operation in the CDCA – without complete backfilling – within the time frame of the proposed Glamis Imperial Project.⁴⁶⁰ In 1997 to 1998 alone, there were six active open-pit gold mining projects in the CDCA. During that same period, the broader Basin and Range Geologic Province, within which the Imperial Project was located, had about 49 major active gold and copper open-pit mining projects.⁴⁶¹ Of the four major open-pit gold mine proposals submitted for the CDCA around the same time as Glamis’, all except the Imperial Project were approved within three years.⁴⁶²

236. Thus, Mr. Leshendok has found that BLM’s review of the Imperial Project took “substantially longer” than comparable reviews—owing in large part to Solicitor Leshy’s involvement, which was a “significant deviation from the standard practices that BLM had utilized for permitting open pit gold mining operations in the CDCA.”⁴⁶³ In short, Mr.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* ¶ 132.

⁴⁶¹ *Id.* ¶ 152.

⁴⁶² *Id.* ¶ 95.

⁴⁶³ *Id.* ¶ 158.

Leshendok has determined that there is no reason why the plan of operation should not have been approved, and that it certainly should have been approved in less than the seven years it took for BLM to take even the initial adverse action.

237. Regarding the subject of pit backfilling, Mr. Leshendok has found that the Glamis proposed partial open-pit backfilling alternative “was consistent with common practices for partial and/or full backfilling of metallic and gold open pits throughout California, including Class L lands in the CDCA, the Basin and Range Geologic Province and the Western U.S.”⁴⁶⁴

He has made the following additional determinations with regard to backfilling:

The backfilling practices in the California desert for open pit gold mining operations are consistent with management practices and actual approved open pit mining operations by regulatory agencies today for gold and metallic mines throughout the rest of the Basin and Range Geologic Province and the U.S.⁴⁶⁵

Within the context of all open pit metallic mining operations within the same geological province among several Western States the proposed Glamis Imperial Project was consistent with approved open pit mining and other projects through the date of this report. There was no past history prior to December 2002 of regulatory agencies in the United States applying complete mandatory backfilling requirements to gold or metallic ore mines.⁴⁶⁶

Open pit gold and metallic mining is a world wide practice. Glamis Gold Ltd., as well as any other gold mining operator, would have reasonably expected that mandatory backfilling would not be a reclamation requirement imposed by a U.S. law or regulation.⁴⁶⁷

⁴⁶⁴ *Id.* ¶ 157.

⁴⁶⁵ *Id.* ¶ 162.

⁴⁶⁶ *Id.* ¶ 165.

⁴⁶⁷ *Id.* ¶ 166.

238. Mr. Leshendok's conclusions are also based on the fact that, as discussed at ¶¶ 73-74, BLM's 2000 revisions to the 3809 rulemaking rejected a regulatory presumption in favor of pit backfilling due to the issuance of the 1999 report by the National Research Council, *Hardrock Mining on Federal Lands*.⁴⁶⁸ That 1999 report reiterated the 1979 NAS/NRC conclusion that reclamation standard of restoring metallic open pits to their "approximate original contour" was generally not technically feasible.⁴⁶⁹

V. **Despite Glamis' Reasonable Investment-Backed Expectations Of Approval, Political Opponents Hijacked The Lawful Process And Conspired To Block The Imperial Project Through Unlawful Means And Without Payment Of Just Compensation**

239. Despite the release of the Draft EIS/EIR in November 1997 and the company's continued positive outlook for the Imperial Project into 1998, a series of events were about to transpire that would radically change the way Respondent reviewed the pending Glamis Imperial Project – events that could never have been reasonably anticipated by Glamis. These events would cause additional multi-year delays in the review of the Imperial Project, and eventually would lead to a complete denial of the Project in January 2001, nearly seven years after Glamis first submitted its plan of operations to BLM for review and approval. While Respondent itself quickly concluded the denial was unlawful and rescinded it, to date, Respondent has failed fully to reverse the expropriation by approving the plan of operations for the Imperial Project. Compounding the damage to Glamis – and again without any compensation – the State of California imposed additional measures with the sole purpose of fully seizing Glamis' property right in extracting gold from the Imperial Project site.

⁴⁶⁸ *Id.* ¶ 146.

⁴⁶⁹ *Id.* ¶ 147 (quoting a nationwide study of hardrock mining practices prepared by the National Academy of Sciences in 1999). *See* discussion, *supra*, at ¶¶ 73-74.

A. Interior Initially Denied The Imperial Project Only After Constructing A Newly Claimed “Authority” Under FLPMA To Block Mines That Fully Complied With All Environmental And Regulatory Conditions

240. Based upon the November 1997 Draft EIS/EIR, the Imperial Project was poised for approval as soon as BLM completed the required consultations and developed the final list of technically and economically feasible mitigation measures. But political appointees hijacked this process and, when unable to find lawful grounds on which to deny the Project, resorted to manufacturing a claimed legal and factual basis for denial – “authority” that had never been used before or since to deny a project on federal lands in the California Desert that met all environmental conditions and regulatory requirements.

1. Recognizing The Primacy Of The Mining Law, The State BLM Office Sought Initially To Complete Its Review Of The Imperial Project In Accordance With The Recommendation Of The 1997 Draft EIS/EIR

As noted above, the November 1997 Draft EIS/EIR recommended approval of the Imperial Project as the “preferred action;” *i.e.*, the action most consistent with the agency’s statutory mandate to permit mineral claim holders to extract their minerals in conformance with environmental standards and subject only to economically reasonable mitigation of identified impacts. BLM still needed to meet its consultation obligations under the NHPA. But the agency recognized – and told both the Quechan and Glamis – that approval under the Mining Law was required. Denial of the plan of operations, as the Interior Solicitor’s Office acknowledged, would be a compensable expropriation of Glamis’ mining claims.

a. The State BLM Office Gave Full Consideration To Identified Cultural Values But Emphasized That The Mining Law Does Not Permit Denial On These Grounds

241. On December 16, 1997, shortly after release of the second Draft EIS/EIR, BLM officials met with the Quechan Tribe at tribal offices to listen further to the Tribe's concerns.⁴⁷⁰ In attendance from BLM were State Director Ed Hastey, Field Manager Terry Reed, Archaeologist Russ Kaldenberg, and Public Affairs Specialist Jan Bedrosian.⁴⁷¹ Invited guests included representatives from the Sierra Club (Edie Harmon) and Senator Boxer's office (Dan Hammer), both of whom were vociferous opponents of the Imperial Project, as well as a reporter for the *Yuma Daily Sun*.⁴⁷² Glamis was not invited and, at that time, had no knowledge that such a meeting even took place.

242. At the December 1997 meeting, Mr. Cachora, the Quechan Tribal historian, likened the religious significance of the Imperial Project area to "Jerusalem or Mecca" and argued that the U.S. Constitution protects Quechan tribal members' freedom to exercise religion.⁴⁷³ Mr. Cachora further noted that the Tribe had allowed other mining operations to "go by" in the area, but that the Imperial Project had become their "last stand,"⁴⁷⁴ despite having failed to raise similar concerns as a member of the archeological survey team inspecting the Imperial Project area in both 1991 and 1995.

243. BLM State Director Hastey responded to Mr. Cachora's concerns by reassuring the Tribe that he had already begun working with the Solicitor's office on the question of the

⁴⁷⁰ Notes from Government to Government Meeting (Dec. 16, 1997) (D-00376-0079-0001), Ex. 96.

⁴⁷¹ *Id.* at 1 (at D-00376-0079-0001).

⁴⁷² *Id.*

⁴⁷³ Notes from Government to Government Meeting, at 4 (at D-00376-0079-0004), Ex. 96.

⁴⁷⁴ *Id.* at 5 (at D-00376-0079-0005).

how religious beliefs of the Tribe were to be treated under the Mining Law.⁴⁷⁵ He explained, however, that as a general matter on federal lands under the Mining Law, mining rights trumped religious values in the event of a conflict between the two.⁴⁷⁶ BLM State Director Hastey added that in reviewing any proposed mining operation, “the *only* criterion for BLM is whether the proposed project is a valid operation.”⁴⁷⁷ Moreover, with respect to the Glamis plan of operations itself, he explained, “BLM is running preliminary validity reviews and may find it necessary to do a more intensive validity examination to ensure the mine meets the legal requirements,” but related its otherwise straightforward obligations to approve the mine, explaining that “BLM ‘is kind of hamstrung’ when it comes to 1872 mining law rights”⁴⁷⁸

244. At the December 1997 meeting, BLM also discussed the subject of mine backfilling in the context of the Imperial Project. In response to questions from Senator Boxer’s office, BLM State Director Hastey noted that BLM would evaluate backfilling and “has required backfilling at other projects, but *must* justify it in economic terms.”⁴⁷⁹ Acknowledging BLM’s longstanding interpretation of FLPMA’s “unnecessary or undue degradation” standard, he added

⁴⁷⁵ *Id.* at 3 (at D-00376-0079-0003).

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.* (emphasis added).

⁴⁷⁸ *Id.* This repeated a similar message KEA was prepared to send to the Tribe in September 1997: “The proposed project is a non-discretionary action. That is, the BLM cannot stop or prevent the project from being implemented, pursuant to the 1872 Mining Act, provided that compliance with other Federal, State, and Local laws and regulations is fulfilled. As a consequence, there is a strong possibility that the proposed mining project may be approved.” Draft Letter from KEA Environmental to Quechan Cultural Tribal Committee and Tribal Members re Imperial Mining Project, at 1 (Sept. 10, 1997) (at MV001222), Ex. 89. This is also consistent with Director’s Hastey’s assurances to Glamis on July 17, 1998 that “Glamis had a right to mine on the property, and the BLM could not stop that. . . .” Memorandum from Steve Baumann to Chuck Jeannes, at 1 (July 17, 1998) (at GLA027876), Ex. 130 (referring to a July 17, 1998 meeting between Glamis and BLM) (note that the memorandum is incorrectly dated “July 15, 1998”); *see also* BLM Notes of July 17, 1998 Glamis Meeting (at MV022321), Ex. 131.

⁴⁷⁹ Notes from Government to Government Meeting, at 4 (Dec. 16, 1997) (at D-00376-0079-0004), Ex. 96 (emphasis added).

that “mitigation has to be ‘*reasonable* under prevailing standards.’”⁴⁸⁰ In fact, and interesting for later developments in the State of California, BLM had just extensively analyzed a complete backfilling alternative for the Imperial Project in its second Draft EIS/EIR and rejected the alternative as infeasible, instead finding (as discussed at ¶ 215) Glamis’ proposed plan of operations as its “Preferred Alternative . . . giving consideration to economic, environmental, technical and other factors. . . .”⁴⁸¹

245. A few weeks after the December 1997 meeting, BLM State Director Hasteley formalized his initial discussions on First Amendment issues surrounding the Imperial Project with the Solicitor’s Office into a written request for a legal opinion from his Regional Solicitor “regarding the conflict between Quechan religious beliefs and the Glamis Imperial Project.”⁴⁸²

His request, dated January 5, 1998, posed the First Amendment question as follows:

The Quechan believe that this is a conflict between their protected right to practice religion under the First Amendment to the Constitution and the 1872 Mining Law; that by allowing the mining to occur the government will have violated their rights under the First Amendment and destroyed their ability to practice their religion where it must be practiced. What are our responsibilities to ensure that we do not violate the First Amendment? What are our responsibilities to the mining claimant to ensure that his property rights are protected?⁴⁸³

The request also revealed the interest of two senior Interior appointees:

This conflict has been elevated to the Secretary and Solicitor Leshy by members of the public and both have indicated personal interest. In addition, Senator Barbara Boxer is potentially planning a trip to meet with the Quechan to hear their concerns first-hand in January.

⁴⁸⁰ *Id.* (emphasis added).

⁴⁸¹ *See Draft EIS/EIR for the Glamis Imperial Project*, at 2-63 (Nov. 1997), Ex. 90.

⁴⁸² Memorandum from State Director to Solicitor re Request for Opinion Regarding Conflict Between Quechan Religious Beliefs and the Glamis Imperial Project, at 1 (Jan. 5, 1998) (at MV002600), Ex. 98.

⁴⁸³ *Id.* at 3 (at MV002602).

It is therefore critical that your office, *in consultation with Solicitor Lesby*, review the legal issues involved *and provide us as soon as possible with a clear legal opinion* on our decisionmaking parameters and legal responsibilities in this case.⁴⁸⁴

b. BLM Proceeded With The Required Consultations And Concluding Review Needed To Issue A Final EIS/EIR And Record Of Decision Approving The Imperial Project

246. As BLM State Director Hastey had informed the Quechan, the Mining Law compelled approval of Glamis' plan of operations. Nonetheless, BLM sought to provide full consideration of the issues raised by the Quechan and to otherwise complete its review in accordance with the existing laws and regulations.

(1) BLM Initiated NHPA Consultations With The California SHPO And The ACHP To Identify Possible Mitigation Measures

247. As discussed at ¶¶ 204-205, through the preparation of the 1997 Draft EIS/EIR and the KEA cultural-resources report, BLM defined a so-called "ATCC" as a region worthy of analyzing for its historic value. Under the applicable 1986 regulations implementing NHPA, once BLM identified a historic property – artificial as it was – that might be adversely affected by the Imperial Project, it had the procedural obligation of consulting with the California SHPO and the ACHP to "seek ways to avoid or reduce the effects."⁴⁸⁵ Importantly, and as Glamis was aware, BLM began these consultations knowing that it had already identified the Imperial Project, as proposed, as the preferred alternative.

248. In February 1998, BLM sent a letter initiating formal Section 106 consultations with the SHPO. Its letter made clear that the agency had already found that "the project will

⁴⁸⁴ *Id.* (emphasis added).

⁴⁸⁵ 36 C.F.R. § 800.5(e) (1986).

have an adverse effect on the ATCC and contributing properties.”⁴⁸⁶ There was no indication that such adverse effects could not be mitigated for, as was done for other projects in the area, such as the major Mesquite Mine and, subsequently, the North Baja Pipeline.⁴⁸⁷

249. The agency asked, first, for the SHPO’s concurrence in its finding and, second, for its help in identifying ways “to avoid or reduce the effects on historic properties.”⁴⁸⁸ Importantly, it was *not* BLM’s position that the Project should be denied due to its effects on historic properties. Such a position would have been contrary to Congress’ intent in developing purely procedural requirements under NHPA, and contrary to BLM’s 3809 Regulations and CDCA Plan, which expressly provided that cultural-resource impacts would not be a basis to deny a proposed mining plan.⁴⁸⁹

250. In August 1998, BLM took the further step of notifying the federal Advisory Council on Historic Preservation (“ACHP”) of its finding of adverse effects, and requested that the ACHP review the Imperial Project.⁴⁹⁰ Again, BLM proceeded with the expectation that the Imperial Project could be approved once the relevant parties agreed upon appropriate mitigation measures. In that vein, the agency provided the ACHP with some five pages of detailed

⁴⁸⁶ Letter from Ed Hastey, BLM, to Cherilyn Widell, California SHPO, at 9 (Feb. 26, 1998) (at D-000158-0001-0061), Ex. 106.

⁴⁸⁷ Sebastian Report, at 12. According to Dr. Sebastian, BLM consultants concluded that, as result of the Pipeline Project, certain highly significant traditional cultural places, including the *Xam Kwatcan Trail*, would suffer multiple and direct adverse effects. Yet, after consultation with the California SHPO, the federal agencies involved in approving that project agreed upon measures to mitigate these adverse effects, and the project was approved to proceed. *Id.*

⁴⁸⁸ Letter from Ed Hastey to Cherilyn Widell, at 9 (Feb. 26, 1998) (at D-000158-0001-0061), Ex. 106.

⁴⁸⁹ See 45 Fed Reg. 78,902, 78,905 (Nov. 26, 1980); *CDCA Plan*, at 18, 101 (1980) (at MV037137 and MV037219), Ex. 12.

⁴⁹⁰ Letter from Ed Hastey to John Fowler, at 1 (Aug. 25, 1998) (at D-00050-0001-0002), Ex. 139.

mitigation options as a starting place for consultation, making it clear that mitigation was the preferred course:

[BLM] would like to begin consultation [with the ACHP] regarding measures to avoid or reduce adverse effects. . . . [T]he KEA report address[es] potential mitigation measures. Many of KEA's suggestions are included in the Draft EIS/EIR as recommended mitigation measures.⁴⁹¹

The ACHP's review of the Imperial Project is discussed more fully below at ¶¶ 309-324.

(2) After Confirming That The Imperial Project Was Economically Viable Even With A Declining Gold Price, BLM Acknowledged That Failure To Approve Would Be A Compensable Expropriation

251. By December 1997, the price of gold had declined to an eight-year low, stabilizing in the first months of 1998 at approximately \$300 per ounce. Accordingly, BLM's California State Office sought confirmation of the economic feasibility of the Project.⁴⁹² Indeed, as the Interior Solicitors noted (who were just beginning to take an active policy role with respect to the Project), because "the recent downward trend in the price of gold has triggered some concern by interest groups that the Imperial Project may not be financially viable"⁴⁹³ BLM undertook a preliminary "feasibility study for the mine," determining that "the mine looks feasible" and thus there was no need "to conduct a full-blown mineral examination" for the Project.⁴⁹⁴

⁴⁹¹ *Id.* at 5 (at D-00050-0001-0006); *see also Issue Paper Addressing Native American and Cultural Resource Values at the Imperial Project*, at 5 (at MV023233), Ex. 308 ("Additional mitigation or compensation measures may occur as a result of the hearing for the Advisory Council on Historic Preservation in mid March.").

⁴⁹² Rob Waiwood, *Review of Glamis-Imperial's Imperial Project Position in the Gold Market*, at 1 (June 19, 1998) (at MV023673), Ex. 125.

⁴⁹³ *Id.* at 14 (at MV023686).

⁴⁹⁴ E-mail from Joel Yudson to John Leshy (Feb. 4, 1998) (at D-00360-0040-0002), Ex. 103.

252. While there may have been “concern” by “interest groups” about the economic viability of the project, in February 1998, Rob Waiwood, BLM’s primary experienced mineral examiner in the California Desert region, had concluded that given “. . . the current economic market for gold, *the Imperial Project will be profitable within the publicly stated technical and financial criteria available.*”⁴⁹⁵ According to Mr. Waiwood, the “key issue regarding the economic viability of the project is the recovery rate,” which had been identified by Glamis as 73 percent.⁴⁹⁶ What Mr. Waiwood did not yet know was that Glamis initially had identified that recovery rate using extremely conservative estimates, and in fact later demonstrated a higher recovery rate of 80 percent, which would greatly increase the Project’s expected profitability.⁴⁹⁷ Indeed, after further review, Rob Waiwood used an 80 percent recovery rate in his formal mineral validity exam, which found Glamis’ mining claims to be valid, as discussed at ¶¶ 346-348 below.

253. As a result of Mr. Waiwood’s confirmation of the economic viability of the Imperial Project, BLM understood that failure to approve Glamis’ plan of operation would cost BLM a “substantial” sum of money:

Approval of POO: Approval of the POO would likely trigger legal action by Native Americans or environmental groups. Resulting impacts from project development would cause significant harm to cultural and religious values. It is unclear whether the religious aspects of the case would take precedent over the mining law. We have been working with the Regional Solicitor for clarification of the legal issues. BLM has been working

⁴⁹⁵ Memorandum from Rob Waiwood to Richard Grabowski & Jim Hamilton re Imperial Project and Criteria for Verification of Operations Data , at 1 (Feb. 20, 1998) (at MV023663), Ex. 105 (emphasis added).

⁴⁹⁶ *Id.*

⁴⁹⁷ See Memorandum from K. McArthur to G. Boyle & C. Jeannes re Imperial Project Valuation, at 1 (June 16, 1999) (at ELGA09002), Ex. 193 (“As a *very* conservative measure, the projected recoveries were discounted to 73%. . . . **It is very probable that Imperial project recovery will amount to 80% or more.**”) (emphasis in original).

unsuccessfully with the Quechan to find an alternative that would allow the project to go forward. . . .

The No Project option: *The mining proposal appears to have merit under the 1872 mining law, the mining claims are properly recorded, a practical POO was submitted consistent with 3809 regulations. Thus, denial of the POO could constitute a taking of rights granted to a claimant under the Mining Law. If such a finding is made, compensation would be required under this option. While no precise estimate of mineral value is known by BLM, reasonable compensation can be expected to be substantial.*⁴⁹⁸

(3) The Solicitor’s Office Quickly Concluded That Mr. Hastey’s View Was Correct: The First Amendment Cannot Be Read To Override The Mining Law Mandate

254. As BLM State Director Hastey instructed (discussed at ¶ 245), staff from the Regional Interior Solicitor’s Office began communicating with Solicitor Leshy’s Office on February 4, 1998 about Director Hastey’s request for a legal opinion:

[D]oes Ed’s [Hastey] request for legal opinion deal just with the First Amendment, or does it also deal with compliance with the sacred sites executive order in relation to BLM’s implementation of FLPMA and the Mining Law of 1872 in this context?⁴⁹⁹

The response was that:

Ed’s [Hastey] specific request for a legal opinion focuses on the First Amendment rights of the tribes to practice religion, and BLM’s responsibilities to the mining claimant. Although the Sacred Sites executive order is not expressly covered in his questions, he does ask that we should review the legal issues involved and legal responsibilities. Thus John [Payne], Janie [Sheperd] and I [Joel Yudson] agree that the opinion should address the sacred sites executive order.⁵⁰⁰

⁴⁹⁸ *Draft Option Paper, Imperial Project (Chemgold) – Glamis Corp*, at 3 (May 7, 1998) (at MV004195), Ex. 112 (emphasis added).

⁴⁹⁹ E-mail from Joel Yudson to John Leshy (Feb. 4, 1998) (at D-00360-0040-0002), Ex. 103 (referring to Leshy’s earlier request “concerning the response to Francis Wheat, who wrote to Garamendi last November concerning sacred sites and unnecessary or undue degradation issues at the proposed Glamis mine in the California Desert Conservation Area” in addition to Ed Hastey’s request for a legal opinion).

⁵⁰⁰ *Id.* The 1996 Executive Order 13007 on Indian Sacred Sites, provides in pertinent part: “In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent (continued...)

255. Subsequently, John Payne of the Interior Regional Solicitor's Office analyzed the issues raised by Director Hastey's request. Just as Director Hastey had advised the Tribe in December 1997, Mr. Payne concluded that the First Amendment could not trump Glamis' property rights under the Mining Law:

After the Lyng decision (485 us 439),⁵⁰¹ *it seems hard to imagine a federal land management decision which could be considered a violation of native*

(...continued)

with essential agency functions, (1) accommodate access to land ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites." Exec. Order No. 13007, 61 Fed. Reg. 26,711 (May 24, 1996).

⁵⁰¹ Mr. Payne was referencing the U.S. Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), in which the Court held that the free exercise clause of the First Amendment does not prohibit the U.S. Forest Service from permitting timber harvesting on federal lands that had been used historically for religious purposes by Native Americans. The Court's opinion is instructive:

The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices. Those practices are intimately and inextricably bound up with the unique features of the Chimney Rock area, which is known to the Indians as the "high country"

However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires

The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours

No disrespect for these practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property

Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land

Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents.

485 U.S. at 451-54 (emphasis added).

american first amendment rights by the courts. BLM seems to have met its obligations to consult.⁵⁰²

256. Mr. Payne’s conclusion meant that unless BLM could demonstrate that Glamis’ mining claims were not valid, BLM would likely face a takings claim (or expropriation claim) if it sought to deny Glamis’ plan of operations. BLM had already issued a “draft validity report” for the Imperial Project, however, that found “that the proposed operation is marginally economical, based on a ten-year average gold price of \$350, but that it would not be economical at current prices (below \$300)” or perhaps with “additional restrictions imposed by BLM or others [that] could increase costs and affect [mining claim] validity.”⁵⁰³

257. Mr. Payne apparently reported this conclusion at a May 20, 1998 meeting held at the BLM State Director’s Office, where he led a discussion on “native american sacred sites v. 1872 mining law.”⁵⁰⁴ Also on the agenda – a suggestion made in May 7, 1998 Option Paper⁵⁰⁵ – were “possible lawsuits” and “private property takings issues (compensation).”⁵⁰⁶ Thus, by May 1998, the Solicitors had addressed the specific question raised by BLM State Director Haste, that is, what were BLM’s “responsibilities to ensure that [it did] not violate the First Amendment?”⁵⁰⁷ Because the answer favored Glamis, BLM State Director Haste’s second question – “What are our responsibilities to the mining claimant to ensure that his property rights

⁵⁰² E-mail from John Payne to Joel Yudson & Janie Shepperd (May 18, 1998) (at D-00376-0049-0001), Ex. 115 (emphasis added).

⁵⁰³ E-mail from John Payne to Joel Yudson et al. (May 21, 1998) (at D-00034-0001-0001), Ex. 117.

⁵⁰⁴ Glamis/Imperial Meeting Agenda (May 20, 1998) (at MV002609), Ex. 116.

⁵⁰⁵ *Draft Option Paper, Imperial Project (Chemgold) – Glamis Corp.*, at 1 (May 7, 1998) (at MV004193), Ex. 112 (emphasis added).

⁵⁰⁶ *Id.*

⁵⁰⁷ *See id.*

are protected?⁵⁰⁸ – was answered as well. In fact, from BLM’s perspective, it was time for Mr. Payne to “release” his legal opinion “that in *light of the Lyng case, a first amendment religious challenge to a decision approving the Plan of Operations was an almost certain loser.*”⁵⁰⁹

(4) As Part of Its Further Consideration Of Cultural Resources, BLM Contemplated Withdrawal Of Lands Surrounding The Imperial Project, But Assured Glamis That The Project Would Be Approved

258. BLM apparently began considering the idea of a proposed administrative land withdrawal to close the area to the location of *new* mining claims at the request of the Sierra Club, who had discovered the idea in Solicitor Leshy’s book from 1987, *The Mining Law: A Study in Perpetual Motion*.⁵¹⁰ Indeed, even before April 1, 1998, the idea for the land withdrawal of the Imperial Project site was reportedly discussed by U.S. Senator Boxer and Interior Deputy Secretary Garamendi.⁵¹¹

259. On June 24, 1998, the BLM field office formally recommended to BLM State Director Hastey that BLM consider a withdrawal as part of the overall Imperial Project review strategy.⁵¹² BLM’s stated purpose for the proposed withdrawal was to set aside “approximately 9,360.74 acres in Eastern Imperial County . . . from further entry to protect the archaeological

⁵⁰⁸ *See id.*

⁵⁰⁹ E-mail from John Payne to David Nawi, at 2 (June 1, 1998) (at D-00376-0010-0002), Ex. 121 (emphasis added); *see also* E-mail from David Nawi (June 2, 1998) (at D-00376-0009-0001), Ex. 122 (referencing John Payne’s communication of this advice to BLM that a “First Amendment/freedom of religion challenge to a decision approving the Plan of Operations would not succeed”).

⁵¹⁰ Facsimile from Edie Harmon, Sierra Club, to Glen Miller, BLM, at 2 (June 10, 1998) (at MV010974), Ex. 123 (“We got the idea for ‘withdrawal from mineral entry’ from John Leshy’s book ‘The Mining Law: A Study in Perpetual Motion’ (1987). Leshy is now BLM’s Chief Solicitor, so his idea should be good!”); *see also* John D. Leshy, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* at 363-64 (1987), Ex. 16.

⁵¹¹ Memorandum from Steve Baumann to C.K. McArthur (Apr. 1, 1998) (at GLA037074), Ex. 108 (“Rob Waiwood, the BLM mineral examiner in Riverside . . . said that Barbara Boxer and John Garamendi had made comments that they were interested in applying for an emergency withdrawal of mineral entry . . .”).

⁵¹² Memorandum from Terry Reed to BLM State Director (June 24, 1998) (at D-00142-0001-0004), Ex. 126.

and Native American religious values.”⁵¹³ According to BLM, the “withdrawal would segregate the lands from nondiscretionary uses, i.e., mining, which could irrevocably destroy and/or negatively impact the archaeological and Native American religious values of the property. The withdrawal would be subject to valid existing rights, but would segregate from any new mineral entry to prevent additional claims from being filed.”⁵¹⁴

260. This identified impact of the withdrawal comports with what BLM State Director Hastey told Glamis representatives in a meeting held on July 17, 1998 to discuss the proposed withdrawal:

The Glamis representatives wanted to know if the proposed land withdrawal (Indian Pass) would impact their mining proposal and why a withdrawal was necessary? It was explained that the withdrawal was necessary to protect the culturally [sic] artifacts from any *future* mining proposals. *However, the Glamis claims and mine plan would have defacto valid existing rights (VER) as of the date of the withdrawal pending the outcome of a formal VER.* The BLM review of their mine plan and EIS would continue as scheduled prior to the withdrawal.⁵¹⁵

In fact, Glamis’ current President and CEO was at that meeting and specifically recalls that “Ed Hastey looked me in the eye and assured me that the Imperial Project eventually would be approved like the other mines in the California Desert, but that we would have to be patient for a

⁵¹³ *Id.*

⁵¹⁴ *Id.*

⁵¹⁵ BLM Notes of July 17, 1998 Meeting with Glamis, at 1 (at MV022321), Ex. 131 (emphasis added).

while longer.”⁵¹⁶ Thus, Glamis was “assured by the BLM State Director that we would not be impugned by this segregation.”⁵¹⁷

261. BLM State Director Hastey’s assurances to Glamis also coincided with BLM’s longstanding views that the 3809 Regulations did not allow denial of a mining plan of operations under the Mining Law if the claimant complied with all application regulations, as summarized in the proposed Indian Pass withdrawal application:

Because of the obvious detrimental impacts which would occur from mining activities, the two values (mining & archaeological values) are incompatible. The Surface Management Regulations (43 CFR 3809 or 36 CFR 228) would also not provide adequate protection. *Without a withdrawal, BLM would not have the discretion to deny authorization of a mining plan of operation if the claimant complies with applicable regulations.*⁵¹⁸

262. Notwithstanding these assurances, Glamis could hardly have anticipated that BLM would propose to withdraw administratively over 9,300 acres of land, just four years after Congress passed the landmark 1994 California Desert Protection Act, setting set aside ten million acres for preservation – *not* encompassing the Imperial Project site – and confirming that no “buffer zones” were to be imposed.⁵¹⁹ Indeed, BLM’s use of mineral withdrawals to avoid its

⁵¹⁶ Statement of K. McArthur, ¶ 17; *see also* Memorandum from Steven Baumann to Chuck Jeannes re Imperial Withdrawal, at 1 (July 15, 1999) (at GLA027876), Ex. 130 (“It must be noted that in this meeting, Ed [Hastey] mentioned that this action [the withdrawal] will not have any effect on our valid claims, or the project itself. As far as he could see, Glamis had a right to mine on the property, and the BLM could not stop that but that this would allow the BLM to say that all the other artifacts would be persevered, and that no other mining would ever be allowed.”) (note that the date of this memorandum is incorrectly labeled “July 15, 1998” – Chuck Jeannes did not join the Glamis staff until April 1999).

⁵¹⁷ Memorandum from Steven Baumann to Chuck Jeannes re Imperial Withdrawal, at 2 (July 15, 1998) (at GLA027877), Ex. 130.

⁵¹⁸ *Withdrawal Petition/Application for Indian Pass Area of Critical Environmental Concern and Extended Management Area*, at 3 (June 1998) (at D-00142-0001-0007), Ex. 120 (emphasis added).

⁵¹⁹ The area of the proposed withdrawal coincided with Glamis’ mining claims in the area, as well as the Area of Traditional Cultural Concern identified in the 1997 KEA Survey, which was an administratively-defined geographic area surrounding the Glamis Imperial Project of no previously-identified unique significance, as discussed at ¶¶ 221-224 above. *See* Figure 7, *infra*, at page 105; *see also* *Environmental Assessment of the Indian Pass Withdrawal*, at Att. 3 (Apr. 25, 2000) (at MV004449), Ex. 208.

land-management responsibilities during the Clinton Administration was soundly criticized after the new administration took office. As explained by a U.S. Forest Service Locatable Minerals Program Leader on August 12, 2002:

During the last administration withdrawals were overused. Some units were and are using mineral withdrawals to avoid their multiple-use management responsibilities. Withdrawals are a legitimate management tool, but it is a tool of last resort. *Some have tried to use ESA issues, cultural resources, and Native American issues to justify mineral withdrawals.* There are existing laws and regulations for managing these resources. . . .

The [current] BLM is actually going back to the pre-Clinton standards when the BLM took a more critical look at minerals withdrawals.⁵²⁰

(5) BLM Confidently Planned To Complete Review Of The Imperial Project By Early Fall 1998 And Glamis Confidently Expected Approval

263. While BLM waited for its requested legal opinion, field office staff prepared an internal “Imperial Project EIS Schedule” indicating that BLM would complete a Final EIS/EIR by September 18, 1998 and issue a Record of Decision (“ROD”) by October 18, 1998.⁵²¹ Under this schedule, Glamis would be able to move forward with the Project by the end of the year, only several months behind the original EIS/EIR contractor’s schedule, which projected that the Imperial Project ROD would be issued by July 11, 1998.⁵²²

264. This schedule would soon become meaningless, however, as the control of nearly all facets of BLM’s review of the Imperial Project were increasingly shifting to Washington. This was due to significant political pressures that were converging to make the Imperial Project

⁵²⁰ Mike Doran, U.S. Forest Service, *Mineral Withdrawals* (Aug. 12, 2002) (at MV023318), Ex. 239 (emphasis added).

⁵²¹ Imperial Project EIS Schedule (July 27, 1998) (at D-00039-0002-0001), Ex. 135.

⁵²² Imperial Project EIS Schedule (Jan. 14, 1998) (at MV012615), Ex. 102.

the project through which senior Clinton Administration appointees would exercise their personal desires to amend the Mining Law of 1872 – administratively, if need be.

2. Political Appointees At Interior Seized Control Of The Imperial Project In An Effort To Derail It While Trying To Avoid A Likely Takings Claim

265. Despite BLM’s request for an expedient and clear legal opinion from the Interior Regional Solicitor on the narrow scope of the agency’s First Amendment obligations to the Quechan Tribe, the agency would have to wait nearly two years for its requested advice. During that time, the scope of the request was turned into a vehicle by which Solicitor Leshy – not the Regional Solicitor – would attempt to amend the Mining Law of 1872 by administrative fiat, using the Imperial Project as a factual predicate. That is, Solicitor Leshy would ultimately issue a legal opinion that sought to provide a new and never previously applied interpretation of FLPMA’s “undue impairment” standard for the CDCA that could be used to deny mining plans of operation on federal lands even where the operation conformed to the law, the 3809 Regulations, and provided technically and economically feasible mitigation measures. The genesis of that legal opinion appears to have its roots in a letter written by a long-time environmental activist and mining opponent to a senior political appointee in Interior, Deputy Secretary John Garamendi.

a. The Asserted Basis For Expanding Interior’s Authority To Deny Mining Projects Originated With A Politically Connected Mine Opponent

266. The author of the letter that planted the seed for the eventual attempt at a complete and permanent overhaul of longstanding Interior land-use policy, dated November 5, 1997, was the late Francis M. Wheat, a politically connected Imperial Project opponent. Mr. Wheat was one of “100 environmental leaders” that publicly and jointly endorsed the re-election

of President Clinton and Vice President Gore in 1996.⁵²³ He was also a founder and trustee of the Earthjustice Legal Defense Fund, formerly known as the Sierra Club Legal Defense Fund.⁵²⁴ The recipient of the letter, Deputy Secretary Garamendi chaired the Clinton-Gore 1992 election campaign in California.⁵²⁵

267. Mr. Wheat had been watching the Imperial Project evolve for some time. In April 1997, while visiting the Imperial Project site, he began to consider ways to prevent the Project from concluding successfully. He noted that “[a]t all events, this is *the place to insist on backfilling of all pits.*”⁵²⁶ Sometime thereafter, Mr. Wheat had a meeting with Mr. Garamendi and several other Interior officials to discuss the Imperial Project. Following that meeting, on November 5, 1997, Mr. Wheat sent a letter to Mr. Garamendi – at Mr. Garamendi’s request – insisting that “the Department – acting through the Bureau – is under a legal duty to prevent” the Imperial Mine from being permitted.⁵²⁷

268. Mr. Wheat’s November 5th letter summarized what he saw as the “problems involved in the projected Glamis Imperial gold mine”⁵²⁸ It also expressed Mr. Wheat’s appreciation to Mr. Garamendi and his “colleagues in the Interior Department” for previously meeting with him on the subject of the Imperial Project.⁵²⁹

⁵²³ *Environmental Leaders Endorse Clinton and Gore*, U.S. Newswire, at 2 (Oct. 24, 1996), Ex.77.

⁵²⁴ *Harvard Law Bulletin, In Memoriam* (Spring 2001).

⁵²⁵ *Clinton Names Garamendi Campaign Chief in California*, Journal of Commerce (Apr. 14, 1992), Ex. 43.

⁵²⁶ Francis Wheat, Notes on the DEIS and on a Visit to the Site of Chemgold’s Imperial Project (Apr. 7, 1997) (at MV012968), Ex. 82 (emphasis in the original).

⁵²⁷ Letter from Francis Wheat to Deputy Secretary John Garamendi, at 5 (Nov. 5, 1997) (at D-00029-0001-0005), Ex. 92.

⁵²⁸ *Id.* at 1 (at D-00029-0001-0001).

⁵²⁹ *Id.* at 7 (at D-00029-0001-0007).

269. In addition to outlining the “problems” with the Imperial Project, the purpose of Mr. Wheat’s letter was to convey his legal analysis on how BLM ought to reinterpret and apply the “unnecessary or undue degradation” standard to the Imperial Mine. As discussed at ¶ 65, at the time, BLM’s 3809 Regulations defined “unnecessary or undue degradation” as disturbance of land surface greater than what is “done by a prudent operator in usual, customary and proficient operations of similar character.”⁵³⁰ Mr. Wheat’s view, however, was that “this definition might rationally apply to ‘unnecessary degradation’ but could not rationally be applied to ‘undue degradation.’”⁵³¹

270. Mr. Wheat was adamant that Interior should adopt a new definition of “undue degradation.” He asserted that it “would seem unjustified for the BLM to continue to maintain – at least in the California desert – its old policy of favoring mining interests when these interests conflict with the protection of other valuable resources of the desert lands, among them scenic, scientific, wildlife, plant life, historical, cultural, archaeological, air and water resources.”⁵³² He asked, “of what importance are the cultural and archaeological values of a particular parcel of land? Are they sufficiently significant alone, or in combination with the other considerations noted above [i.e. scenic, scientific, wildlife, plant life and historical resources], to conclude that it is ‘inappropriate or unwarranted’ to destroy those values.”⁵³³

271. Based on this discussion of a potential new FLPMA legal standard, Mr. Wheat insisted that the Interior “Secretary’s action or discretion is *not limited* by whatever deficiencies may exist in the BLM rules, or its past practice under those rules,” and encouraged Interior to

⁵³⁰ *Id.* at 2-3 (at D-00029-0001-0002 to D-00029-0001-0003).

⁵³¹ *Id.* at 5 (at D-00029-0001-0005 (emphasis in original)).

⁵³² *Id.* at 6 (at D-00029-0001-0006).

⁵³³ *Id.* at 4 (at D-00029-0001-0004).

consider adopting a policy that de-linked “unnecessary” from “undue” in FLPMA’s general legal standard applicable to all federal lands, as well as to adopt a definition for “undue impairment” (applicable in the CDCA and which BLM had equated to the “unnecessary and undue degradation” standard in the 3809 Regulations) that would essentially mean “inappropriate or unwarranted.”⁵³⁴ In this way, Mr. Wheat urged Interior to adopt a totally new and unbounded discretionary authority under which BLM could deny the Imperial Project.

b. Wheat’s Views Found A Receptive Audience Among The Political Appointees at Interior, Including Solicitor Leshy

272. Unfortunately for Glamis’ prospects of receiving fair and equitable consideration of the Imperial Project was the fact that Mr. Wheat’s letter found a receptive audience with Interior’s highest officials. For example, on December 3, 1997, Mr. Garamendi forwarded Mr. Wheat’s letter to several Interior political appointees, including BLM Director Pat Shea, Solicitor Leshy and Deputy Secretary Dave Alberswerth, describing it as presenting “a case against the current Bureau of Land Management’s proposal to allow mining at the Glamis site”⁵³⁵ Mr. Garamendi then asked BLM to “respond to the legal issues raised by Francis [Wheat].”⁵³⁶

273. Like Secretary Babbitt, Solicitor Leshy generally opposed the Mining Law of 1872 and believed that the time had come for its change or repeal. Indeed, his 1987 book

⁵³⁴ *Id.* at 5-7 (at D-00029-0001-0005 to D-00039-0001-0007) (emphasis added). This rationale essentially was adopted by Solicitor Leshy in his legal opinion rendered on December 27, 1999, as discussed below, although the Solicitor was far less forthcoming than Mr. Wheat in acknowledging how this interpretation conflicted with BLM’s existing governing rules and longstanding administrative practice.

⁵³⁵ Memorandum from John Garamendi to Pat Shea re Glamis Imperial Gold Mine (Dec. 3, 1997) (at D-00360-0022-0001), Ex. 94.

⁵³⁶ *Id.* All of this high-level communication within the Interior Department was occurring unbeknownst to Glamis and immediately preceding and during the public comment period on the Imperial Project Draft EIS/EIR, which was announced in the *Federal Register* on December 2, 1997. *See* 62 Fed. Reg. 63,724 (Dec. 2, 1997). Glamis also had no knowledge at the time of Mr. Garamendi’s decision to circulate the “case against” the Glamis mine.

entitled *The Mining Law: A Study in Perpetual Motion*, lamented that the Mining Law “is not a modern statute, and has never been explicitly amended to bring it in line with the felt necessities of the modern administrative state.”⁵³⁷ In fact, he suggested that the Executive Branch might take “bold” measures to facilitate a congressional modification of the law.⁵³⁸ Even still, he did not imply that the Executive Branch could or should succeed to change the Mining Law without the approval of the other governmental branches:

*A bold stroke by the executive might be enough to wrest Mining Law reform from its current paralysis. Indeed, all lands now subject to the Mining Law could be withdrawn from it “in aid of proposed legislation” to reform the Mining Law, just as Presidents Roosevelt and Taft withdrew large tracts of land from oil, gas, and coal activity and thereby forced passage of the Mineral Leasing Act. Although the procedural restrictions in the [FLPMA] make this a substantial undertaking, it is not impossible. Undoubtedly the judiciary and the Congress would be asked to enjoin such an exercise of withdrawal power, but it would at least dramatically raise the level of attention paid to the issue, and could lead to renewed legislative consideration of reform.*⁵³⁹

⁵³⁷ John D. Leshy, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* at 255 (1987), Ex. 16. For a recent contrary view, see Morris, Meiners and Dorchak, *Homesteading Rock: A Defense of Free Access Under the General Mining Law of 1872*, 34 *Envtl. L.* 745 (Summer 2004) (“The mining industry is a heavily capital-intensive industry whose activities involve significant risks and long lead-times. As a result, mining firms are extremely vulnerable to expropriation, as their experience in much of the rest of the world amply demonstrates. Providing a straightforward, administrative system for privatizing mineral rights that does not allow the agency charged with privatization discretionary authority minimizes the opportunities for corruption. . . . Given the prevalence of corruption in the mining industry elsewhere in the world, this is an important advantage of the Mining Law’s nondiscretionary approach.”).

⁵³⁸ John D. Leshy, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* at 363 (1987), Ex. 16.

⁵³⁹ *Id.* at 363-64.

But, importantly, this passage shows Mr. Leshy's willingness to take unlawful action simply to provoke changes in the Law he detested. Solicitor Leshy continued to hold these views when he began to get involved in the Imperial Project,⁵⁴⁰ and he still holds these views today.⁵⁴¹

274. Secretary Babbitt and Solicitor Leshy were not the only high-ranking Interior officials holding entrenched hostility toward the federal Mining Law. For example, Secretary Babbitt's Deputy Director for Interior's Office of Congressional and Legislative Affairs, Dave Alberswerth, published an article in 1991 entitled *The 1872 Mining Law: Time to Pull the Plug*.⁵⁴² In it, he criticized Congress' failure to implement "reforms" of the Mining Law and referred to "the problems posed by this relic from our nation's early history."⁵⁴³ One specific "reform" advocated by Mr. Alberswerth was that "land-managing agencies should have the

⁵⁴⁰ See, e.g., Richard Gordon & Peter VanDoren, *Two Cheers for the 1872 Mining Law*, CATO Policy Analysis No. 300, at n.2 (Apr. 9, 1998), Ex. 109. (noting that Solicitor Leshy was a "vehement critic of the 1872 Mining Law").

⁵⁴¹ See Laura Skaer, Executive Director of the Northwest Mining Association, *Pombo's Proposal to Modernize the 1872 Law Helps Rural Western Communities* (Nov. 2005), Ex. 299 ("Former Department of the Interior Solicitor, John Leshy, made a career out of coming up with cockamamie interpretations of the U.S. Mining Law."); *Of Mines and Men*, *The Wall Street Journal*, Oct. 24, 2003, at A14, Ex. 294 ("This is a tale worth telling because it shows how much government willfully does to destroy jobs. Ms. Norton reversed a Clinton-era opinion that had all but sent the domestic mining industry down an airless shaft. In 1997, an obscure Interior solicitor named John Leshy looked at the 1872 Mining Law and decided that 100 years of consistent interpretation were wrong . . ."). John Leshy currently serves on the Advisory Board of Earthworks, a special interest group which is devoted to opposing mining and energy development projects in the United States and elsewhere. See EarthWorks Advisory Board, at <http://www.earthworksaction.org/advisory.cfm>). Earlier in his career, he worked as a lawyer for the Natural Resources Defense Council for five years. *Id.* Other directors and advisors of Earthworks are, or have been, associated with the Friends of the Earth, the Wilderness Society, and the Sierra Club. *Id.*

⁵⁴² David Alberswerth, *The 1872 Mining Law: Time to Pull the Plug*, 5 Nat. Res. & Env't 34 (Winter 1991). Mr. Alberswerth is currently working for the Wilderness Society focusing on BLM policy issues. See *The Wilderness Society, Experts and Contacts*, at <http://www.wilderness.org/Newsroom/experts.cfm#blm>. At the time he wrote this article, Mr. Alberswerth was Director of the Public Lands & Energy Division of the National Wildlife Federation.

⁵⁴³ Alberswerth, *Time to Pull the Plug*, at 66.

authority to deny certain mineral exploration and development activities on public lands deemed more important to be incompatible with nonmineral values.⁵⁴⁴

275. Once raised to their attention, these high-level political appointees – in particular Solicitor Leshy – took a personal and intensive role in reviewing the Imperial Project. Within weeks of receiving the Wheat letter, Solicitor Leshy was personally communicating with BLM State Director Ed Hastey about the Imperial Project, as acknowledged by Mr. Hastey in his December 17, 1997 meeting with the Quechan Tribe.⁵⁴⁵ Mr. Hastey was also communicating with other senior officials in Washington about the Wheat letter during this time, such as Bob Anderson in BLM’s Washington office, who received Garamendi’s memorandum regarding Mr. Wheat’s views in December 1997 and immediately sought a meeting with Mr. Hastey.⁵⁴⁶

276. This high-level communication between Interior officials and staff regarding the proposed Imperial Project and the Wheat letter continued into early January 1998 and beyond, as evidenced by multiple e-mail exchanges during that time. In fact, the bulk of these e-mails occurred on January 5, 1998, the same day that BLM State Director Hastey sent his formal request for a legal opinion to his Regional Solicitor, indicating that BLM’s “request” for a legal opinion was almost certainly coordinated in advance with Solicitor Leshy and his legal staff.⁵⁴⁷

⁵⁴⁴ *Id.* at 67.

⁵⁴⁵ Notes from Government to Government Meeting, at 3 (Dec. 16, 1997) (at D-00376-0079-0003), Ex. 96; *see also* E-mail from Joel Yudson to Solicitor’s Office staff re Glamis Imperial Gold Mine, responding to an E-mail from John Leshy (Jan. 5, 1998) (John Leshy: “Ed Hastey asked me to look into [the Imperial Project] several weeks ago. I have a copy of a letter to Garamendi from Francis Wheat (dated 11/5/97) highlighting a number of concerns about it, including effects on Quechan tribe sacred sites”) (at D-00376-0077-0004), Ex. 99.

⁵⁴⁶ *See* Memorandum from John Garamendi to Pat Shea re Glamis Imperial Gold Mine (Dec. 3, 1997) (at D-00360-0022-0001), Ex. 94.

⁵⁴⁷ *See, e.g.*, E-mail from David Nawi to Solicitor’s Office staff re Glamis Imperial Gold Mine (Jan 5, 1998) (at D-00376-0077-0003), Ex. 100 (replying to an e-mail from Solicitor Leshy requesting an update on the Glamis mine); E-mail from Joel Yudson to Solicitor’s Office staff re Glamis Imperial Gold Mine (Jan. 5, 1998) (at D-00376-0077-0004), Ex. 99.

Solicitor Leshy was also extensively involved in helping frame the scope of the Solicitors' response to Mr. Hastey's request for a legal opinion, as discussed at at ¶ 254.⁵⁴⁸

3. The Solicitor's Office Wrested Full Control Over The Final Consideration Of The Imperial Project

277. Because of Respondent's assertions of privilege, there are significant gaps in the record of how a Project on the brink of approval was delayed and ultimately denied. What is clear, however, is that once the political appointees became involved, the Solicitor's Office wrested control over the issues to be considered and how they should be resolved. Solicitor Leshy focused first on whether lawful grounds were available to satisfy Mr. Wheat's request that Interior block the Project. When no such grounds proved available, he seized on the idea of creating a new and discretionary veto authority that, with a workable factual record, could be used as justification for denial even where the Project otherwise met all statutory and regulatory requirements.

a. Solicitor Leshy First Sought Lawful Grounds To Justify Denial Of The Imperial Project

278. As noted below at ¶ 282, by the summer of 1998, BLM had confirmed the economic viability of the Imperial Project. At the same time, it was contemplating a withdrawal of lands surrounding the Project – roughly comparable to the artificial ATCC it had constructed for review of cultural resources – to assure the Quechan that no new mineral claims could be staked in the area. Solicitor Leshy saw the path of combining these issues as a possible lawful

⁵⁴⁸ See E-mail from Joel Yudson to John Leshy (Feb. 4, 1998) (at D-00360-0040-0002), Ex. 103 (referring to Leshy's earlier request "concerning the response to Francis Wheat, who wrote to Garamendi last November concerning sacred sites and unnecessary or undue degradation issues at the proposed Glamis mine in the California Desert Conservation Area" and how that interacts with BLM State Director Hastey's request for a legal opinion).

means to kill the Project if a formal mineral validity examination did not confirm Glamis' valid existing rights.

**(1) Solicitor Leshy Questioned The Project's
Economics And Suggested That A Full Mineral
Validity Examination Was Warranted**

279. Given the Interior Regional Solicitor's initial conclusion that the First Amendment did not grant Native American religious concerns general veto authority over mining plans of operations submitted under the Mining Law of 1872, as well as BLM's concerns that if it denied Glamis' plan of operations it could face a likely and "substantial" takings claim (as discussed in ¶ 253 above), Solicitor Leshy sought a copy of BLM's initial mineral validity report to assess the economic viability of the Imperial Project.⁵⁴⁹ On May 21, 1998, BLM State Director Hasteley delivered a copy of BLM's "internal mineral feasibility report" to Solicitor Leshy.⁵⁵⁰

280. Just four days later, Solicitor Leshy sent the following e-mail to his legal staff, signifying that he was in the midst of considering new regulatory constraints for the Imperial Project – one of the things that staff attorney John Payne had suggested (discussed at ¶ 256 above) could adversely impact the financial prospects of the Project:

Ed Hasteley has sent me a copy of an internal mineral feasibility report on this controversial gold mining project in the California Desert northwest of Yuma, AZ. . . . The report is a rather "quick and dirty" review that concludes the proposed Glamis project is marginally profitable, based on a projected gold price over the life of the mine (about nine years) at approximately the average over the past decade and a half (\$375 per ounce, currently gold is about \$300 per ounce). Look it over and discuss. Among the questions that come to mind are: Should BLM do a full-scale validity review prior to, or as part of, deciding on the plan of operations? (The area is not withdrawn.) If the proposals we have in mind for the

⁵⁴⁹ See Memorandum from Ed Hasteley to John Leshy (May 21, 1998) (at D-00376-0039-0001), Ex. 118.

⁵⁵⁰ *Id.*

*3809 rewrite were in effect, how would that question be answered? Considering the report shows that the proposed operation is quite sensitive to costs (e.g., requiring backfilling of one of the pits the company proposes not to backfill would make the project uneconomic[al] (p. 28)), should a full-scale validity determination be made once the regulatory constraints applicable to the project are formulated? . . . Please keep this material and our discussions close – this will likely end up in litigation no matter what we do.*⁵⁵¹

281. In response to these questions, the Interior Regional Solicitor’s office felt that it “would be appropriate for Washington to take the lead on this issue,”⁵⁵² but throughout June 1998, discussions on how to proceed with the review of the Imperial Project continued. During this time, Solicitor Leshy remained focused on the economic viability of the Imperial Project, as evidenced by this June 15, 1998 e-mail to his legal staff:

I want to talk about timing of legal advice on sacred sites/religious issue; and on millsites located as mining claims issue; the form of the legal advice (written legal opinion or more informal advice), process to get there, *and what if anything we can do with the preliminary assessment of the economic viability of the mine . . .*”⁵⁵³

282. The BLM “preliminary assessment of economic viability” mentioned in Solicitor Leshy’s e-mail was finalized only four days later, on June 19, 1998. It was highly favorable to Glamis’ mining claims, concluding that:

Glamis-Imperial appears to have conducted the necessary work within the scope of the regulations, and of a “prudent operator in usual, customary, and proficient operations of similar character . . .” Within the scope and limitations of this review, I feel that the Imperial Project as proposed is the next logical and prudent step in the development of the Imperial deposits . . .

⁵⁵¹ E-mail from John Leshy to Joel Yudson, et al. (May 25, 1998) (at D-00376-0015-0001 and D-00377-0008-0007), Ex. 119 (emphasis added).

⁵⁵² E-mail from John Payne to David Nawi, at 2-3 (June 1, 1998) (at D-00376-0010-0002 to D-00376-0010-0003), Ex. 121 (sharing a “proposed response to John [Leshy] on Glamis”).

⁵⁵³ E-mail from Karen Hawbecker to Lisa Hemmer (June 15, 1998) (at D-0040-0001-0001), Ex. 124 (forwarding e-mail from John Leshy to staff (June 14, 1998)) (emphasis added).

Absent a formal appropriation by the United States of the area encompassing the Imperial Project, I do not recommend that a validity examination be conducted. If the United States creates some right, other than mining on the subject property (e.g., withdrawal), a validity examination would be the next logical step by the Bureau.⁵⁵⁴

(2) Solicitor Leshy Tied The Mineral Validity Exam To The Withdrawal In Hopes Of Blocking The Project

283. As Solicitor Leshy pointed out to his legal staff on May 25, 1998, the lands surrounding the Imperial Project were still open to mineral entry.⁵⁵⁵ He was also wondering whether BLM should do a “full-scale validity review” of the Imperial Project mining claims.⁵⁵⁶ These policy issues converged over the course of next several months, as BLM, in coordination with Solicitor Leshy’s Office, proposed to withdraw the lands surrounding the Imperial Project from further mineral entry.

284. Not surprisingly, Solicitor Leshy took a major interest in the mineral withdrawal, specifically instructing BLM’s field office in late July 1998 that “he wants Solicitor review on this at the D.C. level.”⁵⁵⁷ By that time, the Solicitors had also agreed that Washington would take the lead on responding to BLM State Director Haste’s request for a legal opinion, as summarized in the following e-mail from July 9, 1998:

[W]e had a SOL conference call with J Leshy on this issue today and it was decided that Washington should have the lead on the opinion. It’s my understanding that the Division of Indian Affairs will have the lead on issues related to the First Amendment, and the Division of Mineral

⁵⁵⁴ *Review of Glamis-Imperial’s Imperial Project Position in the Gold Market*, at 34 (June 19, 1998) (at MV023706), Ex. 125 (emphasis added).

⁵⁵⁵ See E-mail from John Leshy to Joel Yudson, et al. (May 25, 1998) (at D-00376-0015-0001 and D-00377-0008-0007), Ex. 119 (emphasis added).

⁵⁵⁶ *Id.*

⁵⁵⁷ See E-mail from Kristina Clark to Paul Smyth (July 28, 1998) (at D-00375-0128-0004), Ex. 137 (“I understand that John Leshy expressed interest. . . . John Leshy has specifically stated he wants Solicitor review on this at D.C. level.”).

Resources (Karen Hawbecker) will have the lead on issues relating to BLM's authority to mitigate impacts and when that would lead to a takings.⁵⁵⁸

In fact, the Washington-based Solicitor's Office was also controlling virtually every aspect of the Imperial Project review at this point, including demanding a final review of the EIS/EIR prior to public release and providing guidance on the types of restrictions that BLM could impose on the Project, as represented by the following internal e-mail from July 10, 1998: "BLM is aware that they need SOL input on *the extent to which they can impose restrictions* and is hoping to get that soon. They are also aware of the need for SOL review of the final EIS before it goes out."⁵⁵⁹

285. Thus, it is clear that by mid-summer 1998, the Interior Solicitor's Office was in control of the Imperial Project review, and planning to draft a legal opinion that would far exceed the scope of BLM State Director Haste's initial request for legal advice from his Regional Solicitor, which had been limited to two very specific questions: "What are our responsibilities to ensure that we do not violate the First Amendment? *What are our responsibilities to the mining claimant to ensure that his property rights are protected?*"⁵⁶⁰ Somehow this seemingly simple request had been transformed into identifying the scope of restrictions that could be imposed on the Project without subjecting the government to a takings claim, a topic far removed from providing advice on how to protect the mining claimant's rights.

⁵⁵⁸ E-mail from John Payne to James Hamilton (July 9, 1998) (at MV015981), Ex. 128 (emphasis added).

⁵⁵⁹ E-mail from John Leshy to John Payne (July 10, 1998) (at D-00378-0141-0001), Ex. 129 (emphasis added).

⁵⁶⁰ Memorandum from State Director to Solicitor re Request for Opinion Regarding Conflict Between Quechan Religious Beliefs and the Glamis Imperial Project, at 3 (Jan. 5, 1998) (at MV002602), Ex. 98 (emphasis added)

286. Given the complete control being exercised by Interior headquarters on nearly all aspects of the Project, including its focus on creating new restrictions that might undermine the financial prospects of the project, the Solicitor's Office was forcing BLM to break with its longstanding policy that it "rarely challenges a Plan of Operations based on the veracity of information or viability of the project, especially in light of the logical sequence for exploration and confirmation of data already done and submitted by the operator."⁵⁶¹ Moreover, the Solicitor's Office was going to such lengths as compelling BLM to seek the advice of the Solicitor's Office regarding whether it should perform a full-scale validity exam of the Imperial Project.⁵⁶² Glamis, of course, thought the idea of doing a validity exam was "not necessary," but requested that if the BLM was going to go ahead with the exam, it should be done "immediately."⁵⁶³

287. The decision to "quietly proceed with a validity determination," away from the public's eye was directed by Solicitor Leshy, who agreed to "continue to hold the withdrawal package," while the validity determination commenced.⁵⁶⁴ Ultimately, however, the pending land withdrawal became too public and the Solicitor's Office eventually agreed to allow the withdrawal to be publicly proposed in October 1998.⁵⁶⁵ By that time, even BLM staff admitted that Solicitor Leshy's involvement was driving them "crazy."⁵⁶⁶ Thus, BLM formally initiated a

⁵⁶¹ See Draft Memorandum from Bob Anderson to Peter Schaumberg & Karen Hawbecker (July 22, 1998) (at MV022317), Ex. 132.

⁵⁶² *Id.*

⁵⁶³ Draft Memorandum from Bob Anderson to Peter Schaumberg (July 31, 1998) (at MV022344), Ex. 138.

⁵⁶⁴ E-mail from John Leshy to legal staff (Sept. 3, 1998) (at D-00375-0106-0001), Ex. 142.

⁵⁶⁵ See E-mail from Bob Anderson to John Leshy (Aug. 28, 1998) (at D-00375-0107-0006), Ex. 140.

⁵⁶⁶ Facsimile from Duane Marti to John Payne (Sept. 23, 1998) (at D-00375-0092-0001), Ex. 146 ("I am beginning to think that your compadres back East do not have enough to do. They are still stewing and fretting over our proposed withdrawal."); E-mail from Vanessa Engle to Duane Marti (Sept. 23, 1998) (at D-00375-0092-0002), Ex. 147 ("*The Solicitor's office is driving me crazy on your Indian Pass ACEC P/A.*

(continued...)

mineral validity examination of the Imperial Project mining claims on September 15, 1998, and set an expedited schedule for the review with an anticipated completion date of December 31, 1998.⁵⁶⁷ With this process started, Solicitor Leshy set to work on trying to determine how best to integrate whatever creative regulatory restrictions and mitigation measures his office could devise into the mineral examination process, as represented in the following e-mail to his legal staff on September 25, 1998: “Regarding the EIS, is there a consensus that BLM should move forward on it, and publish a final version that addresses regulatory/mitigation measures (so that these can be factored into the validity determination)?”⁵⁶⁸ Before he could resolve that issue, however, the BLM field office would raise a topic that Solicitor Leshy thought had long been put to bed.

b. Unable To Find Legitimate Grounds To Deny The Project, Solicitor Leshy Directed BLM To Stop Its Review And Embarked On His Unlawful And Arbitrary Creation Of A New And Unknown Denial Authority

288. By early Fall 1998, the BLM field office was ready to conclude its review and was looking for its legal opinion. Consistent with BLM’s initial request earlier in the year, the field staff wanted documentation of its consideration of the First Amendment issues raised by the

(...continued)

Dick Woodcock [staff attorney] called me at least 6 times yesterday with comments/changes. Then this morning, he sent me John Leshy’s comments on the previous changes and told me there will be additional changes!! When I told Dick this document was only being reviewed internally, Dick said John is worried about a lawsuit and wants the record to hold up in court.” (emphasis added).

⁵⁶⁷ Memorandum from Richard Grabowski to Field Manager, at 2 (Sept. 15, 1998) (at MV022348), Ex. 143 (“Our program schedule is very short. We expect to start the mineral investigation in mid-September, and have the mineral investigation and report complete by the end of the calendar year.”); Work Plan and Schedule for the Mineral Investigation of Mining Claims Comprising the Imperial Project (Sept. 1998) (at MV023795), Ex. 141.

⁵⁶⁸ E-mail from John Leshy to staff (Sept. 25, 1998) (at D-00057-0001-0001), Ex. 148.

Quechan Tribe for inclusion in the Final EIS/EIR's evaluation of the Imperial Project plan of operations.⁵⁶⁹

289. Recognizing the weaknesses of the First Amendment issue, the Solicitor's Office was perplexed that the BLM was still asking for an analysis when other issues seemed more important: "They are still asking for a 1st amendment memo which I thought was no longer necessary given the validity determination going on."⁵⁷⁰ The Solicitors were perplexed because they had already shared their insights regarding the *Lyng* opinion, and they had also researched the applicability of the President's 1996 Sacred Sites Executive Order – which had been grafted into the scope of BLM State Director Hasteley's request for a legal opinion by the Solicitors.⁵⁷¹ The Solicitors had rejected the Executive Order as a basis for denying a plan of operations:

The President's policy of seeking to manage federal lands in a way that does not impose additional burdens on religion or impair access to Indian sacred sites should provide some guidance to decision-making on this issue, *but that policy does not trump federal statutes nor authorize actions that would result in a taking as that term is used in the Fifth Amendment.*⁵⁷²

290. On October 30, 1998, the conflict between the legal issues perceived as relevant by the BLM field office and the Solicitor's Office came to a head, as described in an e-mail from staff attorney Karen Hawbecker to John Leshy: "I sat in on a BLM conference call today regarding the Glamis project. They are still very interested in a memo from us dealing with the

⁵⁶⁹ E-mail from Brenda Aird to Karen Hawbecker (Oct. 16, 1998) (at D-00378-0066-0001), Ex. 150 ("Any word from the solicitor's office concerning their opinion on the 1872 mining law v. 1st amendment rights?").

⁵⁷⁰ E-mail from Brenda Aird to Karen Hawbecker (Oct. 16, 1998) (at D-00378-0066-0001), Ex. 150.

⁵⁷¹ *See supra* ¶ 254.

⁵⁷² E-mail from Dave Etheridge to Mary Anne Kenworthy (July 22, 1998) (at D-00378-0103-0009), Ex. 133 (emphasis added); *see also* Memorandum from Mary Nickels to All Field Offices re Indian Sacred Sites Executive Order: Implementation Advice for Field Managers, at 2 (July 22, 1998) (at MV001873), Ex. 134 ("[T]ribal advocates sometimes argue . . . that the Order gives tribes an interest tantamount to ownership (continued...)

‘1st amendment’ issue. *In fact, they seemed angry that we have not produced such a memo yet.*⁵⁷³

291. This elicited a strong response from Solicitor Leshy the same day to California BLM State Director Ed Haste, reflecting the Solicitor’s role as both a senior Interior policy-maker and lawyer controlling the timing and outcome of the Imperial Project decision:

I understand your folks are giving my folks a hard time about our delay in addressing the first amendment question and other legal issues growing out of this project. As I think you know, I have had several meetings and intensive discussions with the several attorneys in my office working on this right along. It has my substantial personal attention.

These legal issues are complicated and precedent-setting. We will almost certainly be sued by one side or another. . . . It would be a grave mistake to rush through the validity examination or the final EIS without having a good, legally defensible record. . . .

For one thing, despite what your folks seem to think, the “first amendment” issue is not really the important one; instead, the fundamental question is how should the legal standard of preventing “unnecessary or undue degradation” be applied to this mining proposal, which poses threats to significant cultural resources. How much room, for example, does the standard give you to devise mitigation measures to protect such resources? The answer also directly concerns how the final EIS treats potential mitigation measures. . . .

I expect to review a draft memo on these issues when I get back in the country in a couple of weeks. Rest assured this is a high priority with me, and our folks are working hard on it. *In the meantime your folks should delay completion of the validity examination and the final EIS.* The delay is regrettable but unavoidable; we will not be stampeded to make hasty (pun intended) decisions on these matters.⁵⁷⁴

(...continued)

in sacred sites on public lands. This position cannot be supported by statutes, treaties, or Executive Order No. 13007 itself.” (emphasis added).

⁵⁷³ E-mail from Karen Hawbecker to John Leshy (Oct. 30, 1998) (at D-00375-0051-0001), Ex. 151.

⁵⁷⁴ Memorandum from John Leshy to Ed Haste (Oct. 30, 1998) (at MV022293), Ex. 152 (emphasis added).

292. Thus, Solicitor Leshy finally crystallized his thoughts on the issue, and effectively decided that he would need to issue a “precedent setting” legal opinion regarding what mitigation measures could be imposed on the Imperial Project under FLPMA before finalizing the EIS or validity exam.

293. Solicitor Leshy’s memorandum had an immediate adverse effect on the schedule for the Imperial Project, which already had been pending for nearly four years, as discussed in an internal BLM field office e-mail on November 12, 1998: “It seems that the Glamis schedule for completing the EIS/ROD and VER may be *slipping* for various reasons [The reasons include] Leshy’s letter following our last conference call of 10/30/98, recommending that CA BLM, *hold up* on the ROD and VER until his office has developed policy (no date given).”⁵⁷⁵

294. Just a few weeks later, as a result of Solicitor Leshy’s recommendation to “hold up” various steps leading to approval of Glamis’ plan of operations, the internal BLM “Imperial Project EIS Schedule” was revised to read: “*There is no schedule.*”⁵⁷⁶ According to that unsettled schedule, the EIS and validity report were waiting for the Solicitor’s opinion on *unnecessary or undue degradation* and Native American rights issues,⁵⁷⁷ something that the BLM mineral examiner hoped to see in his “lifetime.”⁵⁷⁸

⁵⁷⁵ E-mail from James Hamilton to Richard Grabowski (Nov. 12, 1998) (at MV013773), Ex. 155 (emphasis added).

⁵⁷⁶ Imperial Project EIS Schedule (Dec. 4, 1998) (at MV014966), Ex. 163 (emphasis added).

⁵⁷⁷ Imperial Project EIS Schedule (Dec. 4, 1998) (at MV014966), Ex. 163 (emphasis added); *see also* E-mail from Rob Waiwood to Karen Hawbecker (Nov. 16, 1998) (at D-00042-0001-0002), Ex. 156 (“Regarding the Imperial VER status, at this point we have finished all of the field work, and have acquired all pertinent data from the company. . . . However, if the mining claims are supported by the best case situation, a final report cannot be completed until the ROD for the plan of operations is completed as I do not know at this time what alternatives will be allowed under the unnecessary or undue degradation criteria.”).

⁵⁷⁸ E-mail from Rob Waiwood to Roger Haskins (Dec. 7, 1998) (at D-00411-0011-0002), Ex. 164 (“However, I don’t expect a final report until all the issues with the plan of operation to the point of a decision record, have been settled as there are some costly mitigation in the works that may affect costing in the VER. When that will be is anyone’s guess.”).

295. Shortly thereafter, as he had promised BLM State Director Hasteley, Solicitor Leshy began working on his legal opinion in earnest.⁵⁷⁹ Throughout the drafting process, which unfolded over the next 15 months, Solicitor Leshy remained keenly interested in how and, more importantly, *when* the ACHP would finalize its review.⁵⁸⁰

296. Solicitor Leshy also remained interested in the development of the BLM mineral validity exam and final report. Although the mineral examiner had informed the Solicitor's Office that the report could not be finalized without input from the Solicitor regarding the scope of acceptable mitigation measures,⁵⁸¹ Leshy remained "very interested in knowing what [gold price] approach was being used."⁵⁸² He also reiterated, through his staff, his desire that the

⁵⁷⁹ Beginning in late November 1998, the Solicitor's Office internally circulated numerous drafts of the Solicitor's Opinion and related comments regarding "unnecessary or undue degradation." *See, e.g.*, E-mail from Lisa Hemmer to Solicitor's Office Staff (Nov. 24, 1998) (at D-00064-0001-0001), Ex. 159; E-mail from Lisa Hemmer to John Payne (Nov. 30, 1998) (at D-00378-0044-0001), Ex. 160; E-mail from Joel Yudson to Eric Nagle (Dec. 1, 1998) (at D-00361-0005-0008), Ex. 161; E-mail from Lisa Hemmer to Joel Yudson & Eric Nagle (Dec. 4, 1998) (at D-00361-0005-0003), Ex. 162; E-mail from John Payne to David Nawi (Dec. 8, 1998) (at D-00378-0036-0001), Ex. 166; E-mail from Lisa Hemmer to John Payne, Joel Yudson, & Karen Hawbecker (Dec. 31, 1998) (at D-00378-0029-0004), Ex. 168; E-mail from Lisa Hemmer to Joel Yudson, Karen Hawbecker & Peter Schaumberg (Jan. 11, 1999) (at D-00380-0077-0001), Ex. 171; E-mail from John Leshy to Solicitor's Office Staff (Jan. 11, 1999) (at D-00380-0080-0003), Ex. 172; E-mail from Libby Rodke & Lisa Hemmer to John Leshy (Jan. 14, 1999) (at D-00380-0071-0001), Ex. 173; E-mail from Lisa Hemmer to John Leshy (Jan. 21, 1999) (at D-00380-0066-0001), Ex. 174; E-mail from John Payne to David Nawi (Jan. 25, 1999) (at D-00380-0061-0001), Ex. 175; E-mail from John Leshy to Solicitor's Office Staff (Jan. 26, 1999) (at D-00380-0059-0001), Ex. 176.

⁵⁸⁰ *See, e.g.*, E-mail from John Leshy to staff (Apr. 1, 1999) (at D-00079-0001-0001), Ex. 187 ("Let me know when they issue some sort of report or recommendations."); E-mail from John Payne to Lisa Hemmer (Apr. 9, 1999) (at D-00360-0021-0003), Ex. 189 ("Got in touch with Mr. Stanfill at the NH Advisory Council. He is the staffer who will be working on the report, and he indicated that the Council will try to issue the report sometime in May."); E-mail from Lisa Hemmer to John Payne (Apr. 13, 1999) (at D-00360-0021-0010), Ex. 190 ("John Leshy wants us to hold off on the memo.").

⁵⁸¹ *See* E-mail from Robert Waiwood to Roger Haskins re Glamis Validity Examination (Dec. 7, 1998) (at D-00411-0011-0002), Ex. 164 ("I don't expect a final report until all the issues with the plan of operation to the point of a decision record, have been settled as there are some costly mitigation in the works that may affect costing in the VER.")

⁵⁸² E-mail from Karen Hawbecker to Roger Haskins (Dec. 7, 1998) (at D-00042-0001-0001), Ex. 165. Respondent has withheld – on alleged deliberative process grounds – numerous documents related to how Solicitor Leshy sought to influence the way the mineral validity exam would be conducted. A list of representative documents is provided at Tab C-1 to Claimant's February 15, 2006 filing in this arbitration, Claimant's challenges to which this Tribunal has indicated it "will reconsider" as further evidence is presented in this arbitration. *Decision* of April 26, 2006, ¶ 48.

mineral examiners “not finalize the Glamis mineral report until it has been reviewed by the Solicitor’s Office – either at [Robert Waiwood’s] level or at the panel level.”⁵⁸³ As of December 15, 1998, the BLM’s new target for finishing the VER and the ROD was sometime between mid-January and mid-March 1999.⁵⁸⁴

c. Solicitor Leshy Directed BLM To Apply The New Discretionary Denial Authority Suggested By His Draft Legal Opinion

297. On January 27, 1999, a confidential draft of Solicitor Leshy’s legal opinion was finally released to BLM.⁵⁸⁵ The draft opinion correctly pointed out that “[w]ith respect to the proposed Glamis mine, if the only way to protect cultural resources of the Tribe is to foreclose mining altogether, BLM *cannot* provide such protection under the ‘unnecessary or undue degradation’ standard.”⁵⁸⁶ The proposed opinion creatively concluded, however, that FLPMA’s “undue impairment” standard “provides authority additional to that found in FLPMA’s unnecessary or undue degradation standard”⁵⁸⁷ and – just as Mr. Wheat had suggested by letter in November 1997 – that it could “be read to permit additional mitigation/reclamation requirements over and above those allowed by the ‘unnecessary or undue degradation’ standard.”⁵⁸⁸

⁵⁸³ E-mail from Karen Hawbecker to Roger Haskins re Glamis Validity Examination (Dec. 7, 1998) (at D-00042-0001-0001), Ex. 165 (emphasis added).

⁵⁸⁴ Facsimile from Jim Hamilton to Bob Anderson (Dec. 15, 1998) (at D-00066-0001-0002), Ex. 167. While BLM was targeting completion of the VER by March 1999, it was about that time that other parties intent on harming Glamis’ property interests were literally pulling up Glamis’ claim markers in the Imperial Project area in an effort to disrupt the process. *See, e.g.*, Letter from Gary Boyle, Glamis, to Glen Miller, BLM (Apr. 7, 1999) (at GLA039393), Ex. 188 (“Please be aware that there is evidence of claim marker tampering at the Imperial Project. Glamis is aware of the ongoing claim validity analysis and is concerned that this form of malicious activity will either slow down or adversely effect the outcome of the analysis.”).

⁵⁸⁵ *See* Solicitor’s Leshy, *Working Draft, Regulation of Hardrock Mining* (Jan. 27, 1999) (at MV003669), Ex. 177.

⁵⁸⁶ *Id.* at 19 (at MV003687) (emphasis added).

⁵⁸⁷ *Id.* at 28 (at MV003697).

⁵⁸⁸ *Id.* at 26 (at MV003695).

298. Solicitor Leshy's draft legal opinion noted that BLM had never issued regulations creating a different meaning for the "undue impairment" standard as contrasted with the settled regulatory meaning of the "unnecessary or undue degradation" standard. The draft legal opinion saw this lack of implementing regulations as presenting no obstacle, notwithstanding the fact that Section 601(f) of FLPMA, 43 U.S.C. § 1781(f), expressly provided that "all mining claims located on public lands shall be subject to *such reasonable regulations* as the Secretary may prescribe" (emphasis added). The attempt in the draft Solicitor's Opinion to create a wholly new discretionary mine denial authority through the "undue impairment" phrase in Section 601(f) of FLPMA also contravened BLM's existing and longstanding guideline in the CDCA Plan for Multiple Use Class L and other lands which provided that "BLM will review plans of operations for potential impacts on sensitive resources . . . , and that only "[m]itigation, subject to technical and economic feasibility, will be required."⁵⁸⁹ It also contravened the language of FLPMA expressly limiting the prevention of undue impairment to scenic, scientific, and environmental resources. These were only three of a long list of other resources values – including cultural resource values – that FLPMA listed distinctly elsewhere.⁵⁹⁰ Ignoring basic principles of statutory construction, Solicitor Leshy opined that the three listed resource values "are fairly read to include" the others.

299. The day after he released his working draft of the Solicitor's Opinion, Solicitor Leshy began planning a site visit to the Imperial Project for late February 1999, a few weeks before the ACHP was scheduled to hold a field hearing at the Imperial Project site, as discussed

⁵⁸⁹ CDCA Plan, at 18 (1980) (MV037137), Ex. 12.

⁵⁹⁰ 43 U.S.C. 1781(a).

at ¶ 315.⁵⁹¹ Handwritten notes by BLM official Glen Miller, in preparation for Solicitor Leshy's visit, indicate that visit's true purpose: "*How far can we take this project legally to deny it.*"⁵⁹² As Mr. Miller indicates, the "key issue" for the "Leshy tour" is to "get across the religious, cultural values of the site itself," the "marginal" nature of the "mining operation,"⁵⁹³ the "cost of mitigation," and the "visual" impacts to the "running man trail."⁵⁹⁴ Thus, the true intentions of the Solicitor's office to deny the Imperial Project were laid bare in internal communications within the Department (many on which the government has spent considerable efforts to withhold from the Tribunal).⁵⁹⁵

300. On February 22, 1999, during Solicitor Leshy's visit, BLM's Mr. Miller noted: "*Are we ready to use undue impairment as the standard? Lawyers say yes.*"⁵⁹⁶ The "lawyers" also said that "*if there is significant cultural effect we can deny [the] project.*"⁵⁹⁷ At a meeting with BLM held during Solicitor Leshy's visit to the site, the "need to establish a threshold of undue impairment" was discussed,⁵⁹⁸ a fact captured in the title of BLM's internal notes of the

⁵⁹¹ E-mail from John Leshy to Ed Haste (Jan. 28, 1999) (at D-00379-0037-0001), Ex. 178; *see* Draft Itinerary SOL John Leshy's Trip to Glamis/El Centro Feb. 22-23, 1999 (Feb. 1999) (at D-00073-0002-0002), Ex. 182.

⁵⁹² Handwritten Notes of Glen Miller, BLM (Feb. 10, 1999) (at MV020847), Ex. 180 (emphasis added).

⁵⁹³ While emphasizing in his draft legal opinion that the Glamis Imperial Project was "low-grade" ore, Solicitor Leshy deliberately ignored the fact that this geological characteristic was essentially the same type as in other active mine areas in the region – all of which had been approved in whole or part by BLM. *See supra* ¶¶ 126-137.

⁵⁹⁴ *Id.*

⁵⁹⁵ *See generally* Tab D-1 to Claimant's February 15, 2006 filing in this arbitration.

⁵⁹⁶ Handwritten Notes of Glen Miller, BLM, at 4 (Feb. 22, 1999) (at MV014933), Ex. 181 (emphasis added).

⁵⁹⁷ *Id.* at 3 (at MV014932) (emphasis added).

⁵⁹⁸ *Id.*

meeting: “Meeting Objective – Prepare draft ROD identifying cultural values and view shed which may result in a strong argument for undue impairment.”⁵⁹⁹

301. These notes make clear that Solicitor Leshy would not permit BLM merely to apply an established legal standard to the facts of the Imperial Project, but rather he was directing BLM to gather facts to attempt to support the denial of the Project under a wholly new standard. Despite having essentially predetermined Interior’s decision on the Imperial Project as of late February 1999, however, Glamis would still have to wait nearly two years before the final decision on the plan of operations would be made by Secretary Babbitt, which happened to be the eve of the Secretary’s departure from office.

302. By the end of February 1999, the Solicitor’s Office had resumed tinkering with the legal opinion.⁶⁰⁰ In late March, however, the opinion had been delayed so long that BLM State Director Hastey was about to retire and the Solicitor’s Office was faced with a new variable: Director Hastey’s replacement with Al Wright.⁶⁰¹ In an e-mail to Karen Hawbecker, John Payne explained that “Al [Wright] has a reputation for being a little more cautious than Ed [Hastey], *and may be less likely to make ‘precedent-setting’ decisions.*”⁶⁰² Nevertheless, Mr. Payne noted, “If we have an opinion telling Al he can do something, I think he’ll go with it.”⁶⁰³

303. In early April, the VER process and ROD were behind schedule even according to the BLM’s revised estimation from December 1998. Under the original schedule, a final

⁵⁹⁹ BLM Notes from Imperial Project Meeting of February 22 and 23, at 1 (Feb. 25, 1999) (at MV003582), Ex. 183 (emphasis added).

⁶⁰⁰ See E-mail from John Payne to Lisa Hemmer re Glamis Opinion (Feb. 26, 1999) (at D-00380-0039-0001), Ex. 184.

⁶⁰¹ See E-mail from John Payne to Karen Hawbecker re Glamis Agenda, 3/26/99 Conference Call, at 1 (Mar. 29, 1999) (at D-00380-0010-0001), Ex. 186.

⁶⁰² *Id.* (emphasis added).

⁶⁰³ *Id.*

decision on the Imperial Project was five months overdue. Yet Solicitor Leshy continued to delay his opinion while keeping an eye on both gold price and the ACHP, which was due to issue its comments on the Imperial Project's effects on cultural resources. In fact, Solicitor Leshy instructed his staff to let him know when the ACHP issued its recommendation.⁶⁰⁴ His staff contacted Alan Stanfill, the "highly ranked" ACHP staff member in charge of preparing the ACHP's comments, who informed them that the ACHP would likely issue its "report" in May 1999.⁶⁰⁵ Upon learning this schedule, Solicitor Leshy instructed his staff (in May 1999) "to hold off on the memo."⁶⁰⁶

304. During this time, Mr. Wheat continued to lobby both Interior Secretary Babbitt and Solicitor Leshy to deny the Imperial Project, while expounding upon his earlier legal theories regarding the "unnecessary or undue degradation" standard.⁶⁰⁷

305. On June 18, 1999, a new BLM Imperial Project Schedule noted six unresolved issues regarding the Imperial Project, half of which were attributable to the Solicitor's Office: (1) the Solicitor's instruction on pricing gold and the finalization of the VER, (2) the Solicitor's guidance on "undue impairment," and (3) the Solicitor's review of the final EIS/EIR.⁶⁰⁸ This same schedule specifically indicated that the "EIS [would] address *undue impairment*."⁶⁰⁹

⁶⁰⁴ E-mail from John Leshy to staff (Apr. 1, 1999) (at D-0079-0001-0001), Ex. 187.

⁶⁰⁵ E-mail from Lisa Hemmer to John Payne (Apr. 9, 1999) (at D-00360-0021-0003), Ex. 189.

⁶⁰⁶ E-mail from Lisa Hemmer to John Payne re Glamis – Council Report (Apr. 13, 1999) (at D-00360-0021-0010), Ex. 190.

⁶⁰⁷ See Letter from Francis Wheat to Bruce Babbitt (May 10, 1999) (at D-00360-0003-0003), Ex. 191; Letter from Francis Wheat to John Leshy (May 11, 1999) (at D-00360-0003-0001), Ex. 192.

⁶⁰⁸ BLM Briefing Document for Acting State Director re Glamis Imperial Mine (June 18, 1999) (at MV014758), Ex. 194; Draft Imperial Project Status Memorandum (June 30, 1999) (at MV015997), Ex. 195.

⁶⁰⁹ Draft Imperial Project Status Memorandum (June 30, 1999) (at MV015997), Ex. 195 (emphasis added).

306. Despite the bottleneck in his office, Solicitor Leshy assured Glamis representatives at a face-to-face meeting in Washington, D.C., in July 1999 that the delay in issuing a decision regarding the proposed plan of operations was beyond our control, noting specifically “changed law” as one item out of his control.⁶¹⁰ Moreover, the Solicitor told Glamis that “the interpretation of ‘undue or unnecessary’ versus the ‘undue impairment’ provisions in FLPMA is a live issue.”⁶¹¹ In reality, as evidenced by his draft legal opinion dating back to at least January 1999, and likely well before then, Solicitor Leshy had decided that the “undue impairment” standard would be controlling in the case of the Imperial Project.

307. By September 1999, it was becoming increasingly clear that a revised undue impairment standard was primed to become the new standard that guided the final review of the Imperial Project, despite the apparent confusion and frustration of career BLM staff: “BLM has never done this type of validity exam as adverse and complex as this. . . . [T]his is the first time BLM has challenged a mine plan with no legal issues. . . . [U]ndue impairment is undue & unnecessary degradation. To see final validity exam requires some policy from [Solicitor’s Office] SO.”⁶¹²

⁶¹⁰ E-mail from Glen Miller to Dwight Carey re July Glamis Meetings in DC, at 3 (Aug. 5, 1999) (at MV019654), Ex. 197.

⁶¹¹ *Id.* Despite the ongoing permitting delays, Glamis continued to believe that the Imperial Project’s permits would eventually be forthcoming. For example, Glamis’ strategic plan for 2000 contemplated continuing permitting efforts in 2000, with construction of the mine anticipated construction for 2002 (*see Glamis Gold Ltd. 2000 Strategic Plan*, at 3 (Oct. 29, 1999) (at ELGA12223), Ex. 203), a sentiment repeated at a Board of Director’s meeting in November 1999: “We continue to persevere in our permitting effort, and our Picacho Mine staff are researching ways to move this project forward.” *Board Meeting and Company Review*, at 6 (Nov. 5, 1999) (at ELGA12208), Ex. 204 (noting that “[s]implicity, high productivity and very low technical risk are the cornerstones to Imperial project design philosophy”). During 1999, however, the company did sell the \$7 million mining shovel for the project because it could not justify tying up such significant cash reserves in a piece of mining equipment, with associated storage costs, without having any immediate productive use of that costly equipment. *See* Statement of K. McArthur, ¶ 18.

⁶¹² Handwritten Notes of Glen Miller, BLM, at 1-2 (Sept. 13, 1999) (at MV015017 to MV015018), Ex. 199 (emphasis added).

308. On October 19, 1999, Solicitor Leshy received the final bit of information on which he was waiting in order to incorporate into this opinion. On that day, the ACHP issued its recommendation to Secretary Babbitt that “Interior take whatever legal means available to deny approval for the project.”⁶¹³ The issuance of this recommendation was no surprise to Solicitor Leshy because he had met personally with the ACHP Director in the Interior Solicitor’s Office in early October 1999 to discuss the timing of the release of the long-awaited ACHP recommendation.⁶¹⁴

4. The ACHP Recommendation – Based Upon Faulty Analysis – Assumed A New And Unexpected Prominence In Light Of the Leshy Opinion

309. As discussed above at ¶ 250, in August 1998, BLM’s California State Director initiated formal consultations with the ACHP on the Imperial Project plan of operations. BLM hoped that the ACHP could help identify ways to avoid or reduce the Imperial Project’s potential effects on the “ATCC,” the historic property that BLM’s consultants had purportedly identified as the result of their 1997 cultural-resource survey.⁶¹⁵ However, with the prodding of a staunch Imperial Project opponent, the ACHP ultimately failed to engage in any consultations and decided to recommended directly to the Interior Secretary that the Imperial Project be denied – a recommendation that was timed to precede the release of the Leshy Solicitor’s Opinion.

⁶¹³ Letter from ACHP Chairman Cathryn Buford Slater to Secretary Bruce Babbitt, at 3 (Oct. 19, 1999) (at D-00409-0048-0044), Ex. 201. That same day, a revised BLM status report projected that the VER would be concluded by October 22, 1999 – a full year after the original deadline for a final decision on the Imperial Project. *Imperial Project Status Report* (Oct. 19, 1999) (at MV015230), Ex. 202.

⁶¹⁴ E-mail from John Fowler to Don Klima, Alan Stanfill & Javier Marques (Oct. 15, 1999) (at ACHP01373), Ex. 200 (noting discussion of the “*chicken and egg situation*” presented by the release of the ACHP recommendation and Leshy’s Opinion) (emphasis added).

⁶¹⁵ Sebastian Report, at 8.

a. The ACHP Began With The Unexpected View That The Imperial Project Should Not Go Forward

310. From the beginning, ACHP staff intended to disregard consultations and recommend to Interior that it deny further development of the Imperial Project. Yet, interestingly, even the ACHP did not deny that if Interior disapproved the Imperial plan of operations, it should pay Glamis the value of its property rights in the Project. Indeed, the ACHP acknowledged BLM's longstanding interpretation that the Mining Law compelled approval of the mining operations even where the impact on cultural resources could not be mitigated:

Although it remains to be confirmed, BLM's approach may be rooted in its interpretation of the Mining Act of 1872. This law, according to some legal perspectives, prohibits the Federal Government from denying mineral extraction on Federal lands, even when such extraction may conflict with other uses. In the past, BLM has argued that the law and its implementing regulations do not allow the agency to deny a mining company's Plan of Operations⁶¹⁶

311. Just several weeks after it received BLM's letter requesting assistance, in a public "*Update on the Status of Prominent Section 106 Cases*," released in October 1998, the ACHP announced its position – without having yet actually visited the site or having fully analyzing the Project's plan of operations in light of all relevant public comments – that potential adverse effects on cultural resources surrounding the Imperial Project could not be adequately mitigated. According to the ACHP's status report, "*None of the proposed mitigation measures appear responsive to the need to reduce or eliminate physical, visual, audible, and atmospheric effects of the project.*"⁶¹⁷

⁶¹⁶ ACHP, *Update on the Status of Prominent Section 106 Cases*, at 2 (Oct. 1998) (at D-00094-0002-0002), Ex. 149 (emphasis added).

⁶¹⁷ *Id.* (emphasis added).

312. The public status report was clearly not the first time ACHP staff had thought about and voiced its views that the Project should not go forward. Indeed, just weeks before the October 1998 status report came out, the ACHP employee with lead responsibility for reviewing the Imperial Project, Mr. Alan Stanfill,⁶¹⁸ shared his extensive opinion about just how the Project-specific Section 106 process should unfold. His opinion began with a plan for Interior to acquire Glamis' property interests. He advised that, whatever is done, the ACHP should not agree to any mitigation at the Imperial Project site:

At this time, I am thinking the Council should do an on-sight [sic] and public meeting, then recommending BLM consider other options (like *acquiring the property rights* as was done in the Yellowstone case or withdrawal as was done with the Sweet Grass Hills). Should that fail, then the Council would have a clear path for terminating [consultations]. *I do not see any situation wherein I would recommend an MOA [memorandum of agreement] short of moving the project to a wholly . . . different location.* Please keep in touch and provide me with whatever suggestions, advice, or moral support you wish to convey. I'll try to keep you up-to-date on any progress.⁶¹⁹

313. In the e-mail quoted above, Mr. Stanfill was responding to Mr. Thomas King, an Imperial Project opponent and former ACHP employee. Mr. King had sent a letter to Mr. Stanfill and Mr. Ray Soon, one of three ACHP members assigned specifically to review the

⁶¹⁸ Mr. Stanfill was identified as the *sole staff contact* for the Imperial Project in the October 1998 status report. *See id.*; see also Memorandum from Don Klima to Ray Soon et al. (Nov. 18, 1998) (at ACHP00323), Ex. 157 (“I am pleased that the Chairman chose to appoint you to participate in the Council’s staff-level review of the Imperial Mine project. *Alan Stanfill, the staff member handling this case*, and I look forward to your input and perspectives as the case develops.”); E-mail from Alan Stanfill to Javier Marques (Jan. 8, 1999) (at ACHP00347), Ex. 170 (emphasis added) (“The Imperial Mine Project . . . is assigned to me. . . . The Chairman appointed Ray Soon, Dick Moe, and Dick Sanderson to assist staff in the review of this project. . . .”).

⁶¹⁹ E-mail from Alan Stanfill to Thomas King (Sept. 21, 1998) (at ACHP00301), Ex. 145. An “MOA “refers to an agreement typically reached in consultation between the ACHP, SHPO, and authorizing agency outlining agreed the appropriate and agreed upon mitigation measures for an “undertaking.” *See* 36 C.F.R. § 800.5(e)(4) (1986). During discovery in this NAFTA arbitration, the government has referred to this ardent Project opponent, Mr. King, as a BLM “consultant.” *See* ACHP Privilege Log, Document No. 8 (attached at Tab B-5 to Claimant’s February 15, 2006 discovery filing in this arbitration).

Imperial Project (and one of twenty presidential appointees to the ACHP).⁶²⁰ Mr. Stanfill's e-mail response to Mr. King confirmed that the Imperial Project was "assigned" to him, and it thanked Mr. King for his recent letter, while noting that the letter "tracks with what" Mr. Stanfill had told "Don" Klima, an ACHP staff supervisor.⁶²¹ Mr. Stanfill's acknowledgement that Mr. King's letter "tracks" with what he had told Mr. Klima indicates that he concurred with the following advice given by Mr. King regarding the ACHP's role in holding a public hearing and then recommending denial of the Imperial Project to Interior:

I think there are powerful arguments against an MOA and in favor of rendering a formal comment to the Secretary of the Interior after full, public, on-site review of the matter by Council membership. . . . The case also illustrates the problems presented to an agency like BLM by the long-obsolete Mining Act of 1872. . . . As you doubtless know, there have been repeated recent efforts in Congress to repeal or substantially amend the 1872 law to address its devastating environmental impacts. These efforts have not yet succeeded, but it is hard to imagine the law lasting much longer. *A case like the Imperial Project, if highlighted by Council Action, could contribute importantly to encouraging Congress to take appropriate action on the Mining Law. . . . I hope that the Council would speak eloquently to the need both to deny the project the use of Federal land and to change the 1872 Mining Act to give agencies like BLM more control over destructive uses of the lands whose management they are entrusted.* Such a comment by the Council would show leadership in the protection of the nation's cultural resources. . . . It would place the Council dramatically on record in support of the Administration's efforts to change the Mining Law. . . . I hope you will use your position on the Council to insist that the Council promptly terminate consultation on this project and

⁶²⁰ The three ACHP members assigned to Mr. Stanfill in his review of the Imperial Project included Ray Soon, a native Hawaiian, Dick Sanderson of the U.S. EPA, and Richard Moe, Chairman of the National Trust for Historic Preservation. See Memorandum from Don Klima to Ray Soon et al. (Nov. 18, 1998) (at ACHP00323), Ex. 157. Typically, individual ACHP members do not actively engage in the review of individual projects, as the ACHP admitted at a field hearing it held to review the Imperial Project in March 1999. In the case of the Imperial Project, however, three ACHP member appointees were assigned to advise the staff due to the Project's special "complexity" and "significance." ACHP Field Hearing Transcript, at 8 (Mar. 11, 1999) (at ACHP00528), Ex. 185. Interestingly, the National Trust for Historic Preservation (a permanent member of the ACHP) is an historic property protection advocacy group that later spoke out against the Imperial Project during the passage of California legislation aimed at halting Glamis' mining activities. See Letter from Holly Fiala, Director Western Office of National Trust for Historic Preservation, to Senator John Burton (June 17, 2002) (at ARC00239), Ex. 234.

⁶²¹ E-mail from Alan Stanfill to Thomas King (Sept. 21, 1998) (at ACHP00301), Ex. 145.

convene an on-site public meeting of the full membership to consider it and formulate comments to the Secretary.⁶²²

Thus, with the support of this Imperial Project opponent, ACHP staff had a clear vision of how the Imperial Project's Section 106 should conclude. From there, it was only a passing some procedural obstacles before the advisory body would unveil its final recommendation to Interior.

b. The ACHP Created Only The Façade Of An Independent And Thorough Review Of The Project's Impacts On Cultural Resources

314. In as much as the ACHP had already concluded that no mitigation was acceptable and no consultation needed, it is not surprising that ultimately the Section 106 review was little more than an exercise to give the appearance that ACHP staff were actively considering all opinions and courses of action. In reality, the ACHP knew how its Section 106 review would develop well before the advisory body rendered its final comment directly to Interior.

315. Just as Mr. King had recommended for the course of ACHP's review, in March 1999, the advisory body held an "on-site" public hearing, a practice that was admittedly very "unusual" for the ACHP.⁶²³ The hearing was a part of a claimed effort to gather necessary

⁶²² Letter from Tom King to Ray Soon (Sept. 15, 1998) (AG002726) (emphasis added), Ex. 144. Mr. King announced his views in a much similar manner at the March 1999 field hearing. See ACHP Field Hearing Transcript, at 113 (Mar. 11, 1999) (at ACHP00633), Ex. 185 ("[T]he Council should not under any circumstances enter into a Memorandum of Agreement in this case. This is a case that should be the subject of a full comment to the Secretary of the Interior.").

⁶²³ The ACHP hearing transcript reveals that the field hearing on the Glamis Imperial Project was repeatedly described as "unusual":

I think there's been a certain amount of confusion about this meeting and, I guess, there's probably good reason. *This is kind of an unusual meeting. We don't normally have meetings like this.*

Tim Salt, BLM District Manager for the California Desert District, ACHP Field Hearing Transcript, at 3 (Mar. 11, 1999) (at ACHP00523), Ex. 185 (emphasis added).

This is an *unusual* case for the Council. . . . Because of the *unusual* circumstances of our visit, I'm going to tell you a little bit about the construction of the Council

John Fowler, Executive Director of the ACHP, ACHP Field Hearing Transcript, at 4 (Mar. 11, 1999) (at ACHP00524 to ACHP00525), Ex. 185 (emphasis added).

(continued...)

factual information for a proper assessment of the Imperial Project. As such, the ACHP's Executive Director attempted to give it the appearance of neutrality. In particular, he stated that the ACHP was "here today . . . to *listen* to what you have to say and to *learn* about the impacts of the project, possible options for minimizing those impacts, and generally concerns about historic preservation surrounding this project. . . . *Until we've listened to you, until we've assessed what we've heard, we're not going to be able to say which course this group will take.*"⁶²⁴ As noted above, however, the ACHP staff had already expressed its views on what the ACHP should do. In fact, the ACHP's ultimate actions exactly matched those early articulated views.

316. In addition to receiving public comments on the Imperial Project as part of its field hearing, the ACHP participated in a site visit to survey the Project area. The ACHP again sought to make it appear that this event was part of a fact-finding mission. But staff did not even stop at the actual Imperial Project site or look at any of the previously identified cultural artifacts located in the area of proposed disturbance. Instead, they visited the recently created "Running Man" geoglyph, a site nearly two miles south of the Project area, as well as petroglyphs within the Indian Pass ACEC, well to the north of the Project area (and which were already subject to protection under the 1980 CDCA Plan, the 1987 Indian Pass ACEC Management Plan, and the Indian Pass Wilderness Area designation). The ACHP also examined two trail segments located

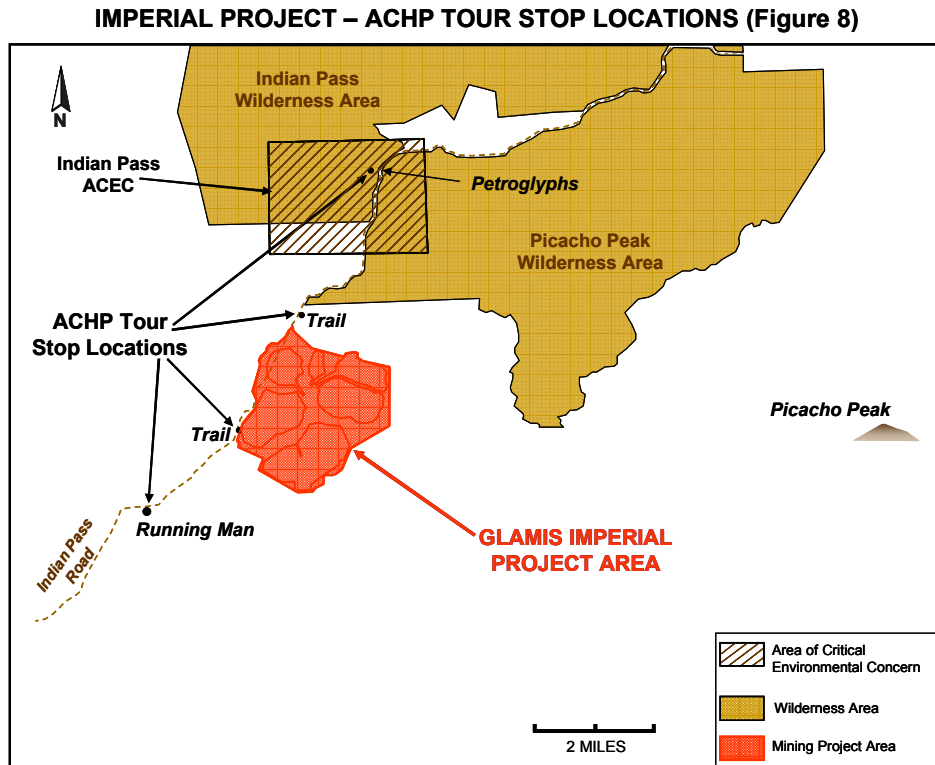
(...continued)

Today it has been noted we're in an unusual circumstance, . . . So we're not playing by the normal rules of the Section 106 process, . . . So we're really at the phase of looking at whether there are ways to allow that project to go forward and minimize the impacts of historic properties, or whether there should be some other action taken by the federal agency. The other aspect of today that is unusual in the Council's involvement in this – makes the nature of the Council's involvement being unusual today is that when these discussions, consultations, go on, they're normally conducted at staff level.

John Fowler, Executive Director of the ACHP, ACHP Field Hearing Transcript, at 7-8 (Mar. 11, 1999) (at ACHP00527 to ACHP00528), Ex. 185 (emphasis added).

⁶²⁴ John Fowler, Executive Director of the ACHP, ACHP Field Hearing Transcript, at 8-9 (Mar. 11, 1999) (at ACHP00528 to ACHP00529), Ex. 185 (emphasis added).

outside the area of proposed disturbance, along the western boundary of the Project area, as depicted in the following schematic:⁶²⁵



317. The ACHP’s decision to visit the Running Man site, a 4-foot-long and 6-inch-high rock figure (geoglyph) (see Figure 9), was particularly unusual considering that BLM’s 1996 EIS/EIR described the site as a post-1940’s “historic fabrication that may be of Anglo origin.”⁶²⁶ Moreover, in 1997, the Quechan Tribal historian did not even know the exact

⁶²⁵ Statement of D. Purvance, ¶ 12.

⁶²⁶ Dr. Schaefer, *Cultural Resources of Indian Pass: An Inventory and Evaluation for the Imperial Project*, at 72 (June 1996), Ex. 74 (attached at Appendix J to the 1996 Draft EIS/EIR for the Imperial Project); see also *id.* at 44 (“the lack of embeddedness of the geoglyph suggest[s] that this may be a very recent historic addition to the site”) (emphasis added).

THE RUNNING MAN (Figure 9)



whereabouts of the site.⁶²⁷ While such a recently manufactured feature could nonetheless have importance to the Quechan Tribe, neither BLM nor the Tribe identified this feature or its importance during the lengthy period that the company was carrying out extensive mineral exploration drilling and preparing its mining plan of operations or while the government formulated information for the Draft EIS/EIR between 1991 and 1995. This fact, in addition to the fact that the Running Man site is located nearly two miles from the proposed Imperial Project mine area, underscores why Glamis could have no reasonable expectation that Interior would eventually employ the site as a central part of the basis for denying the Project.

⁶²⁷ Statement of D. Purvance, ¶ 11.

c. The ACHP's Factual Determinations, On Which It Based Its Recommendation To Interior, Repeated And Expanded On BLM's Flawed Cultural Analysis

318. According to Interior Solicitor's Office communications with the ACHP in April 1999, soon after it concluded its filed hearing, the ACHP began preparing comments to the Secretary of the Interior regarding its desire to see the Imperial Project denied.⁶²⁸ By letter dated October 19, 1999, the ACHP finally advised the Secretary of the Interior of its long-held position – traceable to Mr. Stanfill's e-mail to Mr. Klima – stating, in part:

If implemented, the [Imperial Project] would be so damaging to historic resources that the Quechan Tribe's ability to practice their sacred traditions as a living part of their community life and development would be lost. Overall, the Council is convinced that the cumulative impacts of the proposed mine . . . even with the mitigation measures proposed by the company, would result in a serious and irreparable degradation of the sacred and historic values of the [land] that sustain the tribe. Therefore the Council concludes that the Glamis Imperial Project would effectively destroy the historic resources in the project area, and recommends that Interior take whatever legal means available to deny approval for the project.⁶²⁹

319. The ACHP premised this conclusion on a series of "findings," none of which withstand close analysis or scrutiny in accordance with commonly accepted ethnographic standards. First, it "found" that religious, cultural, and educational values of the artificially designated Indian Pass-Running Man ATCC were of "premier importance" to the Quechan Tribe. As Dr. Sebastian has pointed out and as discussed at ¶ 221-224 and 337, however, the Quechan

⁶²⁸ See E-mail from John Payne to Lisa Hammer (Apr. 9, 1999) (at D-00360-0021-0003), Ex. 189 (referencing communication between the Solicitor's Office and Alan Stanfill regarding the timing of when ACHP would release its comments).

⁶²⁹ Letter from Cathryn Buford Slater to Secretary Bruce Babbitt, at 3 (Oct. 19, 1999) (at D-00409-0048-0044), Ex. 201.

never referred directly to the ATCC. This concept was only devised to focus attention on the Imperial Project area and it had no independent significance to the Tribe. In fact, BLM had already determined in 1987 that there was “*no evidence*” that the Indian Pass area approximately one mile north of the Imperial Project was being “used today by contemporary Native Americans.”⁶³⁰

320. Second, the ACHP “found” that despite development of other portions of the California Desert, “the ATCC has retained sufficient integrity of setting, feeling, and association to remain a critically important area for traditional uses.”⁶³¹ Again, as Dr. Sebastian has pointed out, there is no basis on which to differentiate the “importance” of the Imperial Project site – even with the boundaries of the ATCC superimposed on it – from any other portion of the CDCA falling within the Tribe’s traditional territory.⁶³² The Imperial Project site contains the same types and density of archeological resources that have been identified elsewhere in the region, many of which continue to remain important to Native American cultural values despite approved development in the vicinity.

321. Third, the ACHP concluded that the Imperial Project “would unduly degrade the ATCC, introducing activities and intrusions incompatible with the historic area and its unique qualities.”⁶³³ As discussed at ¶¶ 221-227, Dr. Sebastian concluded after her extensive review

⁶³⁰ *Indian Pass ACEC Management Plan*, at 8 (1987), Ex. 17 (emphasis added). The U.S. Congress had also considered competing values, such as Native American, cultural resources, environmental preservation and mineral development, during passage of the 1994 California Desert Protection Act. Glamis pointed these considerations out to the ACHP in detailed comments that were ultimately ignored by the council. Letter from Charles Jeannes and Gary Boyle to John Fowler (Aug. 13, 1999) (at D-00405-0022-0001), Ex. 198.

⁶³¹ Letter from Cathryn Buford Slater to Secretary Bruce Babbitt, at 2 (Oct. 19, 1999) (at D-00409-0048-0043), Ex. 201.

⁶³² *See* Sebastian Report, at 6-7.

⁶³³ Letter from Cathryn Buford Slater to Secretary Bruce Babbitt, at 2 (Oct. 19, 1999) (at D-00409-0048-0043), Ex. 201.

that the ATCC region is not unique in its cultural-resource composition, nor is it unique as a independently identified region of premiere importance. The Tribe's concerns growing out of the Imperial Project related to a much broader concern for the southern California desert than existed for the Imperial Project location alone.⁶³⁴

d. The ACHP's Decision To Comment Directly To The Interior Secretary Confirms That It Had No Intention Of Engaging In Consultations To Identify Mitigation Measures

322. Formulation of the ill-considered opinions contained in the ACHP's letter to Interior were not the only baseless aspects of the ACHP's actions during review of the Imperial Project. In addition, the ACHP's decision to comment directly to the Secretary of the Interior was abnormal from a procedural standpoint for at least two reasons. First, the BLM State Director asked ACHP staff to provide its views to the state BLM office directly.⁶³⁵ By commenting directly to Interior Secretary Bruce Babbitt instead, the ACHP simply bypassed State BLM Director Hastey's request.

⁶³⁴ The ACHP's field hearing at the Imperial Project confirmed what BLM consultants already knew, but had greatly discounted – the concerns of the Quechan Tribe, as they related to the Imperial Project, extended beyond an artificial “ATCC” to a broad region in Southern California that ranges from Arizona, west to Los Angeles, and south into Mexico. See Lorey Cachora, ACHP Field Hearing Transcript, at 179-80 (Mar. 11, 1999) (at ACHP00699 to ACHP00700); see also Sebastian Report, at 60. Moreover, reiterating what he had told BLM consultants about the vast scope of the area of cultural significance during their inventory and study of the area, the Tribal historian, Mr. Cachora testified before the ACHP at the March 11 field hearing: “*It is a region we are discussing. It just so happens that this area, Indian Pass, is right in the path of one of the regions . . . , but this trail follows west to the present town of Los Angeles, then down to San Juan Capistrano, then it goes into Catalina Island, and then comes back and trails into Mexico.*” Lorey Cachora, ACHP Field Hearing Transcript, at 179-80 (Mar. 11, 1999) (at ACHP00699 to ACHP00700), Ex. 185 (emphasis added).

⁶³⁵ Letter from Ed Hastey to John Fowler, at 1, 11 (Aug. 25, 1998) (at D-00050-0001-0002 and D-00050-0001-0012)), Ex. 139; Sebastian Report, at 63-64.

323. Second, the ACHP's decision to comment directly to the Interior Secretary conflicted directly with the applicable 1986 regulations implementing the NHPA. According to those regulations, the ACHP may comment to the head of the requesting agency *if* consultations prove unproductive and are terminated by either the agency, SHPO or the ACHP.⁶³⁶ In the case of the Imperial Project, however, the ACHP did not engage in *any* consultations with the BLM and SHPO before deciding to comment directly to the Secretary of Interior.⁶³⁷ The ACHP's Executive Director did meet with Solicitor Leshy to discuss the "chicken and egg situation" over who should first issue their opinion about the Imperial Project first.⁶³⁸ The two officials decided that the ACHP would go first.⁶³⁹

324. Despite the unprecedented cultural-resource opinions contained in the ACHP's letter recommending disapproval of the Imperial Project – as well as the extraordinary procedure embodied by the ACHP's decision to send it – the letter found a highly receptive audience in the Interior Solicitor's Office. As will be discussed more fully in the sections that follow, Solicitor Leshy had been, for several months, considering bases upon which he might legally deny approval of the Imperial Project. The ACHP's letter provided him with the perfect opportunity to complete his legal opinion, deny the Imperial Project, and administratively amend the Mining Law in one fell swoop.

⁶³⁶ 36 C.F.R. § 800.5(e)(6) (1986).

⁶³⁷ Sebastian Report, at 63-64. Of course, from the ACHP's standpoint, consultation would have been meaningless, considering that the ACHP had decided – as evidenced by correspondence before the ACHP public field hearing between the ACHP staff member assigned to the Imperial Project, Mr. Stanfill, and Mr. King – that a Memorandum of Agreement regarding mitigation measures would be inappropriate. E-mail from Alan Stanfill to Thomas King (Sept. 21, 1998) (at ACHP00301), Ex. 145.

⁶³⁸ E-mail from John Fowler to Don Klima (Oct. 15, 1999) (at ACH001373), Ex. 200.

⁶³⁹ *Id.*

5. Solicitor Leshy's Legal Opinion Compelled BLM To Reverse Itself In November 2000 And Recommend The "No Action" Alternative To Secretary Babbitt

325. On December 27, 1999, a little over two months after the issuance of the ACHP's much-anticipated letter to the Interior Secretary recommending "that Interior take whatever legal means available to deny approval for the project,"⁶⁴⁰ Solicitor Leshy issued an unprecedented Legal Opinion essentially adopting the analysis initially proposed by Francis Wheat in his 1997 *ex parte* letter to Interior Deputy Secretary John Garamandi.⁶⁴¹ Contrary to settled prior interpretations of Interior's authority under FLPMA, Solicitor Leshy concluded, with Secretary Babbitt's concurrence, that the "undue impairment" provision in FLPMA – without implementing regulations – could justify denial of a plan of operations, even where there are no feasible (technically or economically) measures available to mitigate the alleged harm. Specifically, Solicitor Leshy's Opinion declared that "the 'undue impairment standard' [of FLPMA] might also permit denial of a plan of operations if the impairment of other resources is particularly 'undue,' and no reasonable measures are available to mitigate that harm"⁶⁴² Interior did not provide proper public notice and opportunity for comment before announcing this new interpretation of FLPMA's "undue impairment" provision. Solicitor Leshy was apparently not troubled in the least by the retroactive application of a new "undue impairment" interpretation to Glamis when there had never been even a proposed rulemaking that suggesting

⁶⁴⁰ Letter from Cathryn Buford Slater to Secretary Bruce Babbitt, at 3 (Oct. 19, 1999) (at D-00408-0048-0044), Ex. 201.

⁶⁴¹ See generally Solicitor John Leshy, *Regulation of Hardrock Mining* (Dec. 27, 1999) (MV005585), Ex. 205. For a discussion of the Wheat letter, see ¶¶ 266-271 *supra*.

⁶⁴² *Regulation of Hardrock Mining*, at 17-18 (Dec. 27, 1999) (at MV005601 to MV005602), Ex. 205.

the creation of a discretionary and subjective mine denial authority from this innocuous statutory phrase. He also was willing to exercise this new mine veto authority over the Imperial Project notwithstanding the governing standard in the CDCA Plan, which provided: “BLM will review plans of operation for potential impacts on sensitive resources. . . . Mitigation, subject to technical and economic feasibility will be required.”⁶⁴³

326. After recounting the views of the ACHP, Solicitor Leshy’s opinion declared a new policy for Interior with respect to historic resources: “*If the BLM agrees with the Advisory Council, it has . . . the authority to deny approval of the plan of operations.*”⁶⁴⁴ In this way, the Solicitor’s Opinion dictated the outcome of BLM’s review of the Glamis plan of operations – use of a discretionary denial authority that previously had never existed or been exercised by Interior on similar projects. This new denial authority contravened the provisions of the governing CDCA Plan which provided that cultural-resource impacts would not be a basis for denial of a mining operation.⁶⁴⁵ It also contravened the Congressional promise to Glamis that there would be no “buffer zones” around those areas that Congress had chosen to exclude from further development (as discussed at ¶¶ 114-115 above).

327. Having thus created a new discretionary veto authority, Solicitor Leshy completed the analysis by resurrecting the 1996 “Executive Order on Sacred Sites,” which “mandates that federal land managers ‘shall, *to the extent practicable, permitted by law*, and not clearly inconsistent with essential agency function . . . avoid adversely affecting the physical integrity

⁶⁴³ *CDCA Plan*, at 18 (1980) (MV037137), Ex. 12.

⁶⁴⁴ *Regulation of Hardrock Mining*, at 19 (at MV005603), Ex. 205 (emphasis added).

⁶⁴⁵ *CDCA Plan*, at 18, 22-25, 101-102 (1980) (MV037137 and MV037141 to MV037144 and MV037219 to MV037220), Ex. 12.

of . . . [Indian] sacred sites.”⁶⁴⁶ As discussed at ¶ 289, the Solicitor’s staff lawyers had previously concluded that this Executive Order could not impair Glamis’ vested property rights.⁶⁴⁷ Now that mine approval was discretionary, at least according to Solicitor Leshy, the “*Executive Order therefore guides BLM’s administration of its responsibility to regulate hardrock mining on federal lands here in the CDCA, and directs BLM to a policy choice in favor*

⁶⁴⁶ *Regulation of Hardrock Mining*, at 6 (at MV005590), Ex. 205 (quoting Executive Order 13007) (emphasis added). The 1996 Executive Order 13007 on Indian Sacred Sites, provides in pertinent part, as follows: “In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, *to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions*, (1) accommodate access to land ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.” Exec. Order No. 13007, 61 Fed. Reg. 26,711 (May 24, 1996) (emphasis added).

⁶⁴⁷ This analysis was entirely consistent with a high level May 23, 1997 Interior report transmitted by Secretary Babbitt to Bruce N. Reed, Assistant to the President for Domestic Policy, which identified the Mining Law as one of the “most serious impediments which cannot be alleviated administratively” with respect to the implementation of Executive Order No. 13007. Implementation Report, Executive Order No. 13007 Indian Sacred Sites, at 10 (May 23, 1997) (at D-00028-0001-0014). That 1997 Interior report stated, in part, as follows:

The following is a brief description of the most serious impediments which cannot be alleviated administratively.

An Act to Promote the Development of the Mining Resources of the United States, May 10, 1872. 43 CFR Part 3809

The Mining Act of 1872 was enacted more than 120 years ago. It was designed to assist in the development of the Western United States. The Act allows the patenting of land which containing minerals at a minimal cost to the applicant. The Act provides the Department little discretion for refusing an application for a mining patent. The Department lacks authority to unilaterally include a new basis for the denial of [an] . . . application even where the exploration for and development of minerals impedes access to and religious use of Sacred Sites or physical integrity.

Unavailability of Compensatory Mitigation

The Department fully recognizes the critical cultural, traditional, and historic importance of Sacred Sites as well as archeological sites to Indian and Alaska Native peoples. Many of these sites are unique and simply irreplaceable. *At the same time, the Department recognizes that its ability to protect sacred and other significant sites on public lands may be impeded by vested third party interests or statutory constraints*, such as those outlined in this section. In such situations, options for mitigation are needed *Compensation, could be effective in a variety of ways. The outright purchase of a third party interest, for example, would be one option*

Id.

of preserving the physical integrity of the sites unless such a choice is impracticable, forbidden by law, or clearly inconsistent with essential agency functions.”⁶⁴⁸

328. As discussed at ¶¶ 282, BLM had already made a preliminary determination that Glamis’ mining claims were valid. More importantly, on December 22, 1999, just *five days* before Solicitor Leshy issued his legal opinion, Mr. Al Wright in BLM’s California State Office delivered a Draft Mineral Report to Solicitor Leshy.⁶⁴⁹ Given that the final report released to the public in September 2002 stated that Glamis’ mining claims were valid as of November 1998, it can be presumed that the earlier draft of that report confirmed the existence of Glamis’ valid mining claims.⁶⁵⁰ Thus, if he wanted to stop the Imperial Project, Solicitor Leshy knew that it would have to be through his legal opinion.

⁶⁴⁸ *Regulation of Hardrock Mining*, at 6 (at MV005590), Ex. 205 (emphasis added). The ACHP itself recognized the novelty of the Leshy Opinion. The very day the unlawful Solicitor’s Opinion was publicly released – January 14, 2002 – BLM sent an “advance” copy to Mr. Stanfill at the ACHP; Mr. Stanfill then immediately sent it to Messrs. John Fowler and Don Klima of the ACHP with this message: “*Glamis Solicitor’s Opinion Approved by Babbitt – It’s long, but I knew you’d want to see this ASAP. – Good News!*” Facsimile from Alan Stanfill to Don Klima and John Fowler (Jan. 14, 2000) (at ACHP01462) (emphasis added), Ex. 206. The ACHP then issued an updated report in March 2000 on the Glamis Imperial Project, stating, in part:

Previously, BLM has taken a restrictive view of its authority to actually deny a proposed mining plan and has looked instead to developing mitigation measures to incorporate into the plan. The most recent legal opinion from DOI departs from BLM’s traditional interpretation.

ACHP Update on Prominent 106 Cases, at 3 (Mar. 2000) (at ACHP01487) (emphasis added), Ex. 207.

⁶⁴⁹ See Department of Interior Privilege Log I, Document No. 29 (referenced at Tab C-1, No. 3, to Claimant’s February 15, 2006 filing in this arbitration), at 1.

⁶⁵⁰ The United States has asserted deliberative-process privilege over the December 22, 1999 Draft Mineral Report (which Claimant has challenged during discovery in this arbitration), for what are now obvious reasons – the report demonstrates that Solicitor Leshy knew that BLM had determined the validity of Glamis’ vested property interest before he issued his legal opinion purporting to extinguish these rights. The government’s refusal to turn over that document exemplifies its unlawful and inconsistent use of the deliberative-process privilege to continually undermine Glamis’ position and prevent the Tribunal from learning the true facts of this case. Accordingly, Claimant asks the Tribunal to “reconsider” Claimant’s challenge to the December 22, 1999 Draft Mineral Report, and other documents relating thereto, in accordance with the Tribunal’s *Decision* of April 21, 2006 (¶ 48).

329. Solicitor Leshy's strained interpretation of the Executive Order in his legal opinion left BLM with virtually no choice but to deny Glamis' plan of operations (the Executive Order "*directs BLM to a policy choice in favor of preserving the physical integrity of the sites*"), if it agreed with the ACHP's position that the cultural resources at the Imperial Project could not be protected through mitigation. Moreover, because the Leshy Solicitor's Opinion was approved by Interior Secretary Babbitt, it was binding on all Interior employees including the agency's adjudicatory body, the Interior Board of Land Appeals.⁶⁵¹

330. The BLM field office dutifully followed the ACHP's recommendations and Solicitor Leshy's binding legal advice (expressly concurred with by Secretary Babbitt) and at last issued a Final EIS/EIR for the Glamis Imperial Project in September 2000 – *six years* after Glamis first proposed its plan of operations. In the Final EIS/EIR, BLM wholly reversed its previously studied conclusions and recommendations, which it had articulated in both the 1996 and 1997 Draft EIS/EIRs. As discussed at ¶¶ 193-194 and 215, these public documents had identified approval of Glamis' plan of operations as BLM's "preferred alternative." Contrary to the two published Draft EIS/EIRs, however, the Final EIS/EIR changed its preferred alternative to that of "No Action."⁶⁵² Under the "No Action" alternative there would be no further Imperial Project development. According to the BLM:

The Project Area would remain as is, and present uses in the area, including opportunities for dispersed recreational activities, would continue. The Project Area would remain available for future commercial gold processing proposals or for other proposals as permitted by BLM policy or land-use designations.⁶⁵³

⁶⁵¹ See *The Wilderness Society*, 122 IBLA 162 (1992).

⁶⁵² *Final EIS/EIR for the Glamis Imperial Project*, at 2-70 (Sept. 2000), Ex. 210.

⁶⁵³ *Id.* at S-17.

Thus, according to BLM's selected "No Action" alternative, the Imperial Project would be denied, and "dispersed recreational activities" would continue but *if* BLM chose in its discretion to change land use designations at some indefinite point in the future (*e.g.*, rescind the administrative withdrawal), "future commercial gold" development proposals might be permitted. This statist approach was entirely contrary to the long established valid existing rights held by Glamis in the Imperial Project.

331. BLM's new position, embodied in the Final EIS/EIR, was based entirely on Solicitor Leshy's Legal Opinion. As stated in the Final EIS/EIR:

As already mentioned, the Solicitor for the Department of the Interior issued a legal opinion signed on January 3, 2000 by the Secretary of the Interior that reviewed the regulation of hardrock mining as it applied to the Proposed Action. . . . This opinion found that the unnecessary or undue degradation standard, as defined above, allowed BLM to require reasonable mitigation measures to protect resources, but did not by itself give BLM the authority to prohibit mining altogether on public lands. Because the Proposed Action would be located within the California Desert Conservation Area (CDCA), the opinion went on to analyze the "undue impairment" standard (see 43 U.S.C. §1781(f), quoted above). . . . The opinion found that the "undue impairment" standard would permit BLM to impose reasonable mitigation measures to prevent undue impairment, and that the standard *might also permit denial of a plan of operations* if the impairment of other resources is particularly "undue," and no reasonable measures are available to mitigate that harm."⁶⁵⁴

332. While BLM did not find explicitly that Glamis could employ no reasonable measures to mitigate the alleged cultural-resource impacts from the Project, BLM relied on "extensive consultation with the Advisory Council on Historic Preservation" in selecting the "No

⁶⁵⁴ *Id.* at 1-15, (emphasis added).

Action” alternative.⁶⁵⁵ BLM also noted that the Quechan Tribe was “concerned that the Project will cut-off their ability to use the Trail of Dreams for traditional cultural purposes.”⁶⁵⁶

333. Unlike BLM’s obligations under NEPA, Imperial County was not obligated to select a “preferred alternative” as the lead agency under CEQA, but it was obligated to identify an “Environmentally Superior Alternative,” one that could not be the “no action” alternative.⁶⁵⁷ Imperial County selected Glamis’ proposed plan of operations as the “Environmentally Superior Alternative” in the Final EIS/EIR for the Imperial Project.⁶⁵⁸ This alternative was selected after years of technical and scientific reviews of the Project of various alternative operational scenarios, including a complete backfilling alternative.⁶⁵⁹ Accordingly, Imperial County’s selection in the final EIS/EIR effectively constitutes a finding by the State of California that complete backfilling is *not* the an environmentally conscious alternative to the Imperial Project as proposed.

6. On The Eve Of Leaving Office, Secretary Babbitt Completed The Expropriation By Issuing A Record Of Decision Denying The Imperial Project In Clear Violation of the Law

334. On January 17, 2001, the eve of his departure from office, Secretary Babbitt held a press conference in Washington, D.C. and issued his ROD in which he formally denied approval Glamis’ Imperial Project plan of operations.⁶⁶⁰ The Secretary’s ROD stated in its

⁶⁵⁵ *Id.* at 2-70.

⁶⁵⁶ *Id.* at 3-100.

⁶⁵⁷ *See id.* at 2-70.

⁶⁵⁸ *Id.*

⁶⁵⁹ *See id.* at 2-67 to 2-69; *see also Draft EIS/EIR for the Glamis Imperial Project*, at 2-61 to 2-63 (Nov. 1997), Ex. 90.

⁶⁶⁰ *Record of Decision for the Imperial Project Gold Mine Proposal*, at 1, 10 (Jan. 17, 2001) (at D-00168-0001-0001 and D-00168-0001-0010), Ex. 212 (approved by Bruce Babbitt, Secretary of the Interior). This date was three days before the end of the Clinton Administration.

rationale that the Imperial Project – albeit on federal, not tribal, land – was within a Native American “spiritual pathway” that ran for at least 140 miles in the California Desert area and that tribal members believed the proposed mine would “impair the ability to travel, both physically and spiritually” along this “Trail of Dreams.”⁶⁶¹ The ROD further stated the importance of Solicitor Leschy’s legal opinion in arriving at this conclusion:

In interpreting the legal authorities pertaining to this particular project, this ROD relies upon the Department of the Interior Solicitor’s Opinion of December 27, 1999, which described the nature of BLM’s discretionary authority under the statutory standards of “undue impairment” and “unnecessary or undue degradation” to proposed actions on the public lands in the CDCA.⁶⁶²

335. Secretary Babbitt’s main reasons for denying the Imperial Project were legally unsound. Interior asserted that the proposed Project is located in an area determined to have nationally significant Native American values and historic properties and would cause unavoidable adverse impacts to these resources.⁶⁶³ As a threshold matter, this determination was based on predetermined and fundamentally flawed ACHP advice, as discussed at ¶¶ 319-321 above, which makes its legitimacy highly questionable, at best.⁶⁶⁴ Interior further stated that the Project’s impacts could not be mitigated to the point of meeting FLPMA’s statutory requirement that BLM must prevent “undue impairment” of the public lands in the CDCA.⁶⁶⁵ This novel application of the “undue impairment” standard, however, was based on Solicitor Leschy’s legal opinion, which, as discussed below at ¶¶ 342-345, has since been rescinded as contradictory to

⁶⁶¹ *Id.* at 10 (D-00138-0001-0010).

⁶⁶² *Id.* at 4 (at D-00168-0001-0004).

⁶⁶³ *Id.* at 3 (at D-00168-0001-0003).

⁶⁶⁴ *See id.* at 4 (at D-00168-0001-0004).

⁶⁶⁵ *Id.*

long-settled Interior policies and because it adopted a regulatory interpretation that was not promulgated using mandatory formal notice and comment rulemaking procedures.

336. Interior’s main reasons for denying the Imperial Project were also factually unsound. The ROD states that the proposed project would affect Native American cultural resources in two main ways: (1) damaging the Indian-Pass Running Man Areas of Traditional Cultural Concern and (2) damaging a portion of the Trail of Dreams. Regarding the first point, the ROD asserts that the “proposed project would significantly damage the network of Native American trail segments and related cultural resources associated with the *nationally significant Indian Pass-Running Man Area of Traditional Cultural Concern (ATCC)*.”⁶⁶⁶ As discussed at ¶¶ 221-227, however, the ATCC represented an administrative construct employed by BLM’s consultants to focus solely on anything of cultural interest directly in the mine vicinity. The ATCC is *not* some independent, “nationally significant” region identified as such by the Quechan Tribe. While Glamis does not question the significance of this recently created artifact to the Quechan Tribe, Glamis could not have anticipated that this isolated structure of recent vintage could become the namesake for a large 9,360-acre withdrawal and “Area of Traditional Cultural Concern” (“ATCC”) purposefully drawn to surround and encompass the entire Project area. Indeed, the ATCC concept had never been used by BLM or any other federal agency until it was created specifically for the Glamis Imperial Project by the BLM.⁶⁶⁷

337. Regarding the “Trail of Dreams,” Interior’s ROD concluded that the “proposed project would destroy portions of the Trail of Dreams, other trails, and related ceremonial

⁶⁶⁶ *Id.* at 10 (at D-00168-0001-0010) (emphasis added).

⁶⁶⁷ *See* Sebastian Report, at 8.

areas”⁶⁶⁸ The determination that the Imperial Project was within a Native American “spiritual pathway” and that tribal members believed the proposed mine would “impair the ability to travel, both physically and spiritually, along” this “Trail of Dreams” is not supported by the record. As it turns out, the Trail of Dreams (which was as identified by the Quechan but had never previously been mentioned in any ethnographic literature until it was named in a 1997 Imperial Project cultural-resource report prepared for BLM) does not even cross any portion of the Imperial Project area that was to be disturbed by actual mining activities.⁶⁶⁹ Moreover, the ROD does not describe how the Imperial Project would prevent spiritual journeys along the Trail of Dreams by Quechan Tribal members where dozens of other trail breaks do not (such as highways, pipelines, railroads, irrigation canals, and other development projects).⁶⁷⁰

338. Another troubling aspect of Secretary Babbitt’s ROD is that Figure 1 in the ROD (Map of Proposed Imperial Project) misleadingly depicts “Ancient trails” in the area by using a symbol only within and directly adjacent to the Glamis Imperial Project Area.⁶⁷¹ In fact, BLM’s own 1997 Draft EIS/EIR and the 2000 Final EIS/EIR actually demonstrated that “pre-historic” trails were known to traverse the entire region consisting of over 100 square miles – and the vast majority of these known and identified trails were outside the Imperial Project Area.⁶⁷²

339. Thus, the legal and factual bases for the Secretary’s denial of the Imperial Project were not only wrong, they were also highly irregular. The Secretary’s treatment of the Imperial

⁶⁶⁸ *Record of Decision for the Imperial Project*, at 10 (at D-00168-0001-0010), Ex. 212.

⁶⁶⁹ *See* Sebastian Report, at 10-11.

⁶⁷⁰ *See id.*

⁶⁷¹ *Record of Decision for the Imperial Project*, Figure 1, (at D-00168-0001-0006), Ex. 212.

⁶⁷² *See* KEA Environmental, *Where Trails Cross: Cultural Resource Inventory and Evaluation for the Imperial Project*, at 93-96 (Dec. 1997) (at GLA03472 to GLA03475), Ex. 93 (attached to both the 1997 Draft and 2000 Final EIS/EIR for the Glamis Imperial Project).

Project was blatantly inconsistent with Interior’s treatment of other similar projects in the area. For example, Glamis’ Picacho Mine, which operated throughout the 1980s and 1990s, used the same types of mining and reclamation methods as those proposed for the Imperial Project.⁶⁷³ Moreover, that Mine was located within an area identified by BLM as having “high” Native American interest, after 1978 consultations with Quechan Tribe elders and other Native Americans. In contrast, the Imperial Project area was not in a correspondingly “high” area of Native American interest.⁶⁷⁴

340. Upon learning that Secretary Babbitt officially denied the plan of operations for the Imperial Project, Glamis took steps to adjust its permitting expectations and protect shareholder value in the company by writing off its \$14.3 million investment in the Imperial Project and eliminating the Project’s reported proven and probable reserves. As reported in the company’s annual report and financial statements for 2000 (filed with the U.S. Securities and Exchange Commission and Canadian securities authorities), however, the “Company will appeal this [denial] decision and intends to vigorously pursue all available means to protect its investment in this project. . . .”⁶⁷⁵

⁶⁷³ See McArthur Statement, ¶ 3. As previously discussed, the reclamation methods used at the Picacho Mine earned Glamis an Excellence in Reclamation Award from the California Mining Association and an accommodation in the California Legislature. See ¶ 132 above. In fact, Glamis successfully completed reclamation activities in 2002 and was released from its assurances bond by Imperial County on March 19, 2002. See Letter from P.A. Valenzuela, Imperial County to D.A. Purvance, Chemgold (Glamis) (Mar. 19, 2002), Ex. 227.

⁶⁷⁴ See Figure 4, *supra*, at page 53.

⁶⁷⁵ *Glamis Gold Ltd. Annual Report for 2000*, at 29 (Mar. 6, 2001) (at GLA000928), Ex. 311 (see also Statement of K. McArthur, ¶ 20).

B. The Norton Administration Incompletely Rectified The Unlawful Acts Of Her Predecessor And Failed To Protect Glamis' Investment From Expropriation By The State Of California

341. Fortunately, when the new administration took office in 2001, it took some important initial steps to reverse the improper actions of former Secretary Babbitt and Solicitor Leshy. This remedy remained incomplete, however, because to date it has neither approved Glamis' plan of operations nor compensated Glamis for the loss of its investment.

1. Solicitor Myers Recognized And Rejected Former Solicitor Leshy's Unlawful Expansion Of Interior's Authority In Light Of Policies In The Mining Law

342. On October 23, 2001, the new Interior Solicitor Myers and Interior Secretary Norton reconsidered and rescinded the prior Solicitor's legal opinion and recommended the reconsideration of Secretary Babbitt's decision denying Glamis' plan of operations.⁶⁷⁶ In a new Solicitor's Opinion, Solicitor William Myers determined that Solicitor Leshy had departed from well-established mining law principles without any legal basis. Solicitor Myers' Opinion began by recognizing the federal statutory context which supported mining activity on federal lands and explained how the denial of the Glamis plan of operations departed from the settled understanding and implementation of applicable laws:

The Mining Law of 1872 . . . and the Federal Land Policy and Management Act . . . provide the legal framework for hardrock mining operations on the public lands. In conjunction with the Mining and Minerals Policy Act of 1970 . . ., they reflect longstanding congressional

⁶⁷⁶ See Solicitor's Opinion, M-37007 (Oct. 23, 2001) (D-00314-0007-0001), Ex. 216. Interestingly, Alan Stanfill, who had moved to BLM by this time, sent an e-mail to contacts in the ACHP shortly after Solicitor Myers' Opinion was released. Demonstrating his longstanding bias against the Imperial Project, Mr. Stanfill noted that there was "no word on the street yet as to what BLM might do, but the Council might think about a recommendation that would require the company to fill in the hole it would create as part of its reclamation, and be bonded to ensure that filling occurs." E-mail from Alan Stanfill to C. Gleichman (Oct. 26, 2001) (at ACHP01575), Ex. 218.

intent to support the development of minerals that are critical to the Nation. . . . In 1999, the National Research Council assessed federal and state laws and the 1980 regulations and concluded that they were generally effective in providing mining-related environmental protection.

In November 2000, the Department amended its 1980 regulations. . . . Both the Department's promulgation of the 2000 regulations and its denial of a proposed plan of operations filed by the Glamis Imperial Corporation (Glamis) were based on legal conclusions set forth in the 1999 Solicitor's Opinion. . . . Due to the controversy, including litigation, engendered by the 2000 regulations and the denial of the Glamis plan of operations, I have reviewed the legal bases for both actions and reject certain of the conclusions in the 1999 Opinion⁶⁷⁷

343. Solicitor Myers then explained how Solicitor Leshy's 1999 Opinion had been used to create an unprecedented mine veto authority:

On November 21, 2000, the Department published new regulations that substantially amended the 1980 regulations. . . . Based in part on the legal conclusions in the 1999 Opinion, the regulations revised and expanded the definition of "unnecessary or undue degradation" to include conditions, activities, or practices that "result in *substantial irreparable harm* to significantly scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated." *The Department's adoption of the "substantial irreparable harm" criterion has generated considerable controversy and litigation because the criterion authorizes the Department to entirely prevent mining activity, even when the mine operator has otherwise complied with all other relevant statutory and regulatory requirements*⁶⁷⁸

Relevant legal authorities require removal of the "substantial irreparable harm" criterion from the definition of "unnecessary or undue degradation" . . . through the rulemaking process currently underway within the Department. *In addition, the Department should not apply the "undue impairment" provision in section 601(f) of FLPMA to deny a plan of operations unless and until it completes rulemaking to establish standards for the meaning of "undue impairment." Because the Department has not promulgated regulations to define "undue impairment" under section 601 of FLPMA, I advise the rescission and reconsideration of any decisions made by the Department to deny a plan*

⁶⁷⁷ Solicitor's Opinion, M-37007, at 1 (Oct. 23, 2001) (at D-00314-0007-0001), Ex. 216 (emphasis added)

⁶⁷⁸ *Id.* at 2 (at D-00314-0007-0002).

*of operations based on the application of the “undue impairment” provision, including the Glamis proposal.*⁶⁷⁹

344. Thus, BLM correctly recognized in 2001, as it had when it first construed FLPMA in 1980, that there are statutory limits on the agency’s authority to impose regulations in an attempt to eliminate all environmental impacts, if those regulations also circumscribe the opportunity to reasonably develop mining claims on public lands (as the 2000 mine veto provision would surely do). In fact, as one longtime BLM senior manager wrote to a staff attorney who assisted with the Myers’ Legal Opinion:

I don’t know how you personally feel about the decision, but you did an OUTSTANDING job in writing it.

*We purposely did not define undue impairment in 1980 because we all concluded it meant the same as undue degradation . . . i.e., it is OK to have due degradation and it is OK to have due impairment, but the undue stuff, we can’t allow.*⁶⁸⁰

In fact, Interior has never proposed or issued regulations to define or implement the “undue impairment” standard, which was the provision upon which former Interior Secretary Babbitt unlawfully denied the Imperial Project. Thus, Solicitor Leshy’s legal opinion was widely regarded in 2001 and 2002 by senior officials within Interior as “illegal” and “legally in error” in its efforts to amend the Mining Law of 1872 through administrative means, as well as amend FLPMA’s implementing regulations without undergoing proper procedural requirements.⁶⁸¹

⁶⁷⁹ *Id.* at 20 (at D-00314-0007-0020).

⁶⁸⁰ E-mail from Bob Anderson to Karen Hawbecker (Oct. 26, 2001) (at D-00389-0136-001), Ex. 217 (emphasis added).

⁶⁸¹ *See, e.g.*, BLM Briefing Document (Dec. 19, 2002) (at D-00276-0001-0001), Ex. 269 (“the last administration rejected the Plan of Operation base [sic] on undue impairment—the basis of which the current Solicitor found to be *illegal*”) (emphasis added); Briefing for the Director, at 2 (Apr. 8, 2003) (at MV003376), Ex. 280 (“On October 23, 2001 Solicitor William G. Myers III issued an opinion, approved by Secretary Gale A. Norton, concluding that the earlier solicitor’s opinion regarding ‘undue impairment,’ relative to the Imperial project, was *legally in error*.”) (emphasis added); Briefing for the Secretary, at 2 (Dec. 6, 2002) (at D-00408-0005-0002), Ex. 264 (“Myers issued a legal opinion concluding that the Department should not apply the ‘undue impairment’ provision in section 601(f) of FLPMA to deny a plan
(continued...)”) (continued...)

345. Secretary Babbitt's denial of the Glamis Imperial Project disregarded this nation's century-long implementation of the Mining Law of 1872, as amended. Not only does FLPMA expressly speak to preserving the rights of mining claimants on California Desert lands, the Ninth Circuit in 1999 (the same year the unlawful Leshy Opinion was issued) recognized the Mining Law's continued validity and purpose:

Despite much contemporary hostility to the Mining Law of 1872 and high level political pressure by influential individuals and organizations for its repeal, all repeal efforts have failed, *and it remains the law.*

* * *

The owner of a mining claim owns property, and is not a mere social guest of the Department of the Interior to be shooed out the door when the Department chooses.

* * *

Congress has refused to repeal the Mining Law of 1872. Administrative agencies lack authority effectively to repeal the statute by regulations.⁶⁸²

By granting to BLM a discretionary veto over mining plans of operations, the Secretary's denial "shooed" Glamis out the door, in complete conflict with Congress' expressed intent in both the Mining Law and FLPMA. Not only did the denial fly in the face of longstanding interpretation of FLPMA, but it also was based on a legal opinion that improperly disregarded the procedural requirements contained in FLPMA, which prohibit the administrative interpretation of "undue impairment" without first undertaking proper notice and comment rulemaking procedures.⁶⁸³

(...continued)

of operations unless and until it completes a rule-making to establish standards for the meaning of 'undue impairment.'").

⁶⁸² *United States v. Shumway*, 199 F.3d 1093, 1098, 1103, 1107 (9th Cir. 1999) (emphasis added). See discussion at ¶ 39, *supra*.

⁶⁸³ See Solicitor's Opinion, M-37007, at 18-20 (Oct. 23, 2001) (at D-00314-0007-0018 to D-00314-0007-0020), Ex. 216 ("[U]nless the Department promulgates substantive regulations to define 'undue impairment' under section 601(f) of FLPMA, the Department should not apply the provision to deny a plan (continued...)")

For these reasons, on November 23, 2001, the Secretary of Interior formally rescinded the prior ROD denying the Imperial Project.⁶⁸⁴

2. BLM Confirmed Glamis' Long-Held Belief That Its Mining Claims Are Valid, But Failed To Issue A New Record Of Decision Before The State Of California Destroyed The Value Of Glamis' Investment

346. Once the new administration rejected Solicitor Leshy's Legal Opinion as unlawful and rescinded Secretary Babbitt's denial, one of the first tasks facing BLM was to complete the long delayed mineral validity examination that it had started over three years earlier. On February 13, 2002, BLM formally re-initiated the validity examination.⁶⁸⁵ According to the primary BLM mineral examiner for the Imperial Project, Robert Waiwood, the field work for that exam was finished in 1998⁶⁸⁶ and BLM completed the requisite report in 1999.⁶⁸⁷ Indeed, when asked how long it would take to complete the newly re-initiated examination, Mr. Waiwood stated that the report already was complete as of March 12, 2002, as far as he was concerned.⁶⁸⁸

(...continued)

of operations. . . . Rulemaking, with notice and opportunity for public comment, is the required process for the Department to establish standards for 'undue impairment' under section 601 of FLPMA.'").

⁶⁸⁴ Secretary Norton, *Rescission of Record of Decision for the Imperial Project Gold Mine Proposal* (Nov. 23, 2001) (at D-00218-0001-0001), Ex. 219.

⁶⁸⁵ BLM Press Release, *BLM Initiates Validity Examination on Glamis Imperial Mining Claims* (Feb. 13, 2002) (at ACHP01584), Ex. 223. The mineral exam was "re-initiated" because it had been "placed in suspension" by BLM, according to the lead BLM mineral examiner: "*As a result of the Solicitor's opinion regarding 'undue impairment' in the California Desert Conservation Area (CDCA), the Department has determined that the VER should be placed in suspension, pending completion of review of the plan of operation.*" Letter from Robert Waiwood, BLM, to Dan Purvance, Glamis, at 1 (Oct. 17, 2001) (at GLA030558), Ex. 215 (emphasis added). This admission directly contradicts the troubling statement made by Interior Deputy Solicitor Bernhardt in a signed declaration in this arbitration that "Claimant's allegation that BLM's validity determination was 'purposefully and improperly delayed for years,' is legally immaterial to its claims and factually inaccurate." Declaration of David L. Bernhardt, at 3 (Jan. 5, 2006), (attached at Tab E to Respondent's January 10, 2006 letter to Claimant).

⁶⁸⁶ E-mail from Robert Waiwood to Tony Ferguson (Mar. 12, 2002) (at D-00407-0019-0010), Ex. 225.

⁶⁸⁷ E-mail from Robert Waiwood to James Hamilton (Jan. 17, 2002) (at MV022682), Ex. 222.

⁶⁸⁸ See E-mail from Robert Waiwood to Tony Ferguson (Mar. 12, 2002) (at D-00407-0019-0010), Ex. 225.

347. Interior eventually issued its final *Mineral Report* on September 27, 2002, which was certified by no less than twelve career BLM mineral examiners and reviewers. That report confirmed the unsurprising facts that the Glamis Imperial Project “contains a gold deposit that can be mined and processed by open pit . . . methods at a profit” and that the mining claims were established in compliance with the mining laws of the United States as of November 1998 (when Interior proposed to withdraw the federal lands surrounding the Imperial Project area administratively, leaving intact any valid existing rights), as well as in 2002 (when the report was issued).⁶⁸⁹ BLM found in the *Mineral Report* that “a person of ordinary prudence” would be “justified” in making further expenditures, as of 1998 and 2002, with a “reasonable prospect” of developing a valuable mine.⁶⁹⁰

348. The BLM’s *Mineral Report* used average gold prices ranging from \$295 to \$325 per ounce, for 1998 and 2002, respectively.⁶⁹¹ The *Mineral Report* also found that underground mining and complete backfilling were “not economically feasible” at the Imperial Project.⁶⁹²

349. While Glamis has never contended that the BLM’s *Mineral Report* itself constitutes an appraisal of the value of the Glamis Imperial Project, detailed economic evaluations and positive cash flow of Glamis’ deposit, like those performed in the *Mineral Report*, are nonetheless strong indicators of substantial value (the report determined that the Glamis deposit had a net present value of \$61 million).⁶⁹³ Moreover, the *Mineral Report* is a

⁶⁸⁹ BLM, *Mineral Report*, at 2 (Sept. 27, 2002) (at MV023932), Ex. 255 (emphasis added).

⁶⁹⁰ *Id.* at 3 (at MV023933).

⁶⁹¹ It has long been recognized that placing undue weight on the current spot-market price for metal commodities like gold is never appropriate. *Pacific Coast Molybdenum*, 75 IBLA 16 (1983). The spot price can be unusually low or high in any given year. *Id.*

⁶⁹² *Mineral Report*, at 3 (at MV023933), Ex. 255.

⁶⁹³ *See* Behre Dolbear Report, at 5.

confirmation by the United States that Glamis discovered a proven “valuable mineral deposit[]” under the federal Mining Law, 30 U.S.C. §§ 22 *et seq.* — a law which remains the “cornerstone” of the statutory and regulatory framework applicable to the Glamis Project.⁶⁹⁴

350. With confirmation of Glamis’ investment, BLM should have been poised to issue a prompt new ROD for the Imperial Project, approving Glamis’ proposed plan of operations. The lone impediment to approval identified in the Final EIS/EIR, Solicitor Leshy’s legal opinion had been rescinded – meaning that cultural resource concerns could not form the sole basis for denial of a mining plan of operations under either FLPMA’s “unnecessary or undue degradation” standard or the “undue impairment” standard specific to the CDCA. In fact, Glamis had requested that BLM complete its review of the Imperial plan of operations even before BLM formally restarted the mineral validity examination process, as explained in the following letter dated December 13, 2001 from Glamis’ CEO, Mr. Kevin McArthur: “In light of these events, and in particular the rescission of the ROD, *we request that BLM now issue a new ROD for our pending Plan of Operations. . . . As the project proponent, we ask that the BLM proceed promptly to complete its consideration of the project with the issuance of the ROD.*”⁶⁹⁵

351. As of April 2006, Interior still has not completed that review. While Glamis did request a temporary suspension of the processing of its plan of operations on December 9, 2002, it did so only for a few months during the pendency of a potential buy-out process in the nature

⁶⁹⁴ See U.S. Statement of Defense, at 2 (Apr. 8, 2005).

⁶⁹⁵ See Letter from Kevin McArthur, Glamis Gold, to Mike Pool, BLM California State Director (Dec. 13, 2001) (at MV001360), Ex. 220 (emphasis added),.

of a settled resolution of this controversy.⁶⁹⁶ When BLM California State Director Mike Pool responded to Glamis' request, he qualified BLM's acceptance upon Glamis' agreement not to hold BLM or Interior liable for any delay in processing Glamis' plan of operations.⁶⁹⁷ In light of BLM's precondition for discussions, on March 31, 2003, Glamis refused to reaffirm its request for a suspension, noting: "we expect that the BLM will continue to process the Glamis plan of operations. . . ." ⁶⁹⁸

352. Although Glamis' expectations in this regard have remained the same, it now appears that the government's schedule for completing that review has changed. For example, in October 2002, an internal Interior briefing document indicated that BLM was reviewing the November 2000 Final EIS/EIR "to determine if it is still adequate to base a new decision to approve or deny the proposed plan of operations. BLM has estimated this review to be a three-month process. If the NEPA analysis is adequate, then a ROD could be issued."⁶⁹⁹ However, by April 2003, BLM was still working on this review and had given up trying to estimate when it might be finished: "The next step is for BLM to review the EIS published in November 2000 to determine if it is still adequate on which to base a new decision to approve or deny the mine. That determination of NEPA adequacy (DNA) is underway *and no target date for completion has been set.*"⁷⁰⁰

⁶⁹⁶ See Letter from Kevin McArthur, Glamis Gold, to Mike Pool, BLM California State Director (Dec. 9, 2002) (at AG001140), Ex. 265.

⁶⁹⁷ See Letter from Mike Pool, BLM California State Director, to Kevin McArthur, Glamis Gold (Jan. 7, 2003) (at AG001141), Ex. 271.

⁶⁹⁸ See Letter from Charles Jeannes, Glamis Gold, to Mike Pool, BLM California State Director, at 1 (Mar. 31, 2003) (at CON003376), Ex. 280.

⁶⁹⁹ Rebecca Watson, Briefing for the Secretary re Glamis Imperial Gold Mine, at 2 (Oct. 24, 2002) (at D-00268-0001-0002), Ex. 260.

⁷⁰⁰ Mike Pool, Briefing for the Director, at 2 (Apr. 8, 2003) (at MV003376), Ex. 286 (emphasis added).

353. Years later, Glamis is still waiting. What was true more than six years ago in December 1998, following Solicitor Leschy's politically motivated intervention into the permitting process, appears to remain true today: "*There is no schedule.*"⁷⁰¹

354. While Glamis insisted that Interior continue to review its plan of operations, the company began to explore the potential for a governmental buy-out of its mining claims, since elements within the U.S. Government were evidently highly in favor of preserving the Imperial Project site as a Native American sacred site. As Interior itself has acknowledged, Glamis first preliminarily raised the buy-out issue with Solicitor Leschy in July 2000 after learning that the final EIS/EIR would reverse course and select the "no action" alternative.⁷⁰² Glamis renewed its request for a buy-out when it learned that the State of California was considering complete backfilling regulations, discussed at ¶¶ 370, 368-384 below, which would kill the Imperial Project directly and potentially damage the entire industry.⁷⁰³ Glamis was not alone in this request. On November 22, 2002, U.S. Senators John Ensign and Harry Reid and U.S. Representative Jim Gibbons wrote to Interior Secretary Gale Norton requesting an appraisal of Glamis' property interests and urged discussions with Glamis about federal acquisition for a "reasonable purchase price."⁷⁰⁴ Moreover, that same year, even the ACHP advised BLM to acquire Glamis' mining interests:

⁷⁰¹ Imperial Project EIS Schedule (Dec. 4, 1998) (at MV014966), Ex. 163 (emphasis added).

⁷⁰² See Letter from DOI Inspector General Earl E. Devaney to Senator Barbara Boxer, at 3-4 (Mar. 11, 2003) (at D-00282-0003-0003 to D-00282-0003-0004), Ex. 277.

⁷⁰³ See Letter from Kevin McArthur to Mike Pool (Dec. 9, 2002) (at AG001140), Ex. 265; see also Charles A. Jeannes, *Comments Before the State Mining and Geology Board*, at 2 (Dec. 12, 2002) (at CON003192), Ex. 268 ("Based on the written and oral statements surrounding the proposal, it appears that the sole motivation for the regulation is to stop the Glamis Imperial Project Glamis submits that it is simply bad public policy to potentially destroy an entire industry in the state in order to stop a single project.").

⁷⁰⁴ Letter from Senator John Ensign, Senator Harry Reid & Representative Jim Gibbons to Secretary Gale Norton, at 1 (Nov. 22, 2002) (at D-00384-0048-0002), Ex. 262.

Acquisition of the company's interests could finally resolve the conflict between the proposed mining activity and these unique resources. *We encourage the Bureau to actively pursue further investigation of this option in cooperation with the mining company.*⁷⁰⁵

355. In early 2003, in a letter to Congressman Gibbons, Interior Assistant Secretary Rebecca Watson estimated that an appraisal to support the buy-out negotiations “could cost up to \$300,000” and noted that Interior’s budget did not include such funding.⁷⁰⁶ Glamis was aware that any acquisition of its claims by the Government would likely require separate congressional appropriation, but remained “quite open to exploring creative ways of resolving this dispute to the mutual satisfaction of all interested parties.”⁷⁰⁷ At a May 12, 2003 meeting with Interior, however, Glamis made clear its conditions for ongoing settlement negotiations – Interior would either have to assume that the new California complete backfilling requirements, adopted in December 2002 (discussed below), did not apply to the Imperial Project or that any appraisal of the Project in furtherance of a buy-out be made before the new California laws came into effect.⁷⁰⁸ Furthermore, Interior would have to agree not to oppose any congressional

⁷⁰⁵ Letter from ACHP Chairman John L. Nau, III to BLM Director Kathleen Clarke (Mar. 17, 2002) (at D-00365-0015-0002), Ex. 226 (emphasis added).

⁷⁰⁶ Letter from Interior Assistant Secretary Rebecca W. Watson to Representative Jim Gibbons (Jan. 8, 2003) (at D-00384-0048-0005), Ex. 262.

⁷⁰⁷ Letter from Charles Jeannes to Mike Pool, at 2 (Mar. 31, 2003) (at CON003377), Ex. 280.

⁷⁰⁸ See Interior Handwritten Meeting Notes, at 1 (May 12, 2003) (at D-00372-0011-0001), Ex. 290; see also Interior Handwritten Teleconference Notes (May 6, 2003) (D-00372-0013-0001), Ex. 289 (noting that Glamis was willing to fund an appraisal provided that certain conditions were met by the government). After having its interests declared valid by a formal mineral exam, Glamis was not willing to fund an appraisal (for \$300,000) to be told something it already knew – that the California backfilling measures made a profitable mine worthless. See Handwritten Meeting Notes, at 2 (at D-00372-0011-0002), Ex. 290. As Charles Jeannes communicated to the Department of the Interior, “the goal posts are too far apart. We know it’s \$0 - \$60 million. Don’t need an appraisal for that.” *Id.* Despite these internal government notes from May 12, 2003, the government appears to have misrepresented its knowledge of Glamis’ conditions for funding an appraisal in a June 25, 2003 letter to Courtney Ann Coyle. See Letter from Patricia Morrison, Deputy Assistant Secretary, Department of Interior, to Courtney Ann Coyle, Counsel for the Quechan Tribe, at 1 (June 25, 2003) (at D-00372-0009-0001), Ex. 291 (“When at a June 18, 2003 meeting with Glamis, DOI was informed of Glamis’ unwillingness to fund an appraisal of the Glamis Imperial Mine property, we were likewise surprised at Glamis’ reversal of its position.”).

appropriation for the acquisition.⁷⁰⁹ In June 2003, Interior privately noted that Glamis' conditions were unacceptable,⁷¹⁰ although a subsequent memorandum by Interior Assistant Secretary Watson included appraisal preparations in a list of "next steps," apparently without Glamis' funding.⁷¹¹ By July 2003, however, Glamis determined that the prospects for success with further negotiations were not high, and so it filed an advance notice of this NAFTA claim.

C. Political Opponents In California Independently Expropriated Glamis' Investment

356. Shortly after the Bush Administration rescinded Secretary Babbitt's decision to deny the Imperial Project and announced that it was re-initiating the mineral validity examination of the Imperial mining claims, political opponents within the State of California began to explore legislative and regulatory options to block the mine. These activities eventually culminated in the December 2002 (regulatory) and April 2003 (legislative) adoption of mandatory complete backfilling requirements specifically targeting the Imperial Project, unprecedented requirements that, when adopted, destroyed Glamis' property interests in its mining claims without any compensation for its significant investment. Thus, while Interior did nothing further to remedy the damage done to its prior unlawful acts, the State of California sought to ensure no mining could ever occur at the Imperial Project site.

1. The First Legislative Effort Failed But Made Clear The Targeting Of The Imperial Project

357. The initial legislative effort to block the mine was proposed by Senator John L. Burton, President pro Tempore of the California Senate, on February 22, 2002, a little more than

⁷⁰⁹ See Interior Handwritten Meeting Notes, at 2 (at D-00372-0011-0002), Ex. 290.

⁷¹⁰ See Draft Working Document, Next Steps for Glamis Proposal (June 26, 2003) (at MV001467), Ex. 292 ("Both of these [conditions] are unacceptable to Rebecca [Watson, Assistant Secretary of the Interior].").

⁷¹¹ See Memorandum from Assistant Secretary Rebecca Watson to Deputy Assistant Secretary Patty Morrison re: Glamis (July 29, 2003) (at MV001465), Ex. 293.

a week after BLM announced that it was re-initiating the mineral validity exam.⁷¹² Senator Burton's proposed bill – SB 1828 – declared that it was a state policy to “protect the ability of Native Americans to freely practice their religion in a traditional and meaningful way in natural areas, and at sacred sites associated with those religious practices.”⁷¹³

358. Senator Burton also commissioned a study by the California Research Bureau to identify development projects that may be in conflict with “sacred places in California.”⁷¹⁴ That Bureau released a report on March 22, 2002, identifying the Imperial Project as one of five representative projects that currently were in conflict with sacred tribal areas.⁷¹⁵ It was the only mining project identified.

359. Shortly after the Bureau released its Report, on April 1, 2002, Senator Burton proposed an amendment to SB 1828 that would “prohibit a state agency from issuing a permit for a project if an affected Native American tribe declares that a project will have an adverse impact on a sacred site” unless the “tribe accepts mitigation measures proposed by the lead agency to offset those declared adverse impacts.”⁷¹⁶ The legislative history of SB 1828 makes clear that the bill was drafted by Senator Burton to address specifically the Glamis Imperial Project:

⁷¹² Between January 2000 and July 2002, California Senator Burton received more than \$485,000 in political contributions from Indian Tribes. During that same time period, Governor Gray Davis received more than \$840,000. Greg Lucas, *Tribes Wager Newfound Clout on Sacred Land; Bill Gives Power to Veto Projects Proposed Near Spiritual Ground*, The San Francisco Chronicle, July 29, 2002, at A1 (at ARC00146), Ex. 238.

⁷¹³ Senator Burton, *Senate Bill No. 1828* (introduced Feb. 22, 2002), Ex. 224.

⁷¹⁴ Letter from Kimberly Johnston-Dodds, California Research Bureau, to Senator John L. Burton, at 1 (Mar. 22, 2002), Ex. 228.

⁷¹⁵ *Id.*; see also S. Comm. On Env'tl. Quality, *Summary of SB 1828*, at 2 (Apr. 22, 2002 Hearing), ex. 231. The California Research Bureau later provided more detail on the Glamis Imperial Project to Senator Burton in a revised report issued April 22, 2002. See Letter from Kimberly Johnston-Dodds, California Research Bureau, to Senator John L. Burton, at 1 (Apr. 22, 2002) (at ARC00464), Ex. 232.

⁷¹⁶ Senator Burton, *Senate Bill No. 1828* (amended Apr. 1, 2002), Ex. 230.

This bill was introduced as a result of a particular situation in which a proposed capital project in Imperial County would cause adverse impacts to a Native American sacred site. The Quechan Indian Nation, with lands located in Imperial County, holds a series of trail systems as sacred to their religious beliefs. The proposed Glamis gold mining project would be located in the middle of the Quechan's most sacred trail systems, including the Trail of Dreams."⁷¹⁷

360. Not satisfied that this provision of SB 1828 would effectively block the mine, however, members of Senator Burton's staff continued to work on legislation that was more narrowly drawn to disrupt the Imperial Project. On August 12, 2002, Ms. Mary Shallenberger circulated a facsimile requesting advice on whether two potential amendments to SB 483 – a bill that had been proposed by Senator Sher in 2001 to reauthorize the abandoned mine reclamation program under SMARA⁷¹⁸ – “would hold up to blocking the Glamis Mine.”⁷¹⁹ The proposed amendments included language targeting surface mining operations within one mile of a “traditional cultural property” or a “sacred place that is of spiritual importance” and prohibited a lead agency from issuing a permit or approving a reclamation plan for any such operation.⁷²⁰

⁷¹⁷ Cal. Assemb. Comm. on Appropriations, *Summary of SB 1828*, at 3 (Aug. 14, 2002 Hearing of Natural Res. Policy Comm.), Ex. 241 (emphasis added).

⁷¹⁸ SB 483 was originally introduced by Senator Sher, Chairman of the Senate Committee on Environmental Quality, on February 22, 2001. See Senator Sher, *Senate Bill No. 483* (introduced Feb. 22, 2001), Ex. 213.

⁷¹⁹ Facsimile from “Mary S. to Will. G.” (Aug. 12, 2002) (at AG001035, AG000181 to AG000184), Ex. 240. Claimant believes that the “Mary S.” on the August 12 facsimile is Mary Shallenberger based on a date-stamp on the facsimile indicating that it was “From-Senate Pro Tempore.” Ms. Shallenberger worked for Senator Burton, the President pro Tempore of the Senate. See Letter from Senator Burton to Assemblyman Wayne (June 24, 2002) (at ARC00207), Ex. 235. Claimant believes that the handwritten “Will G.” on the fax actually refers to Will Brieger based on a date-stamp on the fax indicating that it was resent a few hours later by “Legislative Services.” Will Brieger, a Deputy Attorney General within the California Department of Justice's Legislative Affairs Office, had communicated with Ms. Shallenberger regarding draft legislative findings and declarations for SB 1828 one month before the facsimile in question. See E-mail from Mary Shallenberger to Will Brieger (July 18, 2002) (at AG000030), Ex. 237.

⁷²⁰ Facsimile from “Mary S. to Will. G.” (Aug. 12, 2002) (at AG000183), Ex. 240. Just a few months before this proposal, Ms. Shallenberger received an forwarded e-mail from Ms. Courtney Coyle, attorney for the Quechan Tribe, informing her that the Indian Pass area had been listed by the National Trust for Historic Preservation as an important cultural and religiously significant area that was being threatened by the proposed Glamis Imperial Project. See E-mail from Ms. Coyle to Ms. Aristotle Evia (June 10, 2002) (at ARC00543), Ex. 233.

361. On August 20, 2002, Mr. Robert Joehnck, Staff Counsel to the Department of Conservation, circulated a confidential memorandum reflecting the same ideas contained in the potential SB 483 amendments – involving mines located within one mile of Native American “sacred sites” – to “Affected Parties.” By this time, however, these ideas were poised for implementation. Attached to Mr. Joehnck’s memorandum was a draft “SMARA Native American Sacred Sites Bill” that “initially applies only to desert lands as defined by BLM under the California Desert Conservation Plan of 1980. Portions of the bill only apply to surface mining operations that are located on or within one mile of Native American sacred sites.”⁷²¹ More importantly, the bill required any such site to be completely backfilled and re-contoured to original grade.⁷²²

362. This “SMARA Native American Sacred Sites Bill” was introduced in the California Legislature on August 26, 2002 – just six days after being circulated by the Department of Conservation lawyers. The bill would amend both SB 483 and SB 1828 to incorporate the requirement for complete backfilling by doing the following:

prohibit[ing] a lead agency from approving a reclamation plan and financial assurances for a surface mining operation for gold, silver, copper, or other metallic minerals that is located on, or within one mile of, any

⁷²¹ Memorandum from Robert Jeohnck to Affected Parties, at 1 (Aug. 20, 2002) (at ARC00428), Ex. 242 (marked “Confidential Memorandum: This Document is Subject to the Attorney Client Privilege”). Despite the apparent confidential nature of the memorandum, it is clear that by August 22, the draft legislation had been reviewed and edited by “the lawyer for the Quechan Tribe,” edits that were to be reviewed by Mary Shallenberger in Senator Burton’s office. See Facsimile from Jeff Shellito (of Senator Sher’s staff) to Aris Evia (Aug. 22, 2002) (at ARC00829), Ex. 243.

⁷²² Memorandum from Robert Jeohnck to Affected Parties, at 2 (at ARC00429), Ex. 242.

Letter from Senator Sher to Governor Davis, at 2 (Sept. 5, 2002) (at GOV002), Ex. 247. Thus, it appears that the department charged with evaluating the Imperial Project for compliance with the reclamation standards of SMARA instead worked to change the rules that would apply to it, because without the legislation, the “project . . . would otherwise be allowed to go forward under current law.” Governor’s Office of Planning and Research, *Enrolled Bill Report for SB 483*, at 6 (Sept. 18, 2002) (at AG000609), Ex. 253.

Native American sacred site, as defined, and in an area of special concern, as defined, unless the reclamation plan requires that all excavation be backfilled and graded to achieve the approximate original contours of the mined lands prior to mining, and the financial assurances are sufficient in amount to provide for the backfilling and grading.⁷²³

The bill defined “Native American sacred site” to include any specific area identified by an Indian Tribe as culturally or religiously significant, including areas that link “spirit breaks” to other “spirit breaks.”⁷²⁴ A sacred site had to be located, however, on Class C (designated wilderness) or Class L lands or in an Area of Critical Environmental Concern as identified in the California Desert Conservation Area Plan of 1980.⁷²⁵ As the bill’s sponsors were well aware, the Glamis Imperial Project was located on Class L lands in the CDCA. Due to Interior’s years of improper delay, Glamis could also find no comfort in the fact that the bill sought to avoid retroactivity concerns by suggesting it would not apply to any reclamation plan that had been approved prior to September 1, 2002.⁷²⁶

363. In effect, the proposed sacred-site legislation – including SB 1828 and SB 483 – would specifically require the Imperial Project to implement complete backfilling as part of its proposed reclamation plan. The legislative history for the bills stated their obvious purpose to block the Imperial Project:

SB 483 contains narrowly-crafted language intended to prevent approval of a specific mining project proposed for an Imperial Valley location by Glamis Gold, Inc. The proposed project would impact an area known as Indian Pass, where a system of sacred trails is an important part of the Quechan’s spiritual and cultural base. The provisions in SB 483 are

⁷²³ Senator Sher, *Senate Bill No. 483*, at 1-2 (amended Aug. 26, 2002), Ex. 245; Senators Burton and Chesbro, *Senate Bill No. 1828*, at 2 (amended Aug. 26, 2002), Ex. 244.

⁷²⁴ See, e.g., Senator Sher, *Senate Bill No. 483*, at 3, Ex. 245.

⁷²⁵ *Id.* at 1, 3.

⁷²⁶ *Id.* at 4.

*identical to the SMARA provisions in SB 1828, and are intended to affect only this particular project.*⁷²⁷

364. After SB 1828 passed the Legislature, Senator Burton implored Governor Davis to sign the bill on September 9, 2002, informing the Governor that “last year, the U.S. Department of Interior *reversed a previous decision to deny a permit for a Canadian company to dig a huge open pit gold mine at Indian Pass in Imperial County.*”⁷²⁸

⁷²⁹ Even U.S. Senator Barbara Boxer chimed in, telling the Governor that “*S.B. 1828 and 483 would be instrumental in preventing the Glamis gold mine from becoming a reality.*”⁷³⁰ The “Canadian” owned Glamis Imperial Project was the only pending new mine proposal that had been through the costly and time-consuming EIS/EIR process in California at this time. State officials did not target any other pending mine project in this manner.

365. Governor Davis largely agreed with the state and U.S. senator’s views, but felt compelled to veto SB 1828 because the two main pieces of sacred-site legislation – SB 1828 and SB 483 – were inextricably linked. In other words, SB 483 was “designed to become effective

⁷²⁷ California Governor’s Office of Planning and Research, *Enrolled Bill Report for SB 483*, at 5 (at AG000608), Ex. 253 (emphasis added).

⁷²⁸ Letter from California Senator Burton to Governor Davis (Sept. 9, 2002) (at ARC01293), Ex. 248 (emphasis added).

⁷²⁹ Letter from California Senator Sher to Governor Davis, at 1 (Sept. 5, 2002) (at GOV001), ex. 247 (emphasis added).

⁷³⁰ Letter from U.S. Senator Boxer to Governor Davis, at 1 (Sept. 27, 2002) (at ARC01927), Ex. 254 (emphasis added).

only if SB 1828 [was] enacted.”⁷³¹ SB 1828, however, would have given Native American tribes a virtual veto authority for over *any* activity authorized by a state development permit that had the potential to harm a Native American sacred site, subject to certain overriding exceptions. Many of the Governor’s largest administrative agencies advised the Governor to veto the bill because of the subjective nature of “sacred site” claims and the likely broad, adverse economic impacts associated with it. As one agency stated in a “confidential” report to the Governor regarding the probable effects of S.B. 1828:

The definition of sacred site is overly broad, thereby providing the potential misuse by the federally recognized Indian Tribe to stop, delay, or demand unworkable mitigation measures.

The bill is discriminatory and would provide unique and special treatment for the protection of religious sites for a specified group. No other group receives the same protection for their sacred and religious sites. . . .

The bill unnecessarily expands a local situation (the Glamis Gold company project) to a state-wide issue. . . .

[T]his bill would grant Native American Indian tribes vast powers to stop development virtually anywhere in the state. *In contrast, however, those same Native American Indian tribes can completely ignore the same body of environmental and resource protection laws when it is [in] their best interest to do so, such as in developing casinos*⁷³²

Multiple other California agencies wrote to the Governor to express similar concerns.⁷³³

⁷³¹ Cal. Governor’s Office of Planning and Research, *Enrolled Bill Report for SB 483*, at 5 (at AG000608), Ex. 253.

⁷³² Cal. Bus., Transp. & Hous. Agency, *Enrolled Bill Report*, at 6 (Sept. 11, 2002) (at ARC02072), Ex. 250 (emphasis added).

⁷³³ See, e.g., Cal. Dep’t of Toxic Substances Control, *Enrolled Bill Report*, at 9 (Sept. 5, 2002), Ex. 249 (“*The bill would give Native American tribes the ability to stop any project by making a simple declaration. The bill is too broad and does not limit this authority to Native American property, but extends it to all private and public lands in California, thereby giving Native American tribes land-use authority throughout the State.*”) (at ARC02048), Ex. 249 (emphasis added); Cal. Dep’t of Forestry & Fire Prot. (“CDF”), *Enrolled Bill Report*, at 1, 5 (Aug. 30, 2002) (“Given the severity of potential fiscal reductions and programs this year and next, CDF could not implement the provisions of this measure. . . . *CDF anticipates that S.B. 1828 may result in 100 or more new sacred sites identified each year.*”) (at AG000936 and AG000940), Ex. 246 (emphasis added); Cal. Tech., Trade & Commerce Agency, *Enrolled Bill Report*, at 6 (Sept. 15, (continued...))

366. The Governor followed the advice of his agencies on September 30, 2002 and vetoed SB 1828.⁷³⁴ But the Governor signed SB 483 in a symbolic gesture (despite the fact that it had no operative effect without concurrent passage of SB 1828) and used the occasion to publicly state his strong opposition to the Imperial Project:

This bill would prevent mines, such as the Glamis gold mine in Imperial County, from being developed unless sacred sites are protected and restored. I strongly oppose the Glamis gold mine because it would irreparably damage sites sacred to the Quechan Indian Tribe.

Unfortunately, this bill will not become operative because it is joined to another bill, SB 1828, which I am vetoing. Therefore, I am directing the Resources Agency to seek urgency clean-up legislation when the Legislature convenes in December to allow this important Native American sacred site protection to become law.

*I am further directing the Secretary of Resources to pursue all possible legal and administrative remedies that will assist in stopping the development of the Glamis gold mine.*⁷³⁵

367. In sum, the Governor's actions in vetoing SB 1828 and signing SB 483, partly on the advice of his largest agencies, indicated that he was concerned about the unverifiable nature of Native American sacred-site claims, which posed a broad risk to many state government-sponsored development projects. But at the same time, the Governor was not concerned about

(...continued)

2002) (at AG000998), Ex. 251 (“*The bill would have a significant potential economic impact as the broad definition of ‘sacred site’ could affect many projects, compounded by the required notification to Indian tribes on projects within 20 miles of any of the over 100 reservations . . .*”) (emphasis added).

⁷³⁴ Governor Gray Davis, *Veto Message for SB 1828* (Sept. 30, 2002) (at CON001963), Ex. 256.

⁷³⁵ Governor Gray Davis, *Signature Message for SB 483* (Sept. 30, 2002) (at AG000587), Ex. 257 (emphasis added). The Governor delivered a similar message in his veto message for SB 1828: “I would also note that I have signed Senate Bill 483, which protects Native American sacred sites from the adverse environmental effects of proposed mining operations. *I am particularly concerned about the proposed Glamis mine in Imperial County, and I have directed my Secretary for Resources to pursue all possible legal and administrative remedies that will assist in stopping the development of that mine.*” Governor Gray Davis, *Veto Message for SB 1828*, at 2 (at CON001964), Ex. 256 (emphasis added).

subjecting the Glamis Imperial Project to such subjective and unverifiable claims, exposing Glamis' investment to failure.

2. The Governor-Directed Emergency Regulation Was Motivated Solely To Stop The Imperial Project

368. Given that the Governor's veto of SB 1828 rendered SB 483 ineffective, within weeks Senate staffers and lawyers for the California Department of Conservation and Attorney General's Office began developing a new plan to block the Imperial Project. This new anti-Imperial Project plan was shaping up in the form of "emergency" regulations, as is clear from a remarkable e-mail on October 11, 2002 from Jeff Shellito (of Senator Sher's staff) to Rich Thalhammer (Deputy Attorney General):

So, where are we at on the legal feasibility of the state mining board adopting emergency regs. that would (at least for 120 days) mirror the substance of SB 483 (Sher), legislation recently signed by the Governor?

Alison Harvey, Sen. Burton's chief of staff, and I both suggested last week to the Resources Secretary that the Davis Administration push these emergency regs. to give us time to enact trailer bill legislation early next year for SB 483 (Sher).

As I indicated earlier, the Governor's signing message urges Sher to author urgency legislation as soon as possible in the 2003-04 session that would remove a contingency clause linking SB 483 to SB 1828 (Burton) which was vetoed. That is not likely to happen until Jan. – February 2003 at the earliest.⁷³⁶

369. Mr. Thalhammer responded on October 15, 2002, indicating that he had already talked to a lawyer at the Resources Agency on the topic of emergency regulations:

[I have] given advice to Margret Kim [Resources Agency General Counsel] on this; I believe it would be best for you to contact her. I'm not sure you and I have an attorney/client relationship so as to protect our

⁷³⁶ E-mail from Jeff Shellito to Rich Thalhammer (Oct. 15, 2002) (at AG000171), Ex. 258.

communication on this, so I'd rather go this route. Call me if you wish, though, and I can explain why.⁷³⁷

To this, Mr. Shellito sent a reply that in no shy terms discussed the state's efforts to stop Glamis' mine:

If it is the Resources Agency/Mining Board triggering your caution in this matter under the umbrella of attorney-client privilege, I'll deal with them directly. However, *I thought Alison Harvey and I were working with the Resources Agency/DOC on an informal & collegial basis to help stop the Glamis mine*, something that has been significantly complicated by the Governor's veto of SB 1828. It is a bad sign if those folks are now playing hide the ball.

I recall sending you the text of SB 483 and asking your informal opinion as to whether its contents could be adopted as emergency regs by the Mining Board, before you ever heard from Resources Agency or DOC.⁷³⁸

Mr. Thalhammer's final reply acknowledged the considerable legal issues arising in the context of the state's anti-Glamis measures: "The caution is mine alone, Jeff. If this matter ever winds up in litigation, which seems a reasonable possibility, I don't want my informal opinions discussed in open court. That would never be helpful."⁷³⁹

370. Two days later, on October 17, 2002, the California Secretary of Resources sent a letter to the Chairman of the State Mining and Geology Board, a board within the oversight and direction of the Secretary of Resources, asking the board to consider "adopting state regulations

⁷³⁷ *Id.* (reply on Oct. 15, 2002), Ex. 258.

⁷³⁸ *Id.* (reply on Oct. 15, 2002), Ex. 258 (emphasis added).

⁷³⁹ *Id.* (reply on Oct. 15, 2002), Ex. 258 (emphasis added). This matter did end up in litigation, and the State of California is currently invoking multiple privilege claims over communications between the Department of Conservation, the Mining & Geology Board, the Attorney General's Office, and the Governor's Office during this same time period (including in response to this e-mail chain). See Tab A §§ 3-4, to Claimant's February 15, 2006 filing in this arbitration. Claimant can only surmise that the informal and collegial efforts to block the Imperial Project continued unabated behind the cloak of alleged privileged communication.

which would alter current state reclamation policies” at its next scheduled meeting.⁷⁴⁰ The Board did just that, and on December 12, 2002, it imposed mandatory backfilling requirements for all proposed metallic open-pit mines in California on an emergency basis. The sole stated “emergency” was the Glamis Imperial Project, even though it had been pending before Imperial County for over eight years:

*The factual basis for such [an emergency] finding is that there is currently pending with the Bureau of Land Management an application for approval of a plan of operations for a large open pit gold mine (the Glamis Imperial Project). . . . There is, also, currently pending with the County of Imperial, an application for a reclamation plan approval for the mining operation*⁷⁴¹

The Board identified no other mining projects as cause for the emergency regulation. In fact, the Glamis Imperial Project was the only proposed new open-pit metallic mine in the State of California at that time that had been through the EIS/EIR process and remained pending.

3. Senate Bill 22 Was Drafted To Ensure That Only The Imperial Project Was Barred Permanently

371. With the emergency regulations in place, the California Legislature immediately went back to work on a bill aimed at permanently shutting down the Imperial Project. The result was SB 22, a reincarnation of SB 483 but lacking a provision linking its operation to SB 1828, with its potentially far-reaching effects.

⁷⁴⁰ Letter from Mary D. Nichols, Secretary for Resources, to Allen M. Jones, Chairman of the State Mining and Geology Board (Oct. 17, 2002) (at AG000449), Ex. 259 (indicating that the regulations should require complete backfilling of open-pit metallic mines).

⁷⁴¹ State Mining & Geol. Board, *Executive Officer’s Report*, at 4 (Dec. 12, 2002) (at AG000165), Ex. 267; *see also* Letter from Senators Burton and Sher to Allan M. Jones, at 1 (Nov. 13, 2002) (at CON002214), Ex. 261 (“*We are advised that the federal government intends to complete its environmental analysis of the mine’s application by the end of the calendar year.*”); Letter from Senators Burton and Sher to Allan M. Jones, at 1 (Dec. 10, 2002) (at CON003031), Ex. 266 (emphasis added) (“*The proposed emergency regulations must be adopted this month because the federal government is racing to complete an environmental analysis of the Glamis Imperial Project, and the Secretary of the Interior may take action allowing the mine to move forward before the end of the year.*”) (emphasis added).

372. The legislative history of SB 22, introduced on December 2, 2002 by Senators Sher and Burton, provides indisputable further evidence that the bill’s sole purpose was to block the development of the “Canadian” Glamis Imperial Project.⁷⁴²

According to background provided by the authors, SB 483 needs to be made operative immediately because of provisions that establish new reclamation requirements for strip mining operations for gold, silver and other precious metals that affect Native American sacred sites in portions of the California desert. *These changes to [the] statute are urgently needed to stop the Glamis Imperial mining project in Imperial County proposed by Glamis Gold Ltd., a Canadian-based company. . . .*

The author believes the backfilling-requirements established by SB 483 make the Glamis Imperial project infeasible.⁷⁴³

This summary of SB 22 by the California Senate is not the only piece of legislative history to name Glamis’ Imperial Project expressly. The Assembly committee reviewing the bill also stated that, “[i]n particular, the provisions of SB 483 will not allow a reclamation plan for a metallic mineral mining site to be approved if that site is within one mile of a Native American sacred site. *In California, one site would qualify, [the] Glamis Imperial Mining Project . . .*”⁷⁴⁴

The Legislature was adamant about passing SB 22 quickly because the State Mining and Geology Board’s emergency regulation – put in place to block the mine – represented only a temporary fix:

In addition to removing the contingency language and allow[ing] the provisions of SB 483 to become operative as soon as possible, the staff is informed that the emergency regulations adopted by DOC to

⁷⁴² See California Senators Sher and Burton, *Senate Bill No. 22* (introduced Dec. 2, 2002) (at ARC01084), Ex. 263 (repealing the provision of SB 483 that made it contingent on the enactment of SB 1828). Claimant still awaits the production of several State of California bill analyses of SB 22 in accordance with this Tribunal’s April 21, 2006 *Decision*, ¶ 14.

⁷⁴³ Cal. S. Natural Res. Wildlife Comm., *Summary of SB 22*, at 4 (Jan. 14, 2003 (sic) Committee Hearing) (at ARC01071), Ex. 273; see also S. Rules Comm., *Summary of SB 22*, at 3 (Jan. 28, 2003 Third Reading) (at AG00673), Ex. 274.

⁷⁴⁴ Cal. Assemb. Comm. On Natural Res., *Summary of SB 22*, at 3 (Mar. 3, 2003 Hearing) (at CON001986), Ex. 276 (emphasis added).

administratively provide temporary protections for Native American sacred sites potentially affected by metallic mine operations are scheduled to lapse on April 13, 2002. While these emergency regulations can be renewed, the author prefers [that] statutory protections replace regulatory ones at the soonest possible time.⁷⁴⁵

373. “Confidential” bill reports of SB 22, created by various state agencies – the majority of which Respondent, through the State of California, has withheld on deliberative process grounds – also make clear that the sole purpose of the bill was to shut down the mine:

Governor Davis signed SB 483 into law knowing that we would also be vetoing SB 1828. *The signing message for SB 483 expressed the Governor’s opposition to the Glamis Gold Mine proposal* and urged the Secretary of Resources to pursue urgency legislation, along with administrative remedies, to protect the Quechan Tribe’s sacred trails.

Despite the Governor’s veto of SB 1828 and the subsequent lack of implementation of SB 483, *the State has so far prevented the approval of the Glamis Gold Mine through the passage of emergency regulations. . . .* The emergency regulation is effective for 120 days.⁷⁴⁶

374. Thus, with the clock ticking, SB 22 was adopted as “an urgency measure” to block Glamis’ attempt to secure a state mining permit for its Imperial Project.⁷⁴⁷ Indeed, the state expressly acknowledged that in the absence of SB 22, the Glamis Imperial “*project would otherwise be allowed to go forward under current law.*”⁷⁴⁸ The legislation was intended to

⁷⁴⁵ Cal. Assemb. Comm. on Appropriations, *SB 22 Bill Analysis*, at 2 (Apr. 2, 2003 Hearing), Ex. 282.

⁷⁴⁶ California Governor’s Office of Planning & Research, *Enrolled Bill Report of SB 22*, at 3 (Mar. 25, 2003) (at AG000668), Ex. 279 (emphasis added); *see also* Calif. Dep’t of Finance, *Enrolled Bill Report of SB 22*, at 1 (Mar. 27, 2003) (at AG000654), Ex. 281 (“*Finance recommends that this bill be signed because it is consistent with the Governor’s veto message of SB 1828, which states that Administration should pursue all remedies that will assist in stopping the development of the Glamis Gold Mine in Imperial County.*”) (emphasis added).

⁷⁴⁷ Governor’s Office of Planning & Research, *Enrolled Bill Report of SB 22*, at 1 (at AG000666), Ex. 279; *see also* Cal. Dep’t of Finance, *Enrolled Bill Report of SB 22*, at 1 (at AG000654), Ex. 281 (“*This bill would specifically address the controversial Glamis Gold Mine in Imperial County, for which mining operators have been attempting to get a permit.*”) (emphasis added).

⁷⁴⁸ Governor’s Office of Planning & Research, *Enrolled Bill Report of SB 22*, at 4 (at AG000669), Ex. 279 (emphasis added).

“permanently prevent the approval of the Glamis Gold Mine,”⁷⁴⁹ an outcome that was virtually assured because, as the Resources Agency had advised the Legislature, “the reclamation and backfilling requirements of *this bill would make operating the Glamis Gold Mine cost prohibitive.*”⁷⁵⁰ The State was willing to adopt such targeted legislation because it viewed the “fiscal impact” of the legislation as relatively minor, echoing earlier concerns that the legislation could create a “taking”⁷⁵¹ of private property interests: the bill “[c]reates a mandate; however, *because this bill would only affect one mine, the proposed Glamis Gold mine in Imperial County, any reimbursable costs are estimated to be minor.*”⁷⁵²

375. On April 7, 2003, Governor Gray Davis signed SB 22 into law while publicly acknowledging that it was specifically directed at the Glamis Imperial Project. The title of his press release laid bare what he hoped to achieve: “GOVERNOR DAVIS SIGNS LEGISLATION TO STOP PROPOSED GOLD MINE NEAR ‘TRAIL OF DREAMS’ SACRED SITE.”⁷⁵³ The press release recounted the purposes of the legislation: “SB 22 . . . specifically addresses the controversial Glamis Gold Mine. Mining operators have been attempting to get a permit for an open-pit, cyanide gold mine on 1,500 acres of federal land. *The reclamation and backfilling requirements of this legislation would make operating the Glamis Gold Mine cost prohibitive.*”⁷⁵⁴

⁷⁴⁹ *Id.* at 1 (at AG000666) (emphasis added).

⁷⁵⁰ Cal. Dep’t of Finance, *Enrolled Bill Report of SB 22*, at 1 (at AG000654), Ex. 281 (emphasis added).

⁷⁵¹ Cal. Dep’t of Forestry & Fire Prot., *Enrolled Bill Report of SB 1828*, at 7 (at AG000942), Ex. 246 (“*Those members who voted “No” are concerned that the provisions in the measure would constitute a ‘taking’ of private property.*”) (emphasis added).

⁷⁵² *Enrolled Bill Memorandum to Governor re SB 22* (Apr. 4, 2003) (at AG000650), Ex. 283 (emphasis added).

⁷⁵³ California Office of the Governor, Press Release (Apr. 7, 2003) (at AG001319), Ex. 284.

⁷⁵⁴ *Id.* (emphasis added).

376. Governor Davis was even more blunt in his planned speech for that day. Before guests invited from the Quechan Tribe and executives from the California Nations Gaming Association,⁷⁵⁵

⁷⁵⁶ On this point, the Governor was correct.

377.

It was made despite the fact that the California Resources agency claimed that SB 22 was drafted to comply with existing U.S. Supreme Court case law circumscribing the proper reach of state land-use policies:

The provisions of SB 483 that address the Glamis Imperial project were originally drafted by the legal staff of the Department of Conservation at the request of the Resources Agency, and were designed to avoid any conflict with federal law pursuant to the U.S. Supreme Court ruling in California Coastal Commission v. Granite Rock (1987). 480 U.S. 572. This case held that a state or locality could impose *reasonable environmental regulations* on mining activities conducted by a private party on federal land, *provided that the net effect of the imposition of those regulations was not a de facto ban of, or the imposition of a “clear obstacle”* to, the use of the land which was allowed by the federal government on such land.⁷⁵⁸

⁷⁵⁵ List of Invitees to April 7 Bill Signing (at GOV081), Ex. 306

⁷⁵⁶ Talking Points – SB 22 Bill Signing (Apr. 7, 2003) (at GOV063), Ex. 285 (emphasis added).

⁷⁵⁷ *Id.* (emphasis added).

⁷⁵⁸ S. Natural Res. & Wildlife Comm., *Summary of SB 22*, at 5 (at ARC01072), Ex. 273 (emphasis added).

Nonetheless, a law that

is no doubt one that is determining land uses. In light of U.S. Supreme Court precedent, Glamis could not reasonably have anticipated that the State of California would dare take such a bold and unparalleled land-use planning action on federal lands – especially without any scientific or other professional technical consideration of the appropriateness of mandating complete backfilling of open-pit mines as the absolute reclamation standard with no exceptions.

4. California's Mandatory Backfilling Requirements Were Not Supported By Any Technical, Theoretical Or Empirical Studies And Were Completely Unprecedented For Hardrock Metallic Mines

378. Three days after Governor Davis signed SB 22 into law, the State Mining and Geology Board made permanent the mandatory complete backfilling regulations adopted earlier on an emergency basis.⁷⁵⁹ This move signaled that California was entirely repudiating its Forty Niners Gold Rush heritage and imposing

⁷⁶⁰ What is so striking about this repudiation is that it was imposed without reliance on any technical literature or studies to support its supposed state-of-the-art requirements and remained focused on only metallic open-pit mines. As explained by mining regulatory expert, Mr. Tom Leshendok, there were more than 1,100 mines producing non-fuel minerals in California in 2004.⁷⁶¹ The vast majority of these California mines produce non-metallic industrial minerals (e.g., boron, limestone, pumice) and aggregates such as sand and

⁷⁵⁹ California Regulatory Code Supplement, Digest of New Regulations, at 3 (Apr. 18, 2003), Ex. 288.

⁷⁶⁰ Talking Points – SB 22 Bill Signing (at GOV063), Ex. 285.

⁷⁶¹ Leshendok Report, ¶ 114.

gravel.⁷⁶² Most of those commodities are produced through open pit operations. None of those operations, including entirely new operations for those commodities, are subject to the California complete backfilling requirements which apply only to metallic mines like the Glamis Imperial Project.

a. California’s Mandatory Backfilling Requirements Were Not Supported By Scientific Study In The Record

379. In finalizing the unprecedented mandatory backfilling regulations, the State Board openly and brazenly acknowledged that “[n]o technical, theoretical, empirical studies, reports, or documents were prepared or relied upon by the SMGB in its consideration of this rulemaking,”⁷⁶³ confirming that this regulation was indeed an arbitrary and capricious decision forced on Glamis, without any consideration of whether such a draconian regulation – that contravened prior studies of the NAS/NRC issued in 1979 and 1999 – actually had any scientific or technical basis.

380. Officials in Imperial County – the very same experienced officials ultimately responsible for reviewing and approving the Imperial Project reclamation plan as the “lead agency” for California under SMARA – challenged these findings and opposed as ill-advised the complete mandatory backfilling requirements:

Furthermore, with regard to the protection of the “environment,” the statement is made that . . . “metallic mineral mines that employ the cyanide heap leach method for mineral segregation and collection frequently generate very large ‘leach piles’. These features remain on the landscape following the conclusion of mining operations, and may pose a contamination problem when residual cyanide . . . is exposed to

⁷⁶² *Id.*

⁷⁶³ Final Statement of Reasons for 14 CCR § 3704.1, at 4 (at CON002957), Ex. 304 (emphasis added). Contrast this to Imperial County’s selection of the Imperial Project as its “Environmentally Superior Alternative” over a complete backfilling alternative after years of detailed study and review. *See Final EIS/EIR for the Glamis Imperial Project*, at 2-70 (Sept. 2000), Ex. 210.

precipitation percolating through the pile and flushing the processing solution into surface waters’

If there is no scientific analysis to show that cyanide leaching causes significant, adverse environmental impacts to desert washes, its habitat and impacts to wildlife, then what’s the problem?

The public using remote areas in Imperial County have had to deal with many different types of conditions, e.g. heat, deep washes, canyons, desert sands and mountainous areas (to name a few). The mining and reclamation of a gold mining operation will not create any greater danger to the public than that which already exists in the desert. . . .

It is unfortunate that the full development of the potential mineral resources of Imperial County cannot be developed due to the legislative proposals by the State Mining & Geology Board and its staff.⁷⁶⁴

381. When it made these comments, Imperial County had decades of experience in regulating the operation of major open-pit gold mines in Imperial County, including the Mesquite Mine, the American Girl Mine, and the Glamis Picacho Mine, which operated in the California Desert in the 1980s and 1990s.⁷⁶⁵ Indeed, in a 1995 BLM/Imperial County decision to approve the Mesquite Regional Landfill, the California regulatory agencies expressly allowed the use of ore residue from cyanide heap leaching at the Mesquite Mine to be used to construct part of the regional landfill, as well as to be used as daily and final cover material for the landfill. The agencies’ decision relied on a finding from the California Integrated Waste Management Board that, based on geochemical analysis and pilot tests, the ore residues from cyanide heap-leach mining would meet California regulatory standards and “*not pose a threat to the environment.*”⁷⁶⁶ That science-based finding by the State of California remains in force today.

⁷⁶⁴ Letter from Jurg Heuberger, Planning Director, Imperial County Planning and Building Department, to John G. Parrish, Executive Officer, State Mining and Geology Board, at 2-3 (Mar. 17, 2003), Ex. 278 (emphasis added).

⁷⁶⁵ See ¶¶ 117-127 *supra*.

⁷⁶⁶ See Leshendok Report, ¶ 90 (quoting *Final EIS/EIR for Proposed Mesquite Regional Landfill* (1995)) (emphasis added).

382. Despite Imperial County’s best efforts, the State Mining and Geology Board too readily dismissed the County’s comments on the new backfilling regulations by stating simply: “The regulation does not address cyanide heap leaching as a process in mining.”⁷⁶⁷

383. At the time the permanent regulations were adopted, the State Board also baselessly stated that it was “not aware of any cost impacts that an existing representative private person or business would necessarily incur in reasonable compliance with” the new backfilling regulations.⁷⁶⁸ The Board speciously added that the regulations would neither “create nor eliminate jobs within California.”⁷⁶⁹ After April 7, 2003, these statements were at least hyper-technically true with respect to the Glamis Imperial Project, as it had already been stopped “dead in its tracks” by SB 22. The Board, however, also made similar findings prior to SB 22 taking effect.⁷⁷⁰ The Board’s justification for these absurd findings was that the unprecedented emergency final regulations only clarified the Board’s existing regulatory powers, and thus any person planning to build a mine should not be adversely affected by the revised regulations.⁷⁷¹

384. In sum, before the State Board adopted its emergency and final regulations, state law did not require complete backfilling of open-pit metallic mines, nor had it ever been imposed on a particular project as a regulatory requirement in California or elsewhere in the United States (nor in Canada or Mexico). After adoption of the regulations, such backfilling was mandatory.

⁷⁶⁷ California Final Statement of Reasons for 14 CCR § 3704.1, at 11 (at CON002964), Ex. 304. The State Board did, however, to refer the County to the anti-mining advocacy group Mineral Policy Center for further information. *Id.*

⁷⁶⁸ State Mining and Geology Board, *Executive Officer’s Report*, at 7 (Apr. 10, 2003) (at CON002996), Ex. 287.

⁷⁶⁹ *Id.*

⁷⁷⁰ California Regulatory Notice Register 2003, Vol. No. 7-Z, at 217 (at CON002822), Ex. 270.

⁷⁷¹ California Economic Impact Statement, *Backfilling of Open Pit Metallic Mines*, at 1 (Feb. 3, 2003) (at CON002824), Ex. 275 (“Regulation clarifies and makes specific application of requirements already in statute.”).

The State's claim that this was not a new requirement is beyond comprehension,

b. California's Backfilling Mandates Were Unprecedented And Could Not Have Been Foreseen By Any Reasonable Investor

385. California's complete backfilling requirements for metallic mines are unprecedented in the United State, Canada and Mexico.⁷⁷³ Some mine operators have undertaken partial backfilling and "sequential" backfilling (where individual pits are backfilled as part of mining and waste disposal operations from adjacent pits) on a case-by-case basis, and these techniques were indeed part of the proposed Glamis Imperial Project.⁷⁷⁴ But complete backfilling was considered in the Imperial Project EIS/EIR and was rejected by the BLM and Imperial County as being economically infeasible.⁷⁷⁵ Imperial County also determined through the EIS/EIR process that complete backfilling was *not* the Environmentally Superior Alternative at the Imperial Project site (discussed at ¶ 333 above).⁷⁷⁶

⁷⁷² Governor's Talking Points – SB 22 Bill Signing (at GOV063), Ex. 285 (emphasis added).

⁷⁷³ See K. McArthur Testimony, ¶¶ 3, 19, 21-23; Behre Dolbear Report, at 21-23 (§ 5.2); Leshendok Report, ¶¶ 162-166.

⁷⁷⁴ See *Imperial Project Plan of Operations*, at App. B, pp. 19-35 (at GLA056631 to GLA056647), Ex. 55; see also Leshendok Report, ¶¶ 55-60.

⁷⁷⁵ See, e.g., *Final EIS/EIR for the Glamis Imperial Project*, at 2-67 to 2-69 (Sept. 2000), Ex. 210. In fact, BLM had determined that the cost of completely backfilling the final pit would cost \$80-\$100 million and take 4.33 years to complete. *Draft EIS/EIR for the Glamis Imperial Project*, at 2-62 (Nov. 1997), Ex. 90.

⁷⁷⁶ See *id.* at 2-70.

386. Glamis had every reasonable expectation that complete, mandatory backfilling would not be imposed on the Imperial Project because BLM and the California authorities had never imposed it on the substantial number of similar and larger open-pit metallic mines in the California Desert.⁷⁷⁷ These expectations were formed, in part, by its own experience with the Picacho Mine, approximately eight miles away from the Imperial Mine in Imperial County, and the Rand Mine in Kern County, California. Indeed, as discussed at ¶ 134, in May 1998, Congressman Battin (80th Assembly District) sponsored a California Legislature’s member resolution “commending the Glamis Gold Corporation for its environmentally sensitive treatment of the environment at the Picacho Mine and for its groundbreaking reclamation techniques that have earned it the 1997 Excellence in Reclamation Award from the California Mining Association.”⁷⁷⁸ As stated in a presentation to the Glamis board of directors in November 1999, the company’s “showplace performance and award-winning reclamation programs [at the Picacho Mine] have paid dividends in the effort to permit our adjacent Imperial project – an important growth element in Glamis’ future.”⁷⁷⁹

387. In addition to Glamis’ own experience with mines in the California Desert, Glamis formed expectations based on its careful observations of other similar projects in the vicinity. The Mesquite Mine, which was roughly three times larger than the proposed Imperial

⁷⁷⁷ See, e.g., Leshendok Report, ¶¶ 101-103. The California mandatory backfilling measures exclude all existing and future aggregate and industrial mineral open-pit mines in California, mines that produce sand, gravel, limestone, borates and other common materials. Some of these excluded large open pits operate within the 25 million-acre California Desert Conservation Area. See, e.g., Leshendok Report, ¶ 114 (referencing the U.S. Borax/Rio Tinto Mine in Kern County).

⁷⁷⁸ Congressman Battin, California Legislature Assembly Member Resolution No. 1138 (May 13, 1998) (at MV005677), Ex. 114; see also Letter from Denise Jones, California Mining Association, to Steve Baumann, Glamis (Apr. 23, 1998) (at GLA000381), Ex. 110 (“Groundbreaking reclamation techniques developed at Picacho have become and will continue to be a resource for desert mining operations.”); see also Letter from Steve Baumann, Glamis, to Ed Hasteley, BLM State Director, re Picacho Reclamation Award (May 1, 1998) (at GLA038868), Ex. 111.

⁷⁷⁹ Board Meeting 11/05/99 – Company Overview (at ELGA12206), Ex. 204.

Mine, was located approximately twelve miles to the west of the Imperial Project. This Mine, as well as several other large, open-pit metallic mines, operated in the CDCA throughout the 1980s and 1990s, and *none* were ever subjected to complete backfilling requirements, or anything approaching such requirements, by either Interior or the State of California.⁷⁸⁰

388. In a 1995 EIS/EIR for the Briggs Mine on CDCA Class L lands (same as Imperial Project) in Inyo County, it was noted by the BLM and Inyo County, California that “*backfilling has not been a customary or usual practice in mining reclamation and is not required by BLM regulation or policy.*”⁷⁸¹ Again, in the context of the Castle Mountain Project in 1990, BLM and Kern County officials noted that “[*b*]ackfilling is not required by either federal or California legislation.”⁷⁸²

389. There were several sound economic and environmental reasons supporting the State’s longstanding view disfavoring complete backfilling, and the issues surrounding the Castle Mountain Project helped crystallize these reasons. According to that project’s 1990 EIS/EIR, signed by BLM State Director Ed Hasteley on August 17, 1990, “maximum pit backfilling” actually had a “greater impact” than the traditional open-pit reclamation methods on water resources, wildlife, air quality and visual resources.⁷⁸³ Backfilling also would have rendered the

⁷⁸⁰ See Leshendok Report, ¶¶ 88, 101-103; see also Federal Land Mining & Related Project Decisions in the CDCA (listing 12 projects approved between 1985 and 1997) (GLA052882), Ex. 305.

⁷⁸¹ See Leshendok Report, ¶ 101 (quoting *Final EIS/EIR for Briggs Plan of Operations*, at 5.1-29) (emphasis added).

⁷⁸² Letter from J.C. Mitchell, Viceroy Gold Corp., to Ed Hasteley, BLM State Director, re Castle Mountain Project – Backfilling, at 2 (June 20, 1990) (at CON003627), Ex. 30 (emphasis added).

⁷⁸³ *Final EIS/EIR for the Castle Mountain Project*, at 3-37 to 3-38 (Aug. 17, 1990) (at CON003293 to CON003294), Ex. 31. This finding is also applicable to the Imperial Project – complete backfilling and recontouring substantially *increases* the amount of land disturbance from mining activities. See Behre Dolbear Report, at 21-22. In fact, “Behre Dolbear calculates that spreading these wastes would have caused at least 21 percent or a minimum of 270 acres of additional land disturbance over Glamis’ Proposed Project. These wastes could have covered sensitive environmental buffer areas for desert tortoise habitat, dry washes for drainage control, and sensitive vegetation and any cultural resources associated with the

(continued...)

Castle Mountain Project uneconomical, and it would have “foreclose[d] opportunities for future mining of pit walls.”⁷⁸⁴

390. These considerations also led the BLM and Kern County officials to reject a complete, maximum backfilling alternative for the Rand Mine because the “alternative would also promote the loss of potentially mineable precious metal resources.”⁷⁸⁵ According to the BLM and Kern County, this loss of potentially mineable precious metal resources might even result in a “taking” under the U.S. Constitution, for the loss of the mineral claimant’s property right.⁷⁸⁶ These findings came in the context of a proposed expansion at the Rand Mine in 1995, a project owned and operated by a subsidiary of Glamis.

391. As discussed at ¶ 74, a national study undertaken by the National Research Council and National Academy of Sciences (“NRC/NAS”) in 1979, and prepared at the request of the U.S. Congress, provides further evidence of California’s radical departure from the prevailing norms for metallic mining operations in the United States, and elsewhere. The NAS/NRC report on *Surface Mining of Non-Coal Minerals* by the Committee on Surface Mining

(...continued)

Project lands.” *Id.* at 26; *see also id.* at 21-22 (“Complete backfilling may even be environmentally undesirable regarding future resource recovery, water management and quality, land use, wildlife habitat, and cultural resource protection.”).

⁷⁸⁴ Record of Decision, *Castle Mountain Project*, at 8 (Oct. 31, 1990) (at MV036495), Ex. 32; *see also Final EIR/EIS for the VCR Mining Project*, at 3-30 (Oct. 28, 1987), Ex. 19 (“Open pit mines, such as those proposed for the VCR orebody, generally are not suitable for backfilling from both operational and economic standpoints. . . . In the opinion of most mining experts, the cost of backfilling with all of the overburden would render a large open pit mining operation economically infeasible.”); Letter from Richard Grabowski, Chief, Western Field Operations Center, Bureau of Mines, to Ed Hastey, BLM State Director, re Backfilling of Open Pit Mines (June 11, 1990) (at CON003622 to CON003623), Ex. 29 (noting that backfilling “could make an otherwise profitable mine uneconomic” and “could also present problems with groundwater”).

⁷⁸⁵ *See* Leshendok Report, ¶ 103 (quoting *Final EIS/EIR for the Rand Mine*, at 3-20 (Apr. 1995)).

⁷⁸⁶ *See id.*; *see also* Letter from Rand Mining Company to Buzz Todd, BLM, at 4 (Aug. 17, 1994) (at GLA004538), Ex. 53 (“One other point, the cost of any backfilling option will greatly exceed the value that will be added to the land. That cost will be exceeded in both environmental as well as economic terms.”).

and Reclamation (“COSMAR”) found that the restoration of mine land to its original contours “is generally not technically feasible for non-coal minerals, or has limited value because it is impractical, inappropriate or economically unsound”⁷⁸⁷ The NAS/NRC report also discussed the unreasonableness, from an economic standpoint, backfilling would be, finding that “to restore the original contour where massive ore bodies have been mined by the open-pit method could incur costs roughly equal to the original costs of mining. Although technically possible, such backfilling of a large open pit would be of uncertain environmental and social benefit, and it would be economically impractical to mine some deposits under the current cost structures.”⁷⁸⁸

392. The foregoing findings were restated in a follow-up report prepared by NAS/NRC in 1999, again at the request of the U.S. Congress. That report, entitled *Hardrock Mining on Federal Lands*, stated that the “Committee has no strong basis to contradict the COSMAR conclusion on backfilling, which was based on an analysis of estimated costs.”⁷⁸⁹ It also found that the “overall structure of the federal and state laws and regulations that provide mining-related environmental protection is complicated but generally effective.”⁷⁹⁰ If any “backfilling of mines is to be considered, it should be determined on a case by case basis, as was concluded by the Committee on Surface Mining and Reclamation” in 1979.⁷⁹¹

⁷⁸⁷ NAS/NRC, *HARDROCK MINING ON FEDERAL LANDS* 82 (1999) (quoting NAS/NRC, *SURFACE MINING OF NON-COAL MINERALS* xxviii (1979)), Ex. 169.

⁷⁸⁸ *Id.*

⁷⁸⁹ *Id.*

⁷⁹⁰ *Id.* at 5.

⁷⁹¹ *Id.*

D. Glamis Has Experienced A Destruction Of The Imperial Project's Entire Economic Value

393. Glamis' only property interests in the Imperial Project lie in the earth – in the precious minerals that make up its valid existing mineral rights. Glamis' right to use the Project's land surface area is entirely contingent on its right to mine those minerals profitably. When California, in December 2002, adopted the mandatory complete backfilling requirements on an emergency basis, and shortly thereafter, in April 2003, passed targeted and discriminatory legislation, the State effectively took the only property interest that Glamis had, as the imposition of the complete backfilling requirements rendered the Imperial Project cost prohibitive and valueless.

394. According to Mr. Bernard Guarnera of Behre Dolbear & Company, Inc., a highly-qualified mineral appraiser, the value of the Glamis Imperial Project as of December 12, 2002 (the date the backfilling mandate first came into effect) was \$49.1 million.⁷⁹² Today, after the imposition of the backfilling mandate, that value is \$0. Indeed, the calculated net present value for the mine's projected operation under the mandatory backfilling requirement indicates that the mine would result in a projected loss of more than \$11.5 million.⁷⁹³

395. These figures are consistent with Interior's own calculations, released on September 17, 2002 and created by BLM as it tracked the legislative efforts of the State of California. As of April 2002 (selected by BLM presumably based on the date Senator Burton first proposed his targeted legislation), the value of the Imperial Project in light of the backfilling

⁷⁹² See Behre Dolbear Report, at 4.

⁷⁹³ *Id.*

measures was negative \$20.4 million.⁷⁹⁴ BLM's formal *Mineral Report*, dated September 27, 2002, also found that complete backfilling of the Imperial Project "was not economically feasible."⁷⁹⁵ Although this BLM report was not an appraisal, it also calculated that the Imperial Project had a net present value of \$61 million as of November 1998, the date established by BLM as the date on which Glamis had "valid existing rights" in the mineral rights that make up its Imperial Project claims.⁷⁹⁶

396. Thus, as a result of Interior's years of extraordinary delays beginning in 1998, the unlawful project denial on January 17, 2001, and the final legislative and regulatory measures imposed by California between December 12, 2002 and April 10, 2003, the Glamis Imperial Project has been stopped "dead in its tracks" without compensation, as intended by the United States. Glamis now seeks fair and just compensatory relief from this Tribunal.

ARGUMENT

VI. Introduction

397. Since 1972, Glamis has been engaged in the exploration, development and extraction of precious metals in the United States, Mexico and Central America. Within the United States, Glamis has particular experience with mining projects in the California Desert. Glamis successfully planned, proposed, developed and operated two large open-pit gold mines – the Rand Mine in Kern County, California and the Picacho Mine in Imperial County, California –

⁷⁹⁴ Roger A. Haskins, *Comparison of Economic Scenarios for Glamis-Imperial Project*, California (Sept. 17, 2002) (at D-00251-0001-0001), Ex. 252.

⁷⁹⁵ BLM, *Mineral Report*, at 3 (Sept. 27, 2002) (at MV023933), Ex. 255.

⁷⁹⁶ *See* Behre Dolbear Report, at 12.

during the 1980s and 1990s.⁷⁹⁷ In the course of those operations, Glamis never encountered any difficulty securing the various required approvals to develop and operate open pit gold mines under the applicable federal, state and local laws and regulations.⁷⁹⁸ Indeed, Glamis' innovative reclamation planning and techniques for the Picacho Mine earned it an award from the California Mining Association.⁷⁹⁹

398. Given its substantial mining experience world-wide and its particular experience in the California Desert, Glamis approached the Imperial Project fully aware of the applicable legal regimes and requirements. Based on its analysis of those requirements, Glamis' expectation was that the plan of operations would be approved within 2-3 years, as was typically the case.⁸⁰⁰ It was inconceivable to Glamis that the Imperial Project plan of operations, which was projected to be similar to Glamis' Picacho Mine operation and other nearby open pit gold mines in the California Desert,⁸⁰¹ would be denied based on a discretionary denial authority fashioned out of whole cloth by the United States Government, and that the federal approval process would remain in limbo years after that denial was determined to be unlawful. It was equally inconceivable that at the state level, the project would be subjected to unprecedented complete backfilling and site-recontouring requirements imposed by the State of California in a targeted manner, not least since similar types of measures had been expressly rejected by the U.S. Interior Department's BLM and Kern County, California, with respect to Glamis' Rand Mine in the California Desert.⁸⁰² Through

⁷⁹⁷ See Statement of Facts ("SOF"), ¶¶ 21, 134, 136-37.

⁷⁹⁸ See *id.* ¶ 134 (citing Leshendok Report, ¶ 85).

⁷⁹⁹ *Id.* ¶ 134, 386.

⁸⁰⁰ See Leshendok Report, ¶ 95, Table 1.

⁸⁰¹ SOF, ¶ 133.

⁸⁰² *Id.* at ¶ 137 (referencing Final Environmental Impact Statement/Environmental Impact Report for the Rand Project, at 3-19 (Apr. 1995)).

these measures, detailed in the Statement of Facts above, Respondent has expropriated Glamis' valuable mining property interests without providing compensation in violation of NAFTA Article 1110 and has denied Glamis fair and equitable treatment guaranteed under the minimum standard of treatment under international law in violation of NAFTA Article 1105.

VII. Glamis' Mining Claims Qualify As An "Investment" Under NAFTA

399. NAFTA protects the "investment of an investor" through Articles 1110 and 1105. Article 1139 defines the term "investment" in "exceedingly broad terms," covering "almost every type of financial interest"⁸⁰³ The term includes, among many other interests, "real estate or other property (tangible and intangible) acquired in the expectation or used for the purpose of economic benefit or other business purpose."⁸⁰⁴ Here, the expropriated investment consists of a 100 percent interest in 187 mining claims and 277 mill sites located on approximately 1600 acres of federal public lands.

400. Glamis' federal unpatented mining claims are a "unique form of property" recognized by longstanding precedent of the U.S. Supreme Court, and Interior Department decisions.⁸⁰⁵ The U.S. Supreme Court has found such claims to be "property in the fullest sense of that term . . . ,"⁸⁰⁶ conferring upon the owner "the exclusive right of possession and enjoyment

⁸⁰³ *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, ¶ 94 (Award) (Dec. 16, 2002).

⁸⁰⁴ North American Free Trade Agreement, Can.-Mex.-U.S., article 1139, Dec. 8 and 17, 1992, [hereinafter NAFTA].

⁸⁰⁵ *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1961). *Accord United States v. Locke*, 471 U.S. 84, 104 (1985); *see also Shell Oil Co. v. Andrus*, 591 F.2d 597, 603 (10th Cir. 1979), *aff'd* 446 U.S. 657 (1980) ("a locator or owner of an unpatented [mining] claim, properly located, has a vested property interest therein. This has been universally recognized by the courts.") *See also Skaw v. United States*, 13 Cl.Ct. 7, 29 (1987) ("Once there has been a valid discovery and a proper location, an unpatented mining claim is real property in the highest sense."); *Freese v. United States*, 226 Cl.Ct. 252, 639 F.2d 754, 757 (1981) ("It is a matter beyond dispute that federal mining claims are 'private property' enjoying the protection of the fifth amendment Had plaintiff suffered an uncompensated divestment of his federal mining claims, we would have a clear constitutional violation.").

⁸⁰⁶ *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 316 (1930); *See also Skaw v. United States*, 13 Cl. Ct. 7, 29 (1987) ("Once there has been a valid discovery and a proper location, an unpatented mining claim
(continued...)

of all the surface of the land and the minerals thereunder.”⁸⁰⁷ In an opinion that addressed the Glamis Imperial Project (and that was approved by Interior Secretary Gale Norton), the Interior Solicitor likewise recognized the property interests resulting from location of a mining claim:

Mining claim location is a self-initiated act that does not require approval of the United States to establish property rights. When a mining claimant properly locates a mining claim, the claimant acquires a “unique form of property.” *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963). This unique property interest includes the right to use so much of the surface as is reasonably necessary to develop the discovered valuable mineral deposit and the right to extract all valuable locatable minerals without payment to the United States⁸⁰⁸

Finally, the Interior Department’s BLM, upon completion of a mineral examination of Glamis’ mining claims, verified that Glamis had “valid existing rights” under the Mining Law of 1872,⁸⁰⁹ on September 27, 2002.⁸¹⁰ Thus, Glamis’ federal unpatented mining claims constitute “property” subject to the protections afforded “investments” under NAFTA.

(...continued)

is real property in the highest sense.”); *see also Collord v. United States Dept. of Interior*, 154 F.3d 933, 934-35 (9th Cir. 1998) (a “mining claim confers the right to exclusive possession of the claim, including the right to extract all minerals from the claim without paying royalties to the United States. . . . An unpatented mining claim is a ‘fully recognized possessory interest.’ . . .”).

⁸⁰⁷ *Cook v. United States*, 37 Fed.Cl. 435, 437 (1997); *see also United States v. Shumway*, 199 F.3d 1093, 1099-1100 (9th Cir. 1999) (“The phrase ‘mining claim’ represents a federally recognized right in real property. The Supreme Court has established that a mining ‘claim’ is not a claim in the ordinary sense of the word – a mere assertion of a right – but rather is a property interest, which is itself real property in every sense, and not merely an assertion of a right to property.”).

⁸⁰⁸ SOF, ¶ 342 (discussing Solicitor’s Opinion, M-37007, October 23, 2001 (approved by Interior Secretary Norton, advising rescission of 1999 former Interior Solicitor Leshy legal opinion finding basis to deny the Glamis Imperial Project, as well as former Secretary Babbitt’s 2001 denial of the Project)).

⁸⁰⁹ 30 U.S.C.A. § 22 *et seq.*

⁸¹⁰ SOF, ¶ 347.

VIII. The Measures At Issue Relate To Glamis' Investment

401. Article 1101(1) of NAFTA defines the scope and coverage of Chapter Eleven as applying to “measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.”⁸¹¹

402. A “measure” is broadly defined by NAFTA Article 201(1) as including “any law, regulation, procedure, requirement or practice.”⁸¹²

403. The phrase “relating to” requires a legally significant connection between the disputed measure and the investor or an investment that is more than just the mere effect of a measure.⁸¹³

404. The following measures taken by Respondent relate to Glamis’ investment and constitute violations of Articles 1110 and 1105 of NAFTA.

405. California’s unwarranted and unprecedented complete backfilling and site-recontouring requirements. The State of California took a series of actions as part of its initiative to block the Imperial Project. In the fall of 2002, the California legislature amended Senate Bills 1828 and 483 to specifically incorporate language effectively prohibiting the development of the Imperial Project. Though these bills were not ultimately passed (for reasons detailed in the Statement of Facts), they demonstrated Governor Davis’ overt opposition to the Imperial Project. The California SMGB subsequently adopted an emergency regulation (Section 3704.1 of Title 14

⁸¹¹ NAFTA, *supra* note 8, art. 1101(1).

⁸¹² NAFTA, *supra* note 8, art. 201.

⁸¹³ *Methanex Corp. v. United States*, NAFTA/UNCITRAL, ¶ 147 (Preliminary Award on Jurisdiction and Admissibility) (Aug. 7, 2002).

of the California Code of Regulation) requiring complete backfilling and site-recontouring for all proposed open-pit metallic mines within the State, and in doing so, explicitly identified the Imperial Project as the “emergency condition” justifying the regulation. On April 7, 2003, Governor Davis effected a permanent solution to the Imperial Project problem by signing SB 22 into law. That bill codified the establishment of permanent backfilling and grading requirements similar to the SMGB emergency regulation and thereby “stop[ped] the Glamis Gold Mine proposal in Imperial County,” to use Governor Davis’ words.⁸¹⁴ Finally, on April 10, 2003, the SMGB made permanent its earlier emergency complete backfilling regulation with only minor changes – never relying on, or even citing, a single technical study for support.⁸¹⁵ The California actions described above clearly fall within NAFTA’s broad definition of a “measure,” which includes “any law, regulation, procedure, requirement or practice.”

406. The Federal Government’s delay and eventual denial of Glamis’ mining plan of operations in Secretary Babbitt’s Record of Decision on January 17, 2001. The Federal Government’s unreasonable delay and eventual unlawful denial of Glamis’ mining plan constitutes a “measure” under NAFTA. That denial was predicated on a December 1999 legal opinion issued by Solicitor Leshy in which he declared – contrary to all prior precedent and practice that BLM had discretionary authority to deny a plan of operation based solely on impacts to cultural resources identified through the procedural processes of the National Historic Preservation Act. The demonstrable analytical and procedural flaws in the Leshy opinion led to its rescission by the current administration on October 23, 2001. The current administration also determined that the Imperial Project denial, predicated on the Leshy Opinion, likewise had been

⁸¹⁴ SOF, ¶ 15.

⁸¹⁵ *Id.* at ¶ 16.

unlawful. Furthermore, on October 31, 2001, BLM rescinded the regulatory codification of the discretionary denial authority – on grounds of “basic fairness,” no less – to ensure that it would not be applied to any other mining investment projects in the United States. Thus, Glamis was the only party ever to have a mining plan of operation delayed and ultimately denied based upon the discretionary “mine veto” authority manufactured by prior Solicitor Leshy.⁸¹⁶

407. The Federal Government’s and Imperial County’s continued refusal to approve Glamis’ mining plan of operations. Despite the rescission of Secretary Babbitt’s unlawful denial of the Glamis Imperial Project on November 23, 2001, BLM and Imperial County have still not acted upon Glamis’ plan of operation, let alone approved it. It has been over 11 years since it was submitted and about five years since the denial was rescinded, yet Glamis’ plan remains trapped in a procedural holding pattern and its gold remains unmined. This is a “practice” or “procedure,” within the definition of a “measure.”

IX. Respondent Has Breached Its Obligations Under Article 1110 By Taking Measures Tantamount To Expropriation Of Claimant’s Investment Without Payment Of Compensation

408. Article 1110 of NAFTA provides:

No party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment except:

- a) for a public purpose;
- b) on a non-discriminatory basis;
- c) in accordance with due process of law and Article 1105(1); and
- d) on payment of compensation⁸¹⁷

⁸¹⁶ *Id.* at ¶¶ 10, 70-79.

⁸¹⁷ NAFTA, *supra* note 8, art. 1110.

409. This provision prohibits a member State from effecting an expropriation through any of its laws or regulations (among other “measures”) without paying compensation. This is true irrespective of whether the expropriation was effected for a public purpose, on a non-discriminatory basis, and in compliance with due process of law and Article 1105(1).⁸¹⁸ Here, Respondent has rendered Glamis’ valid mining claims worthless through a series of measures including the State of California’s passage of unprecedented legislation and regulations mandating complete backfilling, which were unquestionably targeted at killing the Glamis Imperial Project, and the Federal Government’s denial of Glamis’ Imperial Project based on a fabricated discretionary denial authority and its continued refusal to approve Glamis’ mining plan of operations despite the rescission of the fabricated mine veto authority.

410. Under any standard, and undoubtedly under those established under international law and NAFTA, these actions taken by Respondent constitute measures “tantamount to expropriation” for which compensation is due.

A. NAFTA Is Broadly Drafted To Afford Protection From Direct And Indirect Expropriations As Well As Measures Tantamount To Expropriation

411. The language of NAFTA Article 1110 evinces the treaty negotiators’ intent to establish broad investor protection from indirect expropriations. Specifically, Article 1110 notes that “No party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment.”

⁸¹⁸ *Am. Int’l Group, Inc. v. Iran*, Award No. 93-2-3, 4 Iran-U.S. C.T.R. 96 (Dec. 19, 1983) (holding that Iran’s 1979 nationalization of the Iran America insurance company was not by itself unlawful as there was insufficient evidence to demonstrate that the nationalization was not carried out for a public purpose or was discriminatory. Nonetheless, the Tribunal stated that “it is a general principle of public international law that even in a case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken.”).

412. The double reference to both direct and indirect expropriation as well as measures “tantamount to expropriation” is not accidental. Indeed, the language appears in each of the (approximately) 30 drafts of the article available from the publication of the “travaux” of NAFTA Chapter Eleven, beginning with the first version in 1991.⁸¹⁹ It also mirrors the terms of Article 1605 of the Canada-US Free Trade Agreement that preceded NAFTA.

413. In *Waste Management, Inc. v. United Mexican States*, the tribunal confirmed that the double reference must convey something; it could not be meaningless:

*An indirect expropriation is still a taking of property. By contrast where a measure tantamount to an expropriation is alleged, there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinctions of ownership irrelevant.*⁸²⁰

This view suggests that an indirect expropriation produces – in effect, even if not by transfer of title – a situation where the state can draw some benefit from what is taken away from the owner, with elements of enrichment and creation of an additional benefit for the public or communities favored by the state involved. The “tantamount to expropriation” standard, in contrast, focuses on the economic loss visited upon the property owner.

414. This analysis is consistent with Article 1131 of NAFTA, which provides that “[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”⁸²¹ Moreover, “a measure that diminishes the value of an investment and does not necessarily transfer ownership to a third party is still

⁸¹⁹ The first version of NAFTA from 1991 states in Article 405: Expropriation: “No party shall directly or indirectly nationalize or expropriate an investment in its territory by an investor of another Party or take any measure or series of measures tantamount to an expropriation of such an investment”

⁸²⁰ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, ¶ 143 (Award) (April 30, 2004) (emphasis added).

⁸²¹ NAFTA, *supra* note 8, art. 1131.

treated under the rubric of expropriation.”⁸²² The measures at issue did not merely diminish, but indeed, fully destroyed the value of Glamis’ \$49.1 million investment,⁸²³ and thus they must be “treated under the rubric of expropriation.”

B. U.S. Takings Law Informs Customary International Law And NAFTA Chapter Eleven Jurisprudence And Therefore Is Important In Evaluating NAFTA Expropriation Claims

415. International law, including that on expropriation, is comprised of customary international law, international agreements, and derivation from general principles common to the major legal systems of the world.⁸²⁴ In the context of this dispute, pertinent jurisprudence therefore includes NAFTA Chapter Eleven decisions (in which the issue of “regulatory taking” frequently has arisen), jurisprudence by tribunals examining other investment treaties (frequently under the auspices of ICSID),⁸²⁵ cases before the Iran-U.S. Claims Tribunal (which refined the concept of “creeping expropriation” in international law),⁸²⁶ and other international cases brought before the International Court of Justice and other such bodies.

⁸²² Daniel M. Price, *The Management and Resolution of Cross Border Disputes as Canada/U.S. Enter the 21st Century: NAFTA Chapter 11 – Investor-State Dispute Settlement: Frankenstein or Safety Valve?*, 26 Can.-U.S. L.J. 107, 111 (2000); see *Starrett Housing Corp. v. Iran*, Interlocutory Award No. ITL 32-24-1, 4 Iran-U.S. C.T.R. 122, 154 (Dec. 19, 1983) (“It is recognised by international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.”).

⁸²³ SOF, ¶ 394 (citing Behre Dolbear Report, at 4).

⁸²⁴ RESTATEMENT (THIRD): FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987); see also *id.* at § 103(2) (“In determining whether a rule has become international law, substantial weight is accorded to (a) judgments and opinions of international judicial and arbitral tribunals; (b) judgments and opinions of national judicial tribunals; (c) the writings of scholars; [and] (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.”).

⁸²⁵ These treaties are comparable, often virtually identical in terms of expropriation language and follow a very similar or identical set of objectives and arbitral procedures.

⁸²⁶ One must note that the Algiers Declaration establishing the Iran-U.S. Claims Tribunal did not only mention expropriations, but also referred to “other measures affecting property rights” as a basis for compensation. Only those cases where the Iran-U.S. Claims Tribunal discussed indirect expropriations are referenced in this Memorial.

416. In addition to case law, comparative constitutional law and state practice are integral to interpreting and applying investment treaties such as NAFTA. As a scholar in international investment law explained:

No State can be fixed with responsibility for expropriation unless the act complained of can fairly be said to involve the taking of property within the meaning attributed to that conception by the general principles of law recognized by civilized nations. These principles cannot be ascertained otherwise than by comparative law.”⁸²⁷

The resort to persuasive and authoritative precedent leads to jurisprudence applying constitutional protection of property rights in the major, developed legal systems generally and in the U.S., in particular.

417. U.S. takings doctrine has had a seminal influence on constitutional provisions dealing with property protection⁸²⁸ and continues to have a strong influence on the way international treaties are formulated and treaty-based arbitral jurisprudence is practiced.⁸²⁹ Thus, the *Restatement (Third) of Foreign Relations Law* characterizes the international law of expropriation as being analogous to takings jurisprudence in the United States.⁸³⁰ The *Restatement* provides that “[i]n general, the line in international law is similar to that drawn in United States jurisprudence for purposes of the Fifth and Fourteenth Amendments to the Constitution in determining whether there has been a taking requiring compensation.”⁸³¹

⁸²⁷ F.A. Mann, cited according to Rudolf Dolzer, *Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht*, (*Property, Expropriation and Compensation in International Law*), 213 f. (1985).

⁸²⁸ See, e.g., Grundgesetz für die Bundesrepublik Deutschland [GG] [Constitution] art. 14 (F.R.G).

⁸²⁹ See 2004 U.S. Model BIT, Annex B (Sept. 15, 2004) (defining “indirect expropriation” in a manner generally congruent with U.S. Supreme Court jurisprudence). The 1994 U.S. Model BIT is actually more relevant to NAFTA Chapter Eleven as it reflects the United States’ views on strong expropriation protection at the time that it executed NAFTA.

⁸³⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712 n. 6.

⁸³¹ *Id.*

418. As explained by the U.S. 2002 Trade Promotion Authority Act, even while the United States has subsequently retreated from unqualified protection against expropriation found in Article 1110 of NAFTA and earlier Bilateral Investment Treaties (“BITs”), it has still sought to assure protection comparable to that afforded by U.S. takings jurisprudence:

the principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investments, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States, and *to secure for investors important rights comparable to those that would be available under United States legal principles and practice. . . .*⁸³²

419. Given the influence of the U.S. concept of “regulatory taking” on recent investment treaty practice, it is appropriate to consider U.S. domestic jurisprudence on “regulatory takings” to help fill gaps and clarify open-ended language in the usually very general treaty language on indirect expropriation. Moreover, since the U.S. is the Respondent, it likewise is appropriate to carefully consider domestic U.S. constitutional law jurisprudence and U.S. practice in international proceedings with respect to the issue of indirect expropriation. Certainly, international law prevails over the domestic constitutional law of even a country as significant to investment law as the U.S., but to the extent that there is no identifiable difference between

⁸³² Trade Act of 2002, 19 U.S.C. § 3802(b)(3) (2002); *See also* Laura Svat & Geraldine Fischer, *Introductory Note to the Treaty between the United States of America and the Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment*, 44 I.L.M. 265 (2005).

domestic U.S. takings jurisprudence and international law as defined by treaty practice and arbitral jurisprudence, U.S. domestic jurisprudence is a useful interpretative tool for evaluating Art. 1110 of the NAFTA.

C. California’s Actions With Respect To The Imperial Project Are Measures Tantamount To Expropriation

420. Article 1110, by including not only direct expropriations but also measures “tantamount to expropriation,” encompasses a wide variety of government regulatory activity that may significantly interfere with an investor’s investment. Though drawing the line between measures “tantamount to expropriation” and non-compensable regulations has proven difficult, the *Restatement (Third) of Foreign Relations Law* is generally helpful in “understanding customary international law in this area.”⁸³³ A comment to the *Restatement* distinguishes the two as follows:

*A state is responsible as for an expropriation of property . . . when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien’s property or its removal from the state territory. Depriving an alien of control of his property, as by an order freezing his assets, might become a taking if it is long extended. A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of state, if it is not discriminatory*⁸³⁴

Thus, the comment specifically categorizes regulations that prevent or unreasonably interfere with effective enjoyment of property, such as the ones at issue here, as expropriatory actions. Moreover, even *bona fide* regulations are expropriatory if imposed on a discriminatory basis.

⁸³³ *Feldman Award* ¶ 104 (considering the *Restatement* helpful in “understanding customary international law in this area”).

⁸³⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712 cmt. g. (internal citations omitted) (emphasis added).

421. As acknowledged by the *Feldman* Tribunal, “the Reporter’s Note to the *Restatement* further suggest[s] that ‘whether an action by the state constitutes a taking and requires compensation under international law, or is a police power regulation that does not give rise to an obligation to compensate even though a foreign national suffers loss as a consequence’ must be determined *in light of all the circumstances*.”⁸³⁵

422. Espousing principles similar to those in the *Restatement*, the 1961 *Harvard Draft Convention on International Responsibility* describes a taking as occurring in the case of any “unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property *within a reasonable period of time after the inception of such interference*.”⁸³⁶ The State of California’s complete backfilling and site-recontouring requirements constitute exactly that – unreasonable interferences with Glamis’ use of its property, as demonstrated by the passage of SB 22 and the permanency conferred to the mandatory complete backfilling regulation, § 3704.1. In addition, the Interior Department’s failure to approve, or otherwise act upon, Glamis’ plan of operation to this day, more than 11 years after its submission, continues to prevent Glamis from use and exploitation of its property indefinitely.

423. The body of international case law on expropriation confirms the underlying notions of expropriation in the *Restatement* and *Harvard Draft*, and it demonstrates that the United States’ Federal and State measures constitute an expropriation of Glamis’ investment. While international arbitral tribunals’ decisions are largely fact-specific and sometimes

⁸³⁵ *Feldman* Award ¶ 106 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712 n. 5) (emphasis added).

⁸³⁶ Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 Am. J. Int’ L. 545, 553 (1961) (quoting Article 10(3)(a) of the draft convention) (emphasis added).

inconsistent in their distinctions between non-compensable regulatory impacts and indirect expropriations requiring compensation, they have generally analyzed the following criteria in reaching their decisions: (1) the degree of interference with the property right; (2) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (3) the character of the government action.⁸³⁷ Applied here, each of the criteria compels the conclusion that the series of regulations and legislation specifically designed by the State of California to block the Glamis Imperial Project, including SB 1828, SB 483, emergency regulation §3704.1, SB 22, and the permanent version of regulation §3704.1 constitute measures tantamount to expropriation under NAFTA's investment protections.

1. The Degree Of The California Measures' Interference With Glamis' Property Right Is Extraordinary

424. Most arbitral tribunals have considered the degree of interference with the property right at issue by examining two sub-elements: 1) the severity of the economic impact of the interference or regulation on the owner; and 2) the duration of that interference. The significance of both of these elements was underscored by the Iran-U.S. Claims Tribunal in *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*:

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government . . . such a conclusion is warranted whenever events demonstrate that the *owner was deprived of fundamental*

⁸³⁷ OECD 2004, "'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law", *OECD Working Papers on International Investment*, 2004/4, OECD Publishing, at 10; See 2004 U.S. Model BIT, Annex B 1.1. (Providing that in determining "whether an action or series of actions by a Party . . . constitutes an indirect expropriation," the following factors are to be considered: "(i) the economic impact of the government action . . . (ii) the extent to which the government action interferes with reasonable investment-backed expectations; and (iii) the character of the government action."). These are also the same factors analyzed under U.S. takings law. See *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (deciding if a regulation constituted a taking by balancing three factors: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action).

rights of ownership and it appears that the *deprivation is not merely ephemeral*⁸³⁸

As discussed in detail below, both in terms of their severity and their duration, the measures taken by the U.S. with respect to the Imperial Project constitute an extraordinary degree of interference with Glamis' valid property rights.

a. The Measures' Economic Impact Could Not Be More Severe, As They Effected A Full Devaluation

425. The economic impact element of the interfering measure is the starting point for any expropriation analysis, including that undertaken pursuant to both NAFTA and domestic U.S. takings jurisprudence. As recognized by the tribunal in *Tecnicas Medioambientales Tecmed S.A. v. United Mexican State ("Tecmed")*, it must first be determined whether the claimant was radically deprived of the economical use and enjoyment of its investments.⁸³⁹ "This determination is important because it is one of the main elements to distinguish, from the point of view of an international tribunal, between a regulatory measure, which is an ordinary expression of the exercise of the state's police power that entails a decrease in assets or rights, and a *de facto* expropriation that deprives those assets and rights of any real substance."⁸⁴⁰

426. In *Tecmed*, the investor filed a claim alleging that the Mexican government's failure to re-license its hazardous waste site was an expropriatory act, in violation of the

⁸³⁸ *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Eng'rs of Iran*, III.1 Award No. 141-7-2, 6 Iran-U.S. C.T.R. 219 (June 22, 1984) (emphasis added). In *Tippetts*, the claimant company known as TAMS was determined by the Tribunal to have suffered an indirect expropriation by Iran due to the actions of a government-appointed manager for the company (including failure to communicate with TAMS once the TAMS employees fled the country due to circumstances in Iran – neither "reporting to it on the status of the TIA project and TAMS-AFFA's finances nor responding to its letters or telexes").

⁸³⁹ *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID CASE No. ARB (AF)/00/2, ¶ 115 (Award) (May 29, 2003).

⁸⁴⁰ *Id.*; see also *id.* (referencing R. Dolzer & M. Stevens, *Bilateral Investment Treaties*, 100 (1995) ("In determining whether a taking constitutes an "indirect expropriation," it is particularly important to examine the effect that such taking may have had on the investor's rights. Where the effect is similar to what might
(continued...)

protections under the bilateral investment treaty (BIT) between Spain and Mexico. The tribunal considered the following, in making its decision:

[I]t is understood that the measures adopted by a State, whether regulatory or not, are an indirect *de facto* expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that “...any form of exploitation thereof...” has disappeared; i.e. *the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed*. Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, *even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary*. The government’s intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects.⁸⁴¹

427. In light of these principles, the *Tecmed* tribunal found that the measure at issue, namely the resolution through which the permit’s renewal was denied, met the characteristics of an expropriation in that the non-renewal of the permit and the resulting closing of the landfill was permanent and irrevocable, there was no doubt that the landfill could not be used for the activity for which it had been used in the past, and the benefits and profits expected or projected by the claimant as a result of the operation of the landfill had been fully and irrevocably destroyed.⁸⁴² In considering the economic impact on the claimant, the tribunal also noted that the landfill’s use as a hazardous waste site in the past ruled out any possible sale of the premises in the real estate

(...continued)

have occurred under an outright expropriation, the investor could in all likelihood be covered under most BIT provisions.”).

⁸⁴¹ *Id.* ¶ 114 (emphasis added) (internal citations omitted).

⁸⁴² *Id.* ¶ 117.

market.⁸⁴³ It also stated that “the destruction of the economic value of the site should be assessed from the investor’s point of view at the time it made such an investment.”⁸⁴⁴

428. As in *Tecmed*, the California measures preventing Glamis from operating the Imperial Project are permanent and irrevocable (as discussed further below), its mineral property interests cannot be used for any activity other than mining, and the benefits and profits expected or projected by Glamis as a result of the Imperial Project have been fully and irrevocably destroyed. Like the landfill in *Tecmed*, there is no resale value for Glamis’ mineral property interests in the Imperial Project. This was determined in the results of a mineral appraisal which concluded that “no prospective purchaser would consider acquiring the Project . . . if complete backfilling is required.”⁸⁴⁵ Thus, application of the *Tecmed* rationale to the facts in Glamis’ case merits a finding that Respondent has taken measures tantamount to an expropriation of Glamis’ investment.

429. The economic impact of the interfering measure was also considered a significant factor in *Metalclad Corporation v. The United Mexican States*.⁸⁴⁶ In *Metalclad*, the tribunal held that Mexico, by interfering and precluding Metalclad’s operation of a landfill, through acts including the governor’s declaration of a “Natural Area” for the protection of an allegedly rare cactus which encompassed the landfill area, indirectly expropriated the company’s investment without providing compensation in violation of Article 1110.⁸⁴⁷ The tribunal stated that expropriation under NAFTA includes “covert or incidental interference with the use of property

⁸⁴³ *Id.*

⁸⁴⁴ *Id.*

⁸⁴⁵ Behre Dolbear Report ¶ 1.3.2.

⁸⁴⁶ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, ¶¶ 102-12 (Award) (August 30, 2000).

⁸⁴⁷ *Id.* ¶¶ 102-12.

(continued...)

which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”⁸⁴⁸ Thus, the tribunal gave significant weight to the fact that the claimant was deprived of the economic benefit of its investment.

430. Citing *Tippetts and Metalclad* (among other cases), an arbitral tribunal in *CME (the Netherlands) v. the Czech Republic* found that an expropriation had occurred where the Claimant’s purchase of a joint venture media company was left “as a company with assets, but without business” when the Media Council in the host country “caused the destruction of the [joint-venture’s] operations” and there was “no immediate prospect that the [joint venture] [would] be reinstated in a position to enjoy an exclusive use of the license.”⁸⁴⁹ Like the claimant in *CME*, Glamis’ operation of its investment, the Imperial Project, has been destroyed and there is no prospect – let alone an immediate one – that it will be reinstated in a position to realize the economic benefits of its investment.

431. In the *Pope & Talbot v. Canada* case, the tribunal assessed the impact of the export licensing fee at issue and found that no expropriation had taken place where the introduction of export quotas resulted in *only a reduction of profits*, sales abroad were not entirely prevented and the investor was still able to earn profits.⁸⁵⁰ Though it did not find an expropriation in light of the particular facts, the tribunal rejected Canada’s attempt to except all regulatory measures from the reach of Article 1110, stating that a “*blanket exception for regulatory*

(...continued)

⁸⁴⁸ *Id.* ¶ 103.

⁸⁴⁹ *CME (Netherlands) v. Czech Republic*, UNCITRAL, ¶¶ 591, 607 (Partial Award) (Sept. 13, 2001).

⁸⁵⁰ *Pope & Talbot Inc. v. Canada*, UNCITRAL (Interim Merits Award) (June 26, 2000) (emphasis added).

measures would create a gaping loophole in international protections against expropriation.”⁸⁵¹

Moreover, the tribunal echoed the principles in *Tippetts* and *Starrett Housing*, noting that “mere interference is not expropriation; rather, *a significant degree of deprivation of fundamental rights of ownership is required.*”⁸⁵² Unlike in *Pope & Talbot*, the complete backfilling and site-recontouring at issue in Glamis’ case do not merely reduce the profitability of the Imperial Project – they destroyed any chance of it. A mineral appraisal of the Project determined that after the imposition of the California mandatory backfilling measures, the value of the Imperial Project was totally destroyed and the resulting value was \$0; indeed, it was found to have a negative value of -\$11.56 million.⁸⁵³ Thus, the economic impact of the California regulatory and legislative measures on Glamis’ investment has been far more severe than was the impact of the export licensing fees on the investor in *Pope & Talbot*.

432. As demonstrated by the arbitral decisions discussed above, deprivation of a substantial portion of the economic benefits of a property interest is a significant factor in determining whether there has been an expropriation. This proposition is resoundingly echoed in U.S. Fifth Amendment law on compensable takings, under which only two *per se* rules regarding takings have developed: (1) a permanent physical invasion of private property by the government will always require compensation; and (2) “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property *economically* idle, he has suffered a taking.”⁸⁵⁴ The second of these *per se* takings rules

⁸⁵¹ *Id.* ¶ 99.

⁸⁵² *Pope & Talbot* Interim Award ¶¶ 96-98 (emphasis added).

⁸⁵³ SOF, ¶ 394.

⁸⁵⁴ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992); *see also Lingle v. Chevron*, 544 U.S.528 (2005).

analyzes the degree of interference with the property rights – particularly, with respect to the economic impact of the measures at issue. Indeed, it requires that when a measure deprives the owner of all economically beneficial uses of its property, it will be considered a *per se* taking – without any further consideration of other factors.

433. In *Lucas v. South Carolina Coastal Council* (“*Lucas*”), a South Carolina law prohibiting construction of residential homes (and other buildings) on vacant coastal property was held to be an unconstitutional taking, notwithstanding that the legislature ostensibly sought to prevent “unwise development” and protect “habitat for numerous species of plants and animals, several of which are threatened or endangered.”⁸⁵⁵ At the time that the property owner, Mr. Lucas, acquired the land parcels at issue, construction of single family residences was unrestricted (though subject to building permits), and adjacent landowners had constructed such buildings. The subsequent passage of the South Carolina Beachfront Management Act, however, “flatly prohibited” the construction of occupiable improvements and “provided no exceptions.”⁸⁵⁶ The trial court found that the legislation “decreed a permanent ban on construction . . .” and that this prohibition deprived Lucas of “any reasonable economic use of the lots.”⁸⁵⁷

434. In reaching its decision, the U.S. Supreme Court held that no inquiry into the public interest advanced by the State in support of the restriction was required. The Court held that “[s]urely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply ‘adjusting the benefits and burdens of economic life’.”⁸⁵⁸ As stated by the

⁸⁵⁵ See *Lucas*, 505 U.S. at 1022, n.10.

⁸⁵⁶ *Id.* at 1008-09.

⁸⁵⁷ *Id.* at 1009.

⁸⁵⁸ *Id.* at 1017 (quoting *Penn Central Transpt. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

Court more recently in *Chevron v. Lingle*, “the government must pay just compensation for such ‘total regulatory takings,’ except to the extent that ‘background principles of nuisance and property law’ independently restrict the owners intended use of the property.”⁸⁵⁹

435. Similarly, in *Whitney Benefits v. United States*, the U.S. Court of Claims and the Federal Circuit Court of Appeals held that a taking occurred when Congress enacted the Surface Mining and Reclamation Act of 1977 (“SMCRA”), a statute prohibiting specific surface coal mining in western “alluvial valley floors.”⁸⁶⁰ This statutory prohibition, which theoretically allowed for *underground* mining, prohibited *surface* mining and thus made all mining at that site economically and technically infeasible – resulting in a complete destruction of the value of the plaintiff’s entire coal mineral estate.⁸⁶¹ Though the United States argued that the plaintiff’s property “could not have been taken until their application for a mine permit actually was denied as a result of . . . [the statute’s] prohibitions,” the Claims court held that such a further administrative process would not be required when it was clearly “futile.”⁸⁶² The Federal Circuit recognized that the government’s classification of this statute as a legitimate environmental regulation of property was not enough to prevent it from being a taking. The court stated as follows:

⁸⁵⁹ *Lingle v. Chevron*, 125 S. Ct. 2074, 2081 (2005) (citing *Lucas*, 505 U.S. at 1026-1032).

⁸⁶⁰ *Whitney Benefits, Inc. v. United States*, 18 Cl.Ct. 394, *aff’d*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied* 502 U.S. 952 (1991).

⁸⁶¹ *Id.*

⁸⁶² *Whitney Benefits*, 18 Cl.Ct. at 407. After denying Whitney Benefits’ right to just compensation during more than twelve years of litigation, the federal government finally agreed to settle the case after losses at the U.S. Claims Court and U.S. Federal Circuit, including denial of review by the U.S. Supreme Court, and in 1995 the federal government agreed to pay \$200 million to the Whitney Benefits plaintiffs reflecting the appraised fair market value of the coal mineral estate with interest back to the 1977 date of the statutory taking. See “U.S. to Pay \$200 Million Under Settlement With Coal Co...” *Inside Energy With Federal Lands* (the McGraw-Hill Companies, May 15, 1995), 1995 West Law WLNR 1904676.

The government's facile application of the label 'regulatory' and its citation of cases dealing with congressional regulation of the uses of land and other property subject to many uses are inapt here. *First, . . . the only property here involved is the right to surface mine a particular deposit of coal.* The only possible use of that right is to surface mine that coal. *When Congress prohibited that mining of that coal, it did not merely regulate, it took, all the property involved in this case.* Second, if . . . [the statute] could somehow be deemed 'regulatory' in this case, it would avail the government nothing, *for a regulatory statute that 'goes too far', will be recognized as a taking.*⁸⁶³

436. As demonstrated by *Lucas* and *Whitney Benefits*, consideration of the degree of interference caused by a measure to an owner's property rights (as well as, to a lesser degree, how long the measures are likely to last) is critical in determining whether what appears to be *bona fide* regulation nonetheless constitutes a taking. It is so significant that the U.S. Supreme Court has adopted a *per se* rule considering measures that deprive the owner of all economically beneficial uses of its property to be takings.

437. In light of the significance of the severity of the impact in the assessing whether a deprivation rises to the level of an expropriation, California's complete backfilling and site-recontouring requirements clearly are measures tantamount to expropriation. Like the property owners in cases such as *Tecmed*, *Metalclad*, *Lucas* and *Whitney Benefits*, Glamis has been absolutely precluded from any beneficial use or enjoyment of its property right as a result of government measures that render its right to extract gold worthless. Operation of the Imperial Project under California's novel reclamation requirements would result in multi-million dollar losses, rendering the value of the Glamis property to be zero, as of adoption of the California measures on December 12, 2002.⁸⁶⁴ The California measures thus are sufficiently severe in their economic impact to be tantamount to an expropriation of Glamis' investment under NAFTA

⁸⁶³ *Whitney Benefits*, 926 F.2d at 1172 (emphasis added).

because they had the effect of depriving the owner, “in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property.”⁸⁶⁵

b. The Permanent Nature Of The California Measures Makes Them Far More Than “Ephemeral” For The Purpose Of Expropriation Analysis

438. In addition to the economic impact of the measures at issue, there is a temporal aspect of the measure’s overall interference with the property right that must be considered in determining if they constitute an expropriation. In general, the requirement is laid out as a variation on that expressed by the *Tippetts* tribunal, *i.e.*, that the deprivation must be more than “merely ephemeral.”⁸⁶⁶ While there is no set period of time for which a measure must be in place before this standard is satisfied, the case law on point leaves little doubt that a permanent deprivation, such as that effected by the federal and state measures, is sufficient to be tantamount to an expropriation.

439. The *Tippetts* standard has been applied in a number of subsequent investment arbitral tribunal decisions. In *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, for example, the tribunal stated that “in circumstances where the taking is through a chain of events, the taking will not necessarily be found to have occurred at the time of either the first or the last such event, but rather when interference has deprived the Claimant of fundamental rights of ownership and such deprivation is ‘not merely ephemeral,’ or when it becomes an ‘irreversible deprivation.’”⁸⁶⁷

(...continued)

⁸⁶⁴ SOF, ¶ 394.

⁸⁶⁵ *Metalclad* Award ¶ 103.

⁸⁶⁶ *Tippetts* Award No. 141-7-2.

⁸⁶⁷ *Phillips Petroleum Co. Iran v. Iran*, Award No. 425-39-2, 21 Iran-U.S. C.T.R. 79 (1989).

440. This requirement was also emphasized in *Wena Hotels Ltd. v. Arab Republic of Egypt*, where the tribunal held that being deprived of access to the investment for only one year was sufficient to have deprived the investor of its enjoyment of the investment in a manner which was more than ephemeral.⁸⁶⁸ The tribunal noted that once the claimant's hotels were returned, they were not in the same operating condition that they had been in before the seizures, and were not given permanent operating licenses, which Egypt had revoked prior to restoring the hotels to Wena's control.

441. In *S.D. Myers v. Canada*, the tribunal held that Canada's prohibition of the export of PCB waste from Canada to the U.S. was not "tantamount to expropriation" because the ban was temporary (no more than 18 months) and the regulation did not benefit directly the Canadian exporting authority.⁸⁶⁹ In the instant case, the California legislature has expressly determined that the complete backfilling measures were intended to "permanently" block the Glamis Imperial Project,⁸⁷⁰ and the Governor has determined that "sacred sites are more precious than gold . . ." to the State of California.⁸⁷¹ Notably, the *S.D. Myers* tribunal recognized that "in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial and temporary."⁸⁷²

442. As these cases show, there is no designated period of time for which a regulation must be in place before it can be considered substantial enough to be expropriatory. The duration of the regulation is closely tied to the extent of interference to the investment caused by the

⁸⁶⁸ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Award) (Dec. 8, 2000).

⁸⁶⁹ *S.D. Myers, Inc. v. Canada*, UNCITRAL, ¶ 284 (Partial Award) 232 I.L.M. 408 (November 13, 2000).

⁸⁷⁰ SOF, ¶ 371-78.

⁸⁷¹ *Id.* ¶ 377.

⁸⁷² *S.D. Myers* Partial Award ¶ 283.

measures at issue. Thus, a central issue is whether the interference has deprived the Claimant of fundamental rights of ownership and such deprivation is not merely ephemeral.⁸⁷³

443. In the instant case, SB 22 was signed into law on April 7, 2003 – making the complete backfilling and grading requirements permanent. Likewise, the complete backfilling and site-recontouring requirements of Section 3704.1 of Title 14 of the California Code of Regulation were made permanent on April 10, 2003. These measures are far from being “merely ephemeral.” Thus, consideration of the “degree of interference,” including the extent and duration of the interfering measures, mandates a finding that the California measures are tantamount to expropriation.

2. Respondent’s Measures Severely Interfered With Glamis’ Legitimate, Investment-Backed Expectation Of Being Able To Mine In The Imperial Project Area

444. In evaluating whether measures rise to the level of being expropriatory, arbitral tribunals also consider the extent to which the government action interferes with distinct, reasonable investment-backed expectations.⁸⁷⁴ Thus, the tribunal in *Tecmed* analyzed whether the Mexican government’s measures were “reasonable with respect to their goals, the deprivation of economic rights *and the legitimate expectations of who suffered such deprivation.*”⁸⁷⁵ The tribunal stated:

even before the Claimant made its investment, it was widely known that the investor expected its investments in the Landfill to last for a long term and that it took this into account to estimate the time and business required to recover such investment and obtain the expected return upon making its tender offer for the acquisition of the assets related to the Landfill. To evaluate if the actions attributable to the Respondent – as well as the Resolution [not to re-new the license] – violate the Agreement, such

⁸⁷³ *Tippetts* Award No. 141-72-2, III.1.

⁸⁷⁴ OECD 2004, *supra* note 42, at 20.

⁸⁷⁵ *Tecmed* Award ¶ 122.

expectations should be considered legitimate and should be evaluated in light of the Agreement and of international law.”

The tribunal found that Mexican government’s decision not to renew Tecmed’s permit to operate its hazardous waste site amounted to an expropriation.⁸⁷⁶

445. In the instant case, Glamis had a legitimate expectation that it would be permitted to conduct open-pit mining – a common mining method in the California Desert and elsewhere in the United States and worldwide⁸⁷⁷ – to extract its identified valuable mineral deposit at the Imperial Project.⁸⁷⁸ Glamis’ mining plan of operations was technically and economically sound, and in accordance with applicable regulatory requirements.⁸⁷⁹ As discussed below, during the first decade of Glamis’ multi-million dollar investments into the Imperial Project from 1987 to 1996, there was no way Glamis could possibly have anticipated that despite Congress’ express promise that there would be no “buffer zones” around the designated wilderness areas under the 1994 California Desert Protection Act, the Imperial Project area would nonetheless be blocked to preserve cultural resource values that had not previously been revealed as such during many years of BLM investigation and consultation.⁸⁸⁰ Indeed, during the early 1990s the Quechan Tribe

⁸⁷⁶ *Id.* ¶ 149.

⁸⁷⁷ SOF, ¶ 139-144, 237-238.

⁸⁷⁸ Indeed, the BLM’s September 27, 2002 *Mineral Report* had already found that underground mining methods were infeasible. SOF, ¶ 255.

⁸⁷⁹ *See generally* Leshendok Report.

⁸⁸⁰ *See generally* Sebastian Report.

itself was aggressively pursuing mineral exploration searching for “bulk mineable gold deposits” like those being developed by Glamis and others. That aside, Glamis could not possibly have foreseen that the Federal and California State governments would, respectively, overturn longstanding rules and administrative precedent to advance a political agenda and enact an unprecedented *de facto* ban on open pit metallic mineral mining to accommodate the sudden newfound opposition to the project.⁸⁸¹

a. The Historical Framework For Mining In The California Desert Was Favorable

446. The California Desert is renowned as one of the most highly mineralized areas in the United States – as a result, during the course of the last century mining in the California Desert had evolved into a multi-billion dollar industry. Gold is particularly prevalent in the Desert, and as of 1998 nearly half of all of the gold mines operating in the State of California were operating in the California Desert.⁸⁸² In fact, there are three open pit gold mines located within a dozen miles of the Imperial Project area – one of which, the Picacho mine, belonged to Glamis. To be sure, mining in the California Desert was not entirely unrestricted. The United States and the State of California each have, over time, adopted a variety of protections and restrictions specifically tailored to balance environmental and cultural concerns against the commercial benefits of mineral extraction. Indeed, as discussed in detail below, it was the assiduousness and thoroughness of these efforts – which by 1994 had conspicuously *excluded* the

⁸⁸¹ See generally Leshendok Report.

⁸⁸² SOF, ¶ 123.

Imperial Project area from certain designated wilderness areas where new mining was prohibited – that formed the foundation of Glamis’ reasonable reliance and expectation that it would be able to mine in the Imperial Project area.

447. As detailed in the Statement of Facts, those efforts began thirty years ago, in 1976, when the United States began what would become a nearly two decade long process of identifying areas of environmental and cultural concern in the vast California Desert. That process included a panoply of studies and reviews, and it also featured unprecedented levels of consultation with local Native American tribes, including Quechan tribal elders, who were asked to identify areas of particular concern.⁸⁸³ The passage of the California Desert Protection Act in 1994 was the culmination of that comprehensive assessment of the region, and under that Act, mining operations remained authorized in the Imperial Project Area. After this statutory codification of the status of the area, Glamis began to increase its multi-million dollar investment and proceed with full mine development. In doing so, Glamis was relying on Respondent’s explicit promise *in statutory text* (as well as legislative history) that it “did not intend for the designation of wilderness areas . . . to lead to the creation of protective perimeters or buffer zones around any such wilderness area.”⁸⁸⁴ The 1994 Act thus set the stage for Glamis’ submission of its mining plan of operations for the Imperial Project, which was unassailable from both a legal and a technical perspective.

⁸⁸³ See Sebastian Report ¶ I.A., p. 6, and ¶ V.B, pp. 20-24.

⁸⁸⁴ SOF, ¶ 114; *see also* Statement of K. McArthur ¶ 10-11 (expressing reliance on “no buffer zone” language in 1995).

**b. Glamis' Mining Plan Of Operations Was Technically
And Economically Sound**

448. As Mr. Leshendok concludes in his expert report on the Glamis Imperial Project,

An assessment of the public and Glamis Gold Ltd. records shows that the proposed [Imperial Project] plan of operations was developed in a standard manner consistent with many other open pit gold mining operations in the California Desert Conservation Area. The sequence and substance of Glamis' acquisition of mineral rights, exploration, predevelopment activities, plan preparation, review, application of technically and economically feasible mitigation measures and proposed operating and reclamation practices were consistent with the pattern and practices of other active open pit gold mining plans approved within the California Desert Conservation Area by BLM, the Counties and State.⁸⁸⁵

449. Mr. Leshendok's findings, exhaustively researched and detailed in his accompanying report, are not surprising given that since the issuance by BLM and Imperial County of the second draft EIS in 1997 (which found Glamis' plan to be the "preferred alternative"), no material defect in Glamis' mining plan of operations has ever been identified. Indeed, had any such defect existed, BLM would not have found it necessary to resort to such a "bold action" as the radical reinterpretation of the law, taken by former Interior Solicitor Leshy, to justify the plan denial. BLM itself put it best when it noted in its May, 1998 "Options Paper" that "[t]he mining proposal appears to have merit under the 1872 mining law, the mining claims are properly recorded, a practical [plan of operations] was submitted in accordance with 3809 regulations."⁸⁸⁶

⁸⁸⁵ *Id.* ¶ 233 (citing Leshendok Report).

⁸⁸⁶ *Id.* ¶ 253 (citing BLM, Draft Option Paper, Imperial Project (Chemgold) – Glamis Corp (May 7, 1998) (MV004193)).

450. In short, the measures that culminated in the expropriation of Glamis' property were not the result of any defect in Glamis' plan. Rather, they were a function of a political agenda to reinterpret the applicable mining laws coupled with the Quechan Tribe's belated, unforeseen, and unforeseeable opposition to the mine. The initial result was a Federal effort to gerrymander the law via Interior Solicitor Leshy's opinion to confer an entirely new discretionary veto authority on the Secretary of Interior. When that unlawful effort eventually failed, the State of California stepped in to adopt unprecedented and unjustified changes in its mine reclamation requirements designed specifically to kill the Glamis Project. Both the federal and state measures were radical and unprecedented, and the extraordinary facts of this case conclusively demonstrate that there was no way that Glamis could reasonably have foreseen that the U.S. would initiate such unusual and convoluted efforts to preserve a portion of the California Desert at the expense of Glamis' property rights.

c. Glamis Had No Basis To Suspect That The Quechan Would Identify The Imperial Project Area As Being A Sacred Site In Need Of Protection

451. In the 20 years between 1976 and 1996 when the California Desert Conservation Area was the subject of extensive environmental and cultural studies, the Imperial Project Area was notable only in its absence among the identified areas of concern. At no point in that lengthy and detailed evaluation process could Glamis have suspected that the Quechan Tribe had grave concerns about the project area, much less that it viewed it as analogous to "Jerusalem or Mecca."⁸⁸⁷

452. No such concerns arose:

⁸⁸⁷ *Id.* ¶ 242.

- In 1980, following consultation with five Quechan elders, when BLM issued the California Desert Conservation Area Plan, which did not designate the Imperial project area as an area with significant Native American cultural values;⁸⁸⁸
- In the BLM’s 1987 management plan for the Indian Pass ACEC, about one mile north of the Imperial Project site, which noted that there was “no evidence” of contemporary Native American use of the area;⁸⁸⁹
- In the 1991 cultural resource survey (which featured the active participation of Mr. Cachora, Tribal Historian), the report of which made no mention of the area being viewed as sacred;⁸⁹⁰
- In the lead-up to the passage of the landmark California Desert Protection Act in 1994, which did not establish a protected wilderness area encompassing the Imperial project area;⁸⁹¹
- Between 1991 and 1996, when BLM approved at least seven intensive Glamis exploratory drilling plans of operation without any objection by the Quechan Tribe;⁸⁹²
- Or in 1995 when the Quechan Tribal historian, Lorey Cachora, participated extensively in another major cultural resource survey of the Imperial Project site.⁸⁹³

453. The fact is that as of December 1994, when Glamis submitted its mining plan of operations, there was no reason to believe that whatever cultural value the Imperial Project area embodied was of such significance that long-governing rules would be broken and remade simply to stop the Imperial Project.

⁸⁸⁸ Regarding the government’s consideration of Native American interests during the legislative process, Dr. Sebastian notes that “the substantial effort the ABLM devoted to tribal consultation during the development of the California Desert Conservation Area Plan (BLM Desert District 1980) was unprecedented.” Sebastian Report at 20.

⁸⁸⁹ SOF, ¶¶ 103-110.

⁸⁹⁰ *Id.* ¶ 110.

⁸⁹¹ *Id.* ¶¶ 163-164.

⁸⁹² *Id.* ¶¶ 163-164, 180-181.

⁸⁹³ *Id.* ¶¶ 188-190.

454. In fact, Pilot Knob, by contrast, was an area that the Quechan tribe repeatedly had identified as one of its most important areas.⁸⁹⁴ Yet in 1988, the Tribe sought and obtained U.S. Interior Department funding to conduct exploratory drilling to evaluate gold deposits virtually at the foot of Pilot Knob, even identifying the newly discovered gold deposit (which became the Imperial Project) near Indian Pass as a basis for justifying the exploration. Meanwhile, by the mid-1990s, the Mesquite, Rand, Picacho and American Girl open pit gold mines, all were operating profitably – despite being located with the CDCA areas containing similar cultural artifacts as those at the Imperial Project site.

455. In light of the Tribe’s nearly decade-long silence from 1987 through 1996 as to its views on the Imperial Project area (not to mention its willingness to accept and engage in mineral development activity searching for “bulk mineable” gold deposits in or near areas that it in fact previously deemed sacred), the ongoing mining activity in the CDCA, and the 1994 Act’s express allowance of mining in the area and promise not to expand the areas withdrawn from mineral development, Glamis had no reason whatsoever to believe that the remnants of Native American culture in the area would be grounds to stop a lawful mine operation that conformed to all applicable laws and regulations. Moreover, even if Glamis had been aware of the significance attached to cultural sites in the area, their mere presence would not itself have caused Glamis to foresee difficulties in securing mining approval; rather, Glamis had always been prepared to accept mitigation measures subject to the prevailing standard in the BLM’s governing CDCA Plan, *i.e.*, that they be technically and economically feasible in light of the “prudent operator” standard embodied in the 3809 Regulations.⁸⁹⁵

⁸⁹⁴ *Id.* ¶ 106.

⁸⁹⁵ *Id.* ¶ 65.

d. Glamis Reasonably Believed That The Mining Laws Would Be Interpreted And Applied Consistently With Precedent

456. Until former Interior Solicitor Leshy issued his surprising opinion that “undue impairment” was somehow different from “unnecessary and undue degradation,” there was no way for Glamis to foresee that the ACHP consultation process could give rise to a denial of a mining plan of operations that was technically sound and incorporated prevailing best practices for *environmental* and cultural resource mitigation. Even ACHP – which wanted Interior to take lawful means to stop the project – candidly remarked in March of 2000 about the reinterpretation and noted the dramatic policy shift:

Previously, BLM has taken a restrictive view of its authority to actually deny a proposed mining plan of operations and has looked instead to developing mitigation measures that can be incorporated into the plan. The most recent legal opinion from DOI *departs from BLM’s traditional interpretation*.⁸⁹⁶

457. That “traditional interpretation” dated back to at least 1980, when BLM promulgated the “3809 Regulations” implementing FLPMA. BLM’s 3809 Regulations precisely defined “unnecessary and undue degradation” based on the so-called “prudent operator standard,” which defined “unnecessary or undue degradation” as surface disturbance *beyond* what would be caused *by the mining activity* were it to be undertaken by a prudent operator.⁸⁹⁷ Prevention of “undue impairment” was implemented by the reference to the 3809 Regulations and imposition of technically and economically feasible mitigation measures.⁸⁹⁸

⁸⁹⁶ *Id.* ¶ 327, fn. 646.

⁸⁹⁷ *Id.* ¶ 65.

⁸⁹⁸ *Id.* ¶ 66.

458. The BLM's Environmental Impact Statement issued in 1980 in conjunction with the 3809 Regulations confirmed that the "unnecessary or undue degradation" standard was not designed as, or intended to be, a discretionary veto power.⁸⁹⁹ Moreover, with respect to the NHPA, it specifically noted that "If, upon compliance with the [NHPA], the cultural resources cannot be salvaged or damage to them mitigated, the plan must be approved."⁹⁰⁰ The plain language of the rulemaking thus precluded any possibility of a mining plan of operations veto power, let alone one tied to cultural resource findings under the NHPA.

459. Given the plain language of the 3809 Regulations and preamble, it was inconceivable to Glamis that such a veto power could or would be established via a "reinterpretation" of the statute's "undue impairment" provision. Glamis was not alone in this regard. Throughout the period when Glamis' mining plan of operations was in BLM limbo, government representatives were confirming that their understanding of the Mining Laws was in accord with that of Glamis, and with the 3809 Regulations. Thus, in the 1996 Draft EIS/EIR, BLM pointed out:

The No Action (no project) Alternative forms the baseline from which the impacts of all other alternatives can be measured. Such action would likely not be consistent with the 1872 Mining Act and BLM implementing regulations. It would also generally not be consistent with the BLM multiple use mission and policy of making public lands available for a variety of uses, as long as these uses are conducted in an environmentally sound manner, since the subject lands were not withdrawn for any special use and were open, unappropriated lands when unpatented mining claims were staked.⁹⁰¹

460. In keeping with this analytical framework, in a 1997 consultation with the Quechan Tribe, California State BLM Director Ed Hastey remarked that in reviewing any

⁸⁹⁹ *Id.* ¶ 68.

⁹⁰⁰ *Id.* ¶ 67, fn. 103 (citing 45 Fed. Reg. 78,902, 78,905 (Nov. 26, 1980)).

proposed mining operation “the only criterion for BLM is whether the proposed project is a valid operation.”⁹⁰² In fact, State Director Hasteley indicated that absent a negative finding in the validity examination, BLM was “‘kind of hamstrung’ when it comes to 1872 mining law rights”⁹⁰³ This notion was echoed in a message KEA was prepared to send to the tribe in September 1997, which stated: “The proposed project is a non-discretionary action. That is, the BLM cannot stop or prevent the project from being implemented, pursuant to the 1872 Mining Act, provided that compliance with other Federal, State, and Local laws and regulations is fulfilled. As a consequence, there is a strong possibility that the proposed mining project may be approved.”⁹⁰⁴

461. BLM’s May, 1998 “Options Paper” regarding the Imperial Project provided additional color as to why BLM State Director Hasteley perceived the agency as being “hamstrung.” Evaluating the possible consequences of a denial of the plan of operations, the paper noted that “denial of the [plan] could constitute a taking of rights granted to a claimant under the Mining Law.”⁹⁰⁵ In drawing that conclusion, BLM listed the criteria – consistent with the 3809 Regulations – that Glamis’ plan had met: “The mining proposal appears to have merit under the 1872 mining law, the mining claims are properly recorded, a practical [plan of operations] was submitted consistent with 3809 regulations.”⁹⁰⁶ There was no discussion of the role of NHPA or the ACHP or any other agency in the analysis, because it was BLM’s settled

(...continued)

⁹⁰¹ *Id.* ¶ 215.

⁹⁰² *Id.* ¶ 243.

⁹⁰³ *Id.*

⁹⁰⁴ *Id.* at fn. 478.

⁹⁰⁵ *Id.* ¶ 253 (citing BLM Draft Option Paper, Imperial Project (Chemgold) – Glamis Corp (May 7, 1998) (MV004193)).

⁹⁰⁶ *Id.*

understanding that the input of such purely advisory agencies could not constitute the basis for a denial under the existing law and regulations. Rather, they could only propose additional mitigation for BLM's consideration.

462. The Leshy Opinion, however, came to a different conclusion, by seizing on statutory language in FLPMA that he claimed was left undefined by the 3809 Regulations. Specifically, the statute granted BLM the authority, "subject to valid existing rights," to promulgate "such measures as may be reasonable to protect the scenic, scientific, and environmental values of the public lands of the [CDCA] against *undue impairment*, and to assure against pollution of the streams and waters within the [CDCA]." ⁹⁰⁷ To avoid the settled definition of "unnecessary and undue degradation," the Leshy Opinion argued that "undue impairment" was something different – stretching its application from the "scenic, scientific, and environmental" values specified to "cultural resources" which elsewhere FLPMA treated distinctly from "scenic, scientific and environmental" resources. ⁹⁰⁸ He then argued that this "undue impairment" language, despite decades of contrary interpretation, could be read, *without further implementing regulations*, to provide BLM discretionary veto authority to prevent "substantial irreparable harm" to significant cultural resources. ⁹⁰⁹ To suggest that this view came as a surprise to Glamis would be a drastic understatement.

463. Given the prevailing understanding of what the law and regulations did and did not allow *vis-à-vis* mining plan review, the Leshy Opinion reflected a seismic shift in the governing rules – supporting precisely the sort of veto power that the plain language of the duly promulgated regulations did not allow. Even BLM acknowledged the magnitude of the change –

⁹⁰⁷ *Id.* ¶ 50 (citing 43 U.S.C. § 1781(f) (emphasis added)).

⁹⁰⁸ *See* 43 U.S.C. § 1781(a)(1) and (f).

when the agency eventually rescinded in October 2001 the revised version of the 3809 Regulations incorporating the Leshy veto authority; it remarked that “*as a matter of basic fairness, we should not have adopted this truly significant provision without first providing affected entities an opportunity to comment both as to its substance and as to its potential impacts.*”⁹¹⁰ BLM senior manager Bob Anderson, in a message commenting favorably on the Myers Opinion that rescinded the Leshy Opinion, clearly and concisely summarized BLM’s long-standing view:

We purposely did not define undue impairment in 1980 because we all concluded it meant the same as undue degradation . . . i.e., it is OK to have due degradation and it is OK to have due impairment, but the undue stuff, we can’t allow.⁹¹¹

464. In 1994, when it submitted its mining plan of operations, Glamis’ understanding – based on the plain language of the law and regulations – was no different from that of BLM’s Mr. Anderson in 1980 (and 2001), that of BLM’s Mr. Hasteley in 1997, and that of Interior Solicitor Myers in 2001. Given that the prevailing view in and outside of BLM supported that understanding, Glamis’ expectation that FLPMA would be interpreted on the basis of that prevailing view was eminently reasonable.

(...continued)

⁹⁰⁹ SOF, ¶ 325.

⁹¹⁰ *Id.* ¶ 78 (citing 66 Fed. Reg. 54,834, 54,837 (Oct. 30, 2001)).

⁹¹¹ *Id.* ¶ 344 (citing BLM E-mail from Bob Anderson to Karen Hawbecker (Oct. 26, 2001) (D-00389-0136-001)).

e. Glamis Reasonably Expected That The United States Would Accommodate The Concerns Of The Quechan Tribe Without Blocking The Imperial Project

465. Glamis reasonably expected that the United States would accommodate the stated concerns of the Quechan Tribe by imposing mitigation measures subject to economic and technical feasibility as provided in the CDCA Plan and the 3809 Regulations. Such an approach would have been consistent with the way the United States previously had treated every other known development project in the CDCA region, including the Mesquite open pit gold mine in Imperial County, the Picacho and Rand open pit mines operated by Glamis, and the 80-mile Baja pipeline project which traversed multiple Native American historic trails.⁹¹²

466. Moreover, Glamis' expectation that the Quechan's concerns would not be a basis for the United States to prevent the Imperial Project was consistent with applicable federal court decisions involving similar concerns. The U.S. Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*⁹¹³ held that Native American religious beliefs regarding a particular parcel of federal land would not provide a legal basis to block a proposed land development project (timber harvesting), either under the First Amendment to the U.S. Constitution or under the 1978 American Indian Religious Freedom Act.⁹¹⁴ As the U.S. Supreme Court stated, "[w]hatever rights the Indians have to use the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, its land."⁹¹⁵ The U.S. Supreme Court further explained:

⁹¹² See generally Sebastian Report and Leshendok Report.

⁹¹³ *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

⁹¹⁴ 42 U.S.C. § 1996

⁹¹⁵ *Lyng*, 485 U.S. at 453.

No disrespect for these [Native American religious] practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property. Even without anticipating future cases, the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion, would be far from trivial: the District Court's order [reversed by the Court] permanently forbade commercial timber harvesting, or the construction of a two-lane road, anywhere within an area covering a full 27 sections (*i.e.*, more than 17,000 acres) of public land.⁹¹⁶

467. Notably, the *Lyng* decision was followed in *Havasupai Tribe v. United States*,⁹¹⁷ which involved a conflict between Native American religious values and property rights to unpatented mining claims under the 1872 Mining Law. The *Havasupai* case involved the proposed Canyon Uranium Mine in a National Forest in Arizona. As the court recounted, the "Havasupai assert that the Canyon Mine site is sacred and any mining will interfere with their religious practices at and near the mine, and will kill their deities, and destroy their religion."⁹¹⁸ The district court found *Lyng* dispositive of the tribe's claims under the First Amendment, stating that the tribal plaintiffs were "not penalized for their beliefs, nor are they prevented from practicing their religion."⁹¹⁹ Further, regarding the plaintiff's NEPA claims, the district court found that the consideration of the "no action" alternative was properly presented in the context of constraints under the Mining Law, approvingly quoting passages from the EIS on the project such

⁹¹⁶ *Id.*

⁹¹⁷ *Havasupai Tribe v. United States*, 752 F. Supp. 1471 (D. Ariz. 1990), *aff'd* 943 F.2d 32 (9th Cir. 1991), *cert denied*, 503 U.S. 959 (1992).

⁹¹⁸ *Id.* at 1484.

⁹¹⁹ *Id.* at 1485.

as the following: “it would be inaccurate if the EIS did not reflect to some extent the rights of a mining claimant under the General Mining Law and recognize some limits on Forest Service discretion when reviewing a Plan of Operations.”⁹²⁰ The court held that the “Forest Service cannot categorically deny an otherwise reasonable plan of operations.”⁹²¹ The court stated further:

Of course, the Forest Service would have the authority to deny an unreasonable plan of operations or a plan otherwise prohibited by law. *E.g.*, 16 U.S.C. § 1538 (endangered species located at a mine site). The Forest Service would return the plan to the claimant with the reasons for the disapproval and request submission of a new plan to meet the environmental concerns.⁹²²

The statement of the law and settled administrative practices in the 1990 *Havasupai* decision is consistent with the CDCA Plan as administered by the BLM and as understood in the 1990s by Glamis in the California Desert.⁹²³

f. Glamis Reasonably Believed That Any Required Mitigation Measures Would Be Subject To Technical And Economic Feasibility

468. As late as September 27, 2002, Interior’s BLM verified the reasonableness of Glamis’ investment-backed expectations when it released its *Mineral Report*, finding that “a person of *ordinary prudence*” would be “*justified*” in making further expenditures with a “reasonable prospect” of developing a paying mine.⁹²⁴ This finding is essentially a federal government determination that Glamis had reasonable investment-backed expectations as of 1998 and 2002. Glamis had every reason to believe that its Imperial Project plan of operation would be

⁹²⁰ *Id.* at 1491 (approvingly quoting Forest Service EIS).

⁹²¹ *Id.* at 1492.

⁹²² *Id.*

⁹²³ *See generally* Leshendok Report; Statement of K. McArthur at ¶¶ 4-19.

⁹²⁴ SOF, ¶ 347.

approved, and no reason to believe that it would be required to comply with unprecedented and economically infeasible complete backfilling measures.

469. Complete backfilling requirements have been widely recognized as infeasible and of questionable environmental benefit. Thus, the National Academy of Sciences/National Research Council (“NAS/NRC”) determined in their report on surface mining that “such backfilling of a large open pit would be of uncertain environmental and social benefit . . .”⁹²⁵ Complete backfilling also is problematic in that it precludes any possibility of further mining at the site.

470. Putting aside the uncertain environmental benefit and the foreclosure of any possibility of further site mining, the principal problem with full backfilling is that it is generally cost-prohibitive and economically infeasible. As NAS/NRC’s found, complete backfilling “is generally not technically feasible for non-coal minerals, or has limited value because it is *impractical, inappropriate or economically unsound.*”⁹²⁶ Given the prohibitively high expense of complete backfilling coupled with the CDCA Plan’s requirement that reclamation requirements be subject to “technical and economic feasibility,” it is hardly surprising that no such requirement was ever imposed on any of the other mines in the CDCA, including Glamis’ own operations.

471. “Maximum pit backfilling” was rejected in the context of the Castle Mountain Project⁹²⁷ as well as the Briggs Mine in Inyo County, California, which, like the Imperial Project

⁹²⁵ *Id.*, ¶ 74; *see also id.* ¶ 137 (discussing BLM’s rejection of a “maximum pit backfilling” requirement on the grounds that it had a “greater impact” than traditional open-pit reclamation methods on water resources, wildlife, air quality, and visual resources and that it “foreclose[d] opportunities for future mining of pit walls.”).

⁹²⁶ *Id.* ¶ 391.

⁹²⁷ *Id.* ¶ 388-89 (referencing Castle Mountain Final EIS/EIR, at 3-37 to 3-38 (Aug. 17, 1990) (CON003272 to CON003314, at CON003293 to CON003294)).

area, sat on CDCA Class L lands.⁹²⁸ Nor was the Mesquite Mine, located 12 miles west of the Imperial Project and operated during the 1980s and 1990s, ever subjected to a complete backfilling requirement notwithstanding that it was over three times larger than the Imperial Project would have been.⁹²⁹ Finally, neither of Glamis' own CDCA mines, the Rand Mine or the Picacho Mine, were subjected to a complete backfilling requirement.

472. Complete backfilling was not only an anomaly in the CDCA – the fact is that prior to California's passage of its emergency regulations, no North American or Latin American jurisdiction had ever imposed mandatory complete backfilling upon metallic mines through a regulatory requirement.⁹³⁰ BLM even rejected such a requirement in the context of the Imperial Project itself – the November, 1996 Draft EIS/EIR (for the second time) selected Glamis' proposed partial backfilling plan, including “the applicable mitigation measures listed in Chapter 4 [of the proposal],” as the “preferred alternative.”⁹³¹ Notwithstanding the increased scrutiny of potential cultural resource impact that led to that second 1997 Draft EIS/EIR, BLM did not select a complete backfilling alternative, consistent with its practice in every other known metallic mine in or outside of the CDCA. Under those circumstances, when Glamis submitted its initial proposal in 1994, there was simply no reasonable basis to conclude or even imagine that the proposal would remain pending seven years later and that California would enact such a requirement to finally and fully devalue it.

g. Glamis' Expectations Were Reasonable Under U.S. Law

⁹²⁸ *Id.*

⁹²⁹ *Id.* ¶ 127-29, fn. 242; *see* Leshendok Report, ¶¶ 88, 101-103.

⁹³⁰ *See* Statement of K. McArthur, ¶¶ 2, 18-20; Behre Dolbear Report, at 21-23; Leshendok Report, ¶¶ 162-166.

⁹³¹ SOF, ¶¶ 193, 215 (referencing Draft EIS/EIR of the Glamis Imperial Project (Nov. 1997)).

473. In terms of the overall reasonableness of expectations, the instant case contrasts significantly with the facts in *United States v. Locke*, which involved unpatented mining claims and in which the Court refused to “compensate the owner for the consequences of his own neglect.”⁹³² The mining claimants had in *Locke* had failed to timely file a notice of intention to hold a mining claim, as required by a newly enacted federal recording system.⁹³³ As a result, the BLM notified appellees that their claims had been abandoned and declared void by operation of the statute.⁹³⁴ Applying a parallel analysis from *Texaco v. Short*, which involved fee simple mineral interests, the U.S. Supreme Court held that “regulation of property rights does not ‘take’ private property *when an individual’s reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed.*”⁹³⁵ The Court found it significant that the “property loss was one appellees could have avoided with *minimal burden*; it was their failure to file on time – not the action of Congress – that caused the property right to be extinguished.”⁹³⁶

474. Unlike the parties in *Locke*, Glamis here has taken every possible step to maintain the mining interests it first acquired in 1987. Furthermore, the regulatory burden imposed here is neither “reasonable” nor “minimal.” Rather, Respondent has imposed an intentionally severe and

⁹³² *United States v. Locke*, 471 U.S. 84, 107 (1985) (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982)). In *Texaco*, the appellant’s mining interests were deemed abandoned according to an Indiana statute because the site had not been used for 20 years and no statement of claim had been filed. Appellant claimed that the lack of prior notice of the lapse of their mineral rights deprived them of property without due process of law and that the statute effected a taking of private property for public use without just compensation. The Supreme Court affirmed the lower court’s holding, however, that the Indiana Dormant Mineral Interests Act was a permissible exercise of the state’s police powers. The Court held that there had not been a taking because it was the owner’s own failure to make use of the property, and not the action of the State, that caused the lapse of the property right. Neither the filing requirement nor the use requirement itself constituted a taking, and therefore no compensation was required.

⁹³³ *Locke*, 471 U.S. at 107.

⁹³⁴ *Id.*

⁹³⁵ *Id.* (emphasis added).

cost prohibitive regulatory burden designed to destroy Glamis' entire investment. Accordingly, Glamis' reasonable, investment-backed expectations have been destroyed.

475. *Reeves v. United States*, another takings case from the Federal Claims Court involving mining claims and FLPMA, also is instructive. In *Reeves*, the court ruled that a denial of a mining plan of operations was not a taking of the property interests in unpatented mining claims, but only because the area had been located in a *previously designated* Wilderness Study Area ("WSA") and a statutory "*nonimpairment standard*" under Section 603 of FLPMA, 43 U.S.C. § 1782(c), applied to all activities on such mining claims.⁹³⁷ The court noted that Mr. Reeves "located the mining claims on September 1, 1996, *well after the date the land had been designated a WSA.*"⁹³⁸ The court further reasoned that the "status of the land as a WSA continues to this date, and Congress has not made a final determination regarding the Carcass Canyon WSA's suitability for wilderness preservation. Therefore, the area in which plaintiffs' mining claims are located remains subject to the nonimpairment standard."⁹³⁹

(...continued)

⁹³⁶ *Id.* (emphasis added).

⁹³⁷ *Reeves v. United States*, 54 Fed.Cl. 652 (2002).

⁹³⁸ *Id.* at 669 (emphasis added).

⁹³⁹ *Id.*

476. The *Reeves* Court expressly contrasted the “nonimpairment” standard applicable to WSAs, with FLPMA’s “less stringent, default management standard, unnecessary or undue degradation’.”⁹⁴⁰ As the court explained, “[p]laintiffs attempt to create the present situation with the status of a specifically enumerated exception in hopes that the default management standard of “unnecessary or undue degradation” would apply, but the statute and the regulations fail to support such an exception.”⁹⁴¹

477. The brief of the United States, dated August 29, 2000, filed in *Reeves* also is illuminating. It began by stating that: “[w]here previously, pursuant to the 1872 Mining Law, a claimant could engage in mineral exploration and operations on public domain lands, after FLPMA a mining *claimant no longer acquired those rights if the claim had been staked in an area which had previously been designated as a WSA.*”⁹⁴²

⁹⁴⁰ *Id.* at 667.

⁹⁴¹ *Id.*

⁹⁴² U.S. Defendant’s Supp. Brief at 8, filed in *Reeves v. U.S.*, Aug. 29, 2000 (emphasis added); The government further explained that:

“By analogy, here the right which Plaintiffs argue has been taken from them – the right to mine in violation of the nonimpairment standard – is not a right that they acquired when they staked their claim. This is because at the time Plaintiffs staked their mining claims, the area in question was part of a wilderness study area.^{8/} As such, Congress had determined in Section 1782 that it was no longer going to permit citizens to acquire the right to conduct mining operations which would impair the suitability of the area for wilderness preservation.

Here, because the restriction being imposed by the government reflects “a pre-existing limitation upon the landowner’s title,” no taking has occurred. *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1029. And, this is true even though the regulatory action “may well have the effect of eliminating the land’s only economically productive use....” *Id.* at 1029-30....

^{8/} The fact that Plaintiffs staked their mining claims after the creation of the WSA is, of course, extremely relevant. Because the claims were staked after the creation of the WSA, any property rights they acquired were acquired subject to, inter alia, the nonimpairment provisions of Section 1782....”

478. In contrast to the *Reeves* facts, the Glamis mining claims always have been located *outside* of the designated WSAs in the California Desert, and thus never subject to the FLPMA “nonimpairment” standard. The governing Interior Department Solicitor’s Opinion issued on October 23, 2001, and approved by Interior Secretary Norton, confirmed BLM’s longstanding view that the Glamis mining claims were subject to the less stringent “unnecessary or undue degradation” standard, not the “nonimpairment” standard applicable to WSAs. BLM’s California Desert Conservation Area Plan has provided since 1980 that mining operations could proceed outside WSAs, subject only to mitigation measures that are consistent with technical and economic feasibility.⁹⁴³

479. In sum, Glamis proceeded with the bulk of its investment in the Imperial Project after the 1994 legislation and in reliance on Congress’ express promise in the CDCA not to permit “buffer zones” that would extend the more stringent requirements applicable to WSAs to the Imperial Project site. Glamis’ understanding of and reliance on that legislation and the process leading up to it, its understanding as to the Quechan Tribe’s position on the Imperial Project area, its understanding of the applicable standards governing BLM permitting of mining plans of operations, and its understanding of applicable state reclamation and mitigation requirements all led Glamis to the expectation that the Imperial Project would be viable. Given the facts available to Glamis at the time, that expectation was reasonable, and indeed any other conclusion would have been manifestly unreasonable.

⁹⁴³ SOF, ¶¶ 65-69.

3. The Character Of California's Measures Confirms Their Expropriatory Nature

480. The “character” of the governmental conduct at issue is the final consideration for arbitral tribunals in evaluating expropriation claims. This concept incorporates a balancing test where the factors favoring a deferential view of governmental conduct are weighed against the effects of the deprivation suffered by the property owner. This balancing test, however, is only required in cases where there has been a substantial deprivation of property rights – not in cases where there has been a total deprivation.⁹⁴⁴

a. The Total Deprivation Of Glamis' Investment Based On The California Measures Eliminates The Need To Balance The Measures Against The Government's Justification For Them

481. Under U.S. domestic law, where regulation results in a total deprivation of all economically beneficial use, the courts treat that deprivation as a *per se* taking for which compensation must be paid without case-specific inquiry into the public interest advanced in support of the measure.⁹⁴⁵ Similarly, in the context of international investment disputes, tribunals have focused on the severity of the measure's effects over the government's justification for imposing them. As stated clearly by the *Tippetts* tribunal, “the intent of the government is less important than the effects of the measures on the owner and the form of the measures of control or interferences is less important than the reality of their impact.”⁹⁴⁶ The *Biloune* tribunal also held that the measures taken by the Ghanaian government constituted constructive expropriation

⁹⁴⁴ See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Lingle v. Chevron*, 544 U.S. 528 (2005); *Biloune v. Ghana Investments Centre*, (Awards of 1989 & 1990) 95 I.L.R. 183 (1993), *Phelps Dodge Corp. v. Iran*, ¶ 22 Award No. 217-99-2, 10 Iran-U.S. C.T.R. 121 (Mar. 19, 1986).

⁹⁴⁵ *Lucas*, 505 U.S. at 1015 (1992).

⁹⁴⁶ *Tippetts* Award No. 141-7-2, III.1

based on the *effect* of its actions and omissions, without concern for the motivations behind the government's measures.⁹⁴⁷ Similarly, in *Phelps Dodge Corp. v. Iran*, though the tribunal was cognizant and understanding of the government's legitimate motivations behind its actions, the effect on the claimant nonetheless warranted compensation.⁹⁴⁸ These cases suggest that the more far-reaching the economic impact of the measures at issue, the more ready tribunals and courts will be to find an indirect expropriation without inquiring further into the justification for the deprivation-causing regulation.

482. Here, the California backfilling and site-recontouring requirements have had the effect of completely destroying the entire economic and commercial value of Glamis' investment in the Imperial Project.⁹⁴⁹ In such a case, the total deprivatory effect of the measures and their uniquely severe and targeted impact upon Glamis demonstrates that there has been an expropriation, as in cases like *Lucas* and *Phelps Dodge*.⁹⁵⁰ Accordingly, compensation is required on this basis alone, without any further need to assess the "motivations for the actions and omissions" of the State of California.⁹⁵¹

⁹⁴⁷ *Biloune*, 95 I.L.R. at 209 ("The motivations for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case. What is clear is the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr. [sic] Biloune without possibility of re-entry had the *effect* of causing the irreparable cessation of work on the project." (emphasis added)).

⁹⁴⁸ *Phelps Dodge* Award No. 217-99-2 ¶ 22 ("The Tribunal fully understands the reasons why the Respondent felt compelled to protect its interests through this transfer of management, and the Tribunal understands the financial, economic and social concerns that inspired the law pursuant to which it acted, but those reasons and concerns cannot relieve the Respondent of the obligation to compensate Phelps Dodge for its loss.").

⁹⁴⁹ SOF ¶ 394.

⁹⁵⁰ *Phelps Dodge* Award No. 217-99-2 ¶ 22 (finding that Phelps Dodge was deprived of "virtually all of the value of its property rights in [its investment,] SICAB.").

⁹⁵¹ *Biloune*, 95 I.L.R. at 209.

b. Any Analysis Of The Proportionality Between The Means Employed And The Aim Pursued By California Further Demonstrates That Its Measures Are Tantamount To Expropriation

483. In cases where there has been a substantial (but not total) deprivation, tribunals and courts will weigh the legitimacy of the purpose against the deprivation suffered by the investor, while considering the proportionality of the means to their end.⁹⁵² Moreover, where there is at least a “substantial deprivation” which disappoints legitimate investment-backed expectations, all indicators point towards a finding of an indirect expropriation.⁹⁵³ It is then the host state’s responsibility to meet the burden of proof and legal persuasion that, contrary to all indications and likelihood, the deprivation contrary to legitimate expectation can be justified. The principle, as is typically the case with burdens of proof and persuasion, is that the party who alleges a defense, a legal theory in its favor, or evidence in its favor, must prove it.⁹⁵⁴ It would be counterintuitive to require the claimant whose property rights are taken to prove that the regulation causing that deprivation is unjustified, since “proving the negative” is frequently impossible. Application of such a balancing analysis, though unnecessary in Glamis’ case since it involves a total deprivation, further demonstrates that Glamis’ investment in the Imperial Project has been expropriated without compensation in violation of Article 1110.

⁹⁵² For the European Convention on Human Rights (ECHR) *Matos e Siva, Lda. v. Portugal*, 24 E.H.R.R. 573, ¶ 92 (1996); *Tecmed v. Mexico*, ICSID CASE No. ARB (AF)/00/2 (May 29, 2003).

⁹⁵³ See *Tecmed Award* ¶ 122.

⁹⁵⁴ Robert von Mehren, *Burden of Proof in International Arbitration*, in PLANNING EFFICIENT ARBITRATION PROCEEDINGS 123 (Vandenbergh ed., 1996).

484. Under the balancing analysis, the legitimacy of the government’s purpose in imposing the offending measures must be assessed. There is no blanket protection for regulatory actions under international law, as recognized by the *Tecmed* tribunal. The tribunal stated:

[W]e find no principle stating that regulatory administrative actions are *per se* excluded from the scope of the [investment] Agreement, even if they are beneficial to society as a whole – such as environmental protection – particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever.⁹⁵⁵

485. Speaking specifically to environmental measures, the tribunal in *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica* stated:

Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains.⁹⁵⁶

486. In addition to the assessment of the government’s purpose for the imposed measures, the effect on the investor must also be weighed. Furthermore, “[t]here must be a reasonable relationship of proportionality between the means employed and the aim pursued.” This approach was explained and applied by the *Tecmed* tribunal:

After establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, *whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection*

⁹⁵⁵ *Tecmed* Award ¶ 121.

⁹⁵⁶ *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, ¶ 72 (Award) (Feb. 17, 2000), 15 ICSID Rev.-Foreign Investment Law Journal (2000).

legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.⁹⁵⁷

487. Under the facts here, this test requires a weighing of the legitimacy or strength of California's purpose behind its backfilling and regrading measures against the impact of these measures on Glamis' Imperial Project, while considering whether the means employed were proportional to the aim pursued.

488. The emergency regulation (Section 3704.1 of Title 14 of the California Code of Regulation), which was subsequently made permanent, did not have a legitimate public purpose – indeed, it did not even purport to do so. From Governor Davis' initial direction to impose a new regulation to the alleged “emergency” justifying immediate action, the sole function was to stop the Glamis Imperial Project.⁹⁵⁸ The emergency regulation, by requiring – “without exception” – complete backfilling and site-recontouring for all proposed open-pit metallic mines within the State, rendered Glamis' mining project economically unfeasible. The regulations (both the emergency and permanent versions) certainly achieved the aim that they pursued – stopping the Glamis Imperial Project – but the imposition of extreme means to achieve an illegitimate end is not protected as non-compensable under Chapter 11 of NAFTA. Moreover, even assuming *arguendo* that there was a legitimate public purpose for imposing such regulations, the means were not proportional, as they had a severe deprivatory impact on Glamis in total disregard of the protection afforded investments under NAFTA.

⁹⁵⁷ *Tecmed Award* ¶ 122 (emphasis added).

⁹⁵⁸ SOF, ¶ 370 (referencing State Mining & Geol. Board, Exec. Officer's Report, at 4 (Dec. 12, 2002) (at AG000165) (“*The factual basis for such [an emergency] finding is that there is currently pending with the Bureau of Land Management an application for approval of a plan of operations for a large open pit gold mine (the Glamis Imperial Project). . . .*”)).

489. Like the emergency backfilling regulations at issue, the statutory enactment of the complete backfilling and mandate was intended and designed to “*permanently prevent the approval of the Glamis Gold Mine,*” and also like the regulations it lacked any technical or scientific basis.⁹⁵⁹ The legislative history of the provision is replete with references to the effect that such legislation would, and ultimately did, have on Glamis’ investment – namely, rendering its operation cost prohibitive.⁹⁶⁰ Any balancing of the illegitimate purpose behind the California legislative measures at issue against the severe expropriatory impact on Glamis’ investment weighs in favor of finding that the imposition of these measures are tantamount to expropriation. No analysis of the proportionality of the means and end is necessary where, as here, the end is not a legitimate one.

490. Thus, a balancing of the legitimacy (or lack thereof) of California’s purpose behind its backfilling and regrading measures against the severe impact of these measures on Glamis’ investment weighs in favor of finding a violation of Article 1110.

c. As Applied To Glamis, The California Measures Are Not A Bona Fide Exercise Of The State’s Police Powers Such That Regulatory Measures Are Non-Compensable

491. In some instances, courts and tribunals have found government regulations to be justified as a legitimate exercise of its police powers. As stated in commentary to the *Restatement (Third) of Foreign Relations Law*:

a state is not responsible for loss of property or for other economic disadvantage resulting from *bona fide* general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of state, *if it is not discriminatory*⁹⁶¹

⁹⁵⁹ SOF, ¶ 374; *see also id.* ¶¶ 379-81, 385-92.

⁹⁶⁰ *See id.* ¶ 375.

⁹⁶¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 39, § 712 cmt. g. (emphasis added).

In other words, a State may not owe compensation for regulatory measures where (1) they are *bona fide* regulations commonly accepted as within the State’s police power; and (2) they are *not discriminatory*. In the specific context of the Glamis Imperial Project, the California measures imposing complete backfilling and site-recontouring requirements are neither, and thus they are compensable.

(1) The California Measures Are Not *Bona Fide* Regulations Commonly Accepted As Within The State’s Police Power

492. Although analysis of government regulations “starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation *does not* prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining the actions of the State . . . to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation.”⁹⁶² In *GAMI*, for instance, the tribunal refrained from intervening in what it viewed as a reasonable government effort to restructure an industry in crisis (in the context of national treatment analysis). However, the opposite also is true in cases where the regulations at issue are not founded on a legitimate reason, and thus, cannot justify substantial deprivation. In cases where governments have based a regulation on an objective for which legitimate regulation power exists in order to pursue another motive, the regulations have been considered arbitrary or not in good faith – in other words, not *bona fide*. In *S.D. Myers*, for example, the Canadian

⁹⁶² *Tecmed Award* ¶122 (emphasis added).

restriction was revealed not to be motivated by environmental concerns, but rather by a strategy to protect national business interests.⁹⁶³

493. California's mandatory backfilling and site-recontouring measures were not *bona fide* regulations designed to set reclamation standards for open-pit mining activities. This is clear given the lack of any supporting technical, theoretical or empirical studies to verify whether these measures would significantly provide any meaningful environmental benefits or protection of culturally sensitive areas.⁹⁶⁴ In this regard, it is noteworthy that two reports commissioned by the U.S. Congress, the National Academy of Sciences/National Research Center (NAS/NRC) concluded in 1979 and 1999 found that establishing complete backfilling as a mandatory reclamation standard for open pit metallic mines "would be of uncertain environmental and social benefit" in addition to being "economically impractical to mine some deposits under the current cost structures."⁹⁶⁵

494. In spite of these findings, California made no attempt to develop any technical or scientific justification for its backfilling mandate. California failed to conduct or even cite to a single technical or empirical study presenting such a justification.⁹⁶⁶ This absence of technical support belies any claim that the law or regulations were designed as a general environmental regulation and proves that it was simply a targeted effort to block the Glamis Imperial Project.

⁹⁶³ See *S.D. Myers v. Canada*, (Partial Award) 232 I.L.M. 408 (November 13, 2000).

⁹⁶⁴ SOF, ¶ 16 (stating "In the course of promulgating the permanent and unprecedented regulations, the State Mining and Geology Board expressly acknowledged that it relied on **no** scientific, empirical or technical studies to support them.").

⁹⁶⁵ *Id.* ¶ 74.

⁹⁶⁶ *Id.* ¶¶ 379-81.

495. Furthermore, if California’s initial purpose was to protect cultural resources generally through these measures, it was beyond the scope of the environmental and mining regulations used to implement this purpose. Not only is protection of cultural resources outside of the scope of the means employed, but as a practical matter, that goal is not furthered by California’s measures. If sensitivity to the Native American sacred sites should focus on the concept of leaving the earth intact, then mining followed by complete backfilling and recontouring is counterproductive. Though the earth may appear to look similar *ex post* to the view it presented *ex ante*, it is not the same earth. It has been significantly disturbed—not least by the wider area-ranging movements of the backfilling and site-recontouring operations. Moreover, a study of the effects of Glamis’ compliance with the complete backfilling requirement demonstrates that it would *increase* total disturbance of the area by at least 21 percent – thereby having a greater adverse impact on any cultural resources on the land surface.⁹⁶⁷ Much or all of that increased disturbance would result in backfill being graded *over* the terrain surrounding the Imperial Project Area, thereby covering up the very relics and cultural sites that California purported to be protecting.

496. In short, California used its environmental and reclamation regulatory power for what was openly a political purpose – to stop the Glamis Imperial Project to send a clear “message to the federal government that our sacred sites are more precious than gold.”⁹⁶⁸ Thus, environmental regulatory power was used to pursue motives extraneous to the objective of such power – which cannot be qualified as good faith regulation. Even critics of Glamis do not doubt that the Governor contrived the use of reclamation powers to stop the mine in order to protect the

⁹⁶⁷ See Behre Dolbear Report ¶ 5.3, p. 25.

⁹⁶⁸ SOF, ¶ 377.

spiritual pathway and related sacred site issues.⁹⁶⁹ The State of California measures at issue, which used an environmental regulation to effect a political purpose, cannot be deemed as a legitimate exercise of its police power as applied to Glamis – the only company in the state with a pending project that had undergone the costly EIS/EIR in reliance on the laws and regulations that existed at the time it made its investments and pursued its plan of operations.

(2) The California Measures Are Discriminatory

497. California’s measures would only be non-compensable if they were both *bona fide* and non-discriminatory. As discussed above, the complete backfilling and site recontouring requirements are not truly a *bona fide* exercise of California’s police powers. In addition, they are discriminatory and therefore constitute measures tantamount to expropriation for which fair compensation must be paid.

498. In analyzing takings claims, “courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy.”⁹⁷⁰ When a particular property is targeted for regulation, the case for finding that a taking has occurred is even stronger than in cases like *Lucas*, where there was no indication that the measure at issue was passed with an eye toward frustrating Mr. Lucas’s enjoyment of a particular property interest.⁹⁷¹ Where restrictions on a particular property demonstrate discrimination

⁹⁶⁹ Alison A. Ochs, *Glamis Gold – A Foreign U.S. Citizen?: NAFTA and its Potential Effect on Environmental Regulations & the Mining Law of 1872*, 16 *Colo. J Int’l Env’tl. L. & Pol’y* 495, 507 (2005). This thoroughly anti-NAFTA and anti-Glamis article commends the government for using environmental regulation for protecting indigenous sacred lands by blocking the Glamis Imperial Project.

⁹⁷⁰ *Lucas*, 505 U.S. at 1073 (Stevens, J., dissenting) (citations omitted).

⁹⁷¹ *Id.* at 1008.

against the property user, courts give weight to evidence disclosing the actual purpose behind the regulation.⁹⁷²

499. In *Whitney Benefits*, for instance, the Federal Circuit emphasized that Congress was “carefully attentive to the question of which particular coal properties it was affecting.”⁹⁷³ In fact, “Congress revised the bill to ensure that SMCRA itself *would preclude the mining of Whitney coal.*”⁹⁷⁴ The court’s rationale in concluding that the SMCRA effected a taking of the plaintiff’s coal estate *upon enactment* is particularly appropriate here:

*A fortiori, when a statute is enacted, at least in part, specifically to prevent the only economically viable use of a property, an official determination that the statute applies to the property in question is not necessary to find that a taking has resulted. . . . It makes little sense for Congress to pass SMCRA with the intention that it applied to plaintiffs’ property and for defendant to require plaintiffs to obtain an official determination that SMCRA applied to their property before taking could occur. Congressional intent as to the Whitney coal was abundantly clear when it passed SMCRA. Plaintiffs’ property was taken as of its enactment.*⁹⁷⁵

500. *United Nuclear Corp. v. United States* also involved a case where the government changed its regulatory policies to target a particular mineral property.⁹⁷⁶ In that case, United Nuclear was a lessee under a mining lease administered by the U.S. Interior Department on Navajo Reservation lands. United Nuclear spent more than five million dollars on mineral exploration for uranium and discovered a valuable deposit worth far in excess of that sum.

⁹⁷² See, e.g., *G & D Holland Construction Company v. City of Marysville*, 12 Cal. App. 3d 989, 994 (1970) (“The principle limiting judicial inquiry into the legislative body’s police power objectives does not bar scrutiny of a quite different issue, that of discrimination against a particular parcel of property. ‘A city cannot unfairly discriminate against a particular parcel of land’ . . . [W]here ‘spot zoning’ or other restriction upon a particular property evidences a discriminatory design against the property user, the courts will give weight to evidence disclosing a purpose other than that appearing upon the face of the regulation.”) (citations omitted).

⁹⁷³ *Whitney Benefits*, 926 F.2d at 1173.

⁹⁷⁴ *Id.* at 1174 (emphasis added).

⁹⁷⁵ *Whitney Benefits*, 18 Cl.Ct. at 407 (emphasis added).

⁹⁷⁶ 912 F.2d 1432 (Fed. Cir. 1990).

Although the leases provided that operations “would be subject to future regulations,” the court held that this did “not indicate that United [Nuclear] fairly can be said to have anticipated that the Secretary would apply a new policy requiring tribal approval of mining plans to leases entered into almost six years earlier”⁹⁷⁷ When the Interior Department adopted a new discretionary policy requirement – as a direct result of the United Nuclear mine proposal – that granted the Native American tribe a veto power over United Nuclear’s potential mine development, and the tribe exercised that right by denying development, the Federal Circuit held that a taking occurred.

The court explained:

*[T]he property interest that is the subject of the taking claim is United’s leasehold interest in the minerals, which the government took by preventing United from mining under the leases, and not the mere expectation that United would be permitted to engage in mining. . . . [W]e hold that the Secretary’s refusal to approve the mining plan seriously interfered with United’s investment-backed expectations by destroying them.*⁹⁷⁸

Following the Federal Circuit’s ruling that a taking occurred, the United States agreed in 1991 to pay United Nuclear \$67.5 million in compensation, after contending in litigation since 1984 that no compensation was owed.⁹⁷⁹

501. Discriminatory targeting was also at issue in *Sunset View Cemetery Association v. R.J. Krantz* and *City of Orange v. Valenti*. Each of these cases featured a facially neutral restriction that nevertheless had the effect of singling out a particular piece of property. In *Sunset View Cemetery Association*, the California Court of Appeals, concluded that an emergency ordinance prohibiting all commercial uses of a cemetery, “including but not limited to mortuary” use, had no factual basis in relation to public health or welfare and was therefore arbitrary and

⁹⁷⁷ *Id.* at 1436.

⁹⁷⁸ *Id.* at 1437 (emphasis added).

invalid.⁹⁸⁰ The court found that the ordinance, which was passed in response to a trial court ruling directing the county to grant the plaintiff's application to build a mortuary, stemmed plainly from the county's attempt to frustrate the plaintiff's plan to build a mortuary.⁹⁸¹

502. Likewise, in *Valenti*, the California Court of Appeals held unconstitutional the city's emergency parking ordinances, which affected all "public service office buildings."⁹⁸² The court found that the ordinances were enacted solely in response to the proposed opening of a state unemployment insurance office, and were therefore "clearly discriminatory" and "obviously" aimed at stopping establishment of the office.⁹⁸³ According to the court, the only pending "emergency" was the action which the legislative body wanted to prevent.⁹⁸⁴

(...continued)

⁹⁷⁹ See *UNC Gets Payment*, *Wall St. Journal* at A2 (Jan. 16, 1991).

⁹⁸⁰ *Sunset View Cemetery Association v. R.J. Krintz*, 196 Cal.App.2d 115, 117, 123-24 (1961).

⁹⁸¹ *Id.* at 123-124.

⁹⁸² *City of Orange v. Valenti*, 37 Cal.App.3d 240, 243 (1974).

⁹⁸³ *Id.*

⁹⁸⁴ *Id.* See also *Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981) (holding that where apartment developers had a legitimate permit to build apartment complex but, in response to referendum that showed an overwhelming resistance to the proposed complex, city passed a new ordinance that forbade construction of any new apartments, implementation of ordinance was arbitrary and unreasonable); *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483, 1485-89 (11th Cir. 1988) (holding that when citizen complaints spurred city to pass ordinance re-zoning plaintiff's property from the least restrictive industrial classification to a light industrial classification, thereby prohibiting establishment of a wood-chipping operation, after city commission first passed a resolution approving the wood-chipping operation, city must pay just compensation). See also *Burrows v. City of Keene*, 121 N.H. 590, 600-01 (1981) (holding that city's action in passing ordinance rezoning plaintiffs' land to include 109 acres within a conservation zone, thereby prohibiting all "normal, private development" on plaintiffs' property, after it failed to offer a reasonable price to buy the property for which plaintiff was seeking a development permit, was an unconstitutional taking); *Trustees Under Will of Pomeroy v. Town of Westlake*, 357 So.2d 1299, 1303-04 (La.App. 1978) (holding that zoning ordinance classifying the plaintiff's property as residential is discriminatory and unconstitutional because plaintiff's property constitutes the only section of the river bank in town with a residential zoning, and the classification is apparently based solely on the aesthetic benefit to the neighbors of having it remain vacant); *Huttig v. City of Richmond Heights*, 372 S.W.2d 833, 839-41, 843 (Mo. 1963) (concluding that singling out plaintiff's tract for residential zoning bears no substantial relationship to the public health, safety, morals, or general welfare, in light of the fact that property had three times more value as commercial than residential property, and in view of adjacent commercial development and traffic patterns, and therefore the zoning violates the state and federal constitutions); *Herman Glick Realty Co. v. St. Louis County*, 545 S.W.2d 320, 324-325 (Mo.App. 1976) (holding that maintenance of "non-urban zoning" on plaintiff's tract of land bears no substantial

(continued...)

503. The facts and legal issues here are closely aligned with those in the cases discussed above in which a taking was held to have occurred. As in *Whitney Benefits*, the discriminatory measures in Glamis' case were "enacted, at least in part, specifically to prevent the only economically viable use of a property."⁹⁸⁵ Although the California legislation facially has statewide application to mining operations within one mile of Native American sacred sites, it nevertheless has the effect of singling out a particular piece of property (similar to the measures in *Sunset View* and *Valenti*). Not only was Glamis' Imperial Project identified as the sole basis for the "emergency" which was used to justify the unprecedented costly regulations on a rushed basis, but it was the only metallic mine in the State within a mile of a Native American "sacred site" that had gone through the full EIS/EIR process and was awaiting final approval of a pending mining plan of operation and reclamation plan, following years of company efforts and multi-million dollar investments when these measures were enacted. Furthermore, in a press release announcing the enactment of SB 22, Governor Davis proclaimed that "the bill essentially stops the Glamis Gold Mine proposal in Imperial County."⁹⁸⁶

504. Moreover, the nearly 1000 industrial mineral and aggregate (non-metallic) mining operations in California (extracting sand, gravel, limestone, pumice, borates, *etc.*, most often by open pit methods, including entirely new operations to extract those commodities by open pit methods) are left untouched by the new mandatory backfilling requirements.⁹⁸⁷ In short, the facts

(...continued)

relationship to the public health, safety, morals, or general welfare because its apparent purpose is to hold the land in its undeveloped state without considering its relation to neighboring property or its best and highest potential use, and which results in it not being available to the plaintiff for any profitable use, and is therefore unreasonable and arbitrary).

⁹⁸⁵ *Whitney Benefits*, 18 Cl.Ct. at 407.

⁹⁸⁶ SOF, ¶ 15 (citing Cal. Governor's Office, *Talking Points – SB 22 Bill Signing* (Apr. 7, 2003) (GOV063)).

⁹⁸⁷ Leshendok Report ¶ 114.

surrounding the imposition of the backfilling and recontouring measures leave no doubt that Glamis was the target of these measures.⁹⁸⁸

505. With respect to California’s protection of sacred sites, it is noteworthy that when such protection extended past the Glamis project into other state-wide development activities, and State-sponsored projects in particular, the Governor’s view was decidedly different than when the protection harmed only Glamis. Thus, when presented with SB 1828, which was expected to result in widespread “sacred site” claims and development project impediments, the Governor was advised to veto the bill.⁹⁸⁹ Thus, Glamis was singled out and expected to bear the entire economic burdens of protecting sacred sites, a burden the state was unwilling to impose on itself. To put it another way, the California legislation was only going to be signed if its effects would be limited to compromising Glamis’ interests.

506. If conduct by the state can be qualified as “singling out an owner-investor” by “targeting legislation,” then the presumption is that this owner-investor is required to bear a special sacrifice for the interests (which change in accordance with public opinion at large) which, in turn, is considered to constitute an indirect expropriation. This theme of “disproportionate burden” or “special sacrifice” runs throughout the regulatory expropriation jurisprudence.⁹⁹⁰ As the U.S. Supreme Court has affirmed repeatedly, the overall purpose of regulatory takings doctrine is to ensure that the burdens imposed are “not so wholly disproportionate to the burdens

⁹⁸⁸ See SOF, ¶¶ 10-17.

⁹⁸⁹ *Id.* ¶ 364.

⁹⁹⁰ See *Penn Cent. Transp.*, 438 U.S. at 123; *Armstrong v. United States*, 364 U.S. 40, 49 (1960); for the European Convention on Human Rights (ECHR), *Sporrong & Lönnroth v. Sweden*, 5 E.H.R.R. 35, ¶ 73 (1982); *Matos e Silva, Lda. v. Portugal*, 24 E.H.R.R. 573, ¶ 92 (1996).

other individuals face in a highly regulated society that some people are being forced ‘alone to bear public burdens which, in all fairness and justice, must be borne by the public as a whole.’”⁹⁹¹

507. The purpose of the “special sacrifice” or “disproportionate burden” concept is to keep a majority – or a minority that is in terms of political influence powerful and vociferous – from imposing on the minority their views for which the others should pay. In practical terms: If the people of California or the Quechan tribe and its sympathizers feel so strongly about the preservation of ancient spiritual pathways, and if this sentiment and discovery is important enough for them, they should pay the owners for taking away acquired rights when their operation is in conflict with the new sentiments emerging.⁹⁹² This principle is the very purpose why Article 1110 guarantees compensation for such expropriation.

508. Moreover, the recent statement regarding expropriation made in the *Methanex v. U.S.*⁹⁹³ award does not compel a different analysis or result. The *Methanex* tribunal had to determine the legal implication of a California regulatory measure favoring ethanol against methanol, the product on which the claimant’s commercial operations relied. Though the case focused on the alleged breach of the national treatment obligation, the tribunal also dealt briefly with the “indirect expropriation” claim at the end of its 307 page award. It said:

But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments

⁹⁹¹ *United States v. Locke*, 471 U.S. 84, 107 n. 15 (1985) (internal citations omitted) (involving unpatented mining claims that were subject to a “reasonable” procedural regulation requiring the mere clerical recordation of property interests – in stark contrast to the prohibitive and exorbitant reclamation requirement in the Glamis case); see *Lingle v. Chevron*, 125 S. Ct. 2074, 2080, 2084 (2005).

⁹⁹² See *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987) (Where Chief Justice Rehnquist stated for the Court: “the Fifth Amendment makes clear that it is designed not to limit the government interference with property rights *per se*, but rather to secure compensation . . .”).

⁹⁹³ *Methanex Corporation v. United States of America*, NAFTA/ICSID, Part IV, Chapter C, 12 ¶ 26 (Final Award) (August 3, 2005).

had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.⁹⁹⁴

509. To the extent that the tribunal’s pronouncement sought to create a general defense of “non-discriminatory” and “due-process based” regulation, it constituted a departure from established comparative constitutional and international investment law. The *Methanex* tribunal’s sparsely supported statement,⁹⁹⁵ as what seems to be the consensus in the international investment law community, is *obiter dictum*. Moreover, it goes further than even the restrictive statement now being advanced by the United States in its Model BIT⁹⁹⁶ which acknowledges that:

(b) *Except in rare circumstances*, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.⁹⁹⁷

The phrase, “[e]xcept in rare circumstances,” acknowledges – as U.S. takings jurisprudence does – that “non-discriminatory,” public-welfare regulation may nonetheless be considered “tantamount to expropriation” in appropriate circumstances. The *Methanex* language quoted is therefore not only inconsistent with customary international law and established NAFTA, ICSID and BIT practice, but also the position taken, in 2004, by the United States.

510. In any case, the regulation at issue in *Methanex* – a state-wide ban on the use of the gasoline additive “MTBE” (methyl tertiary butyl ether) – was the product of significant

⁹⁹⁴ *Id.* at Part IV, Chapter D, 4 ¶ 7.

⁹⁹⁵ Todd Weiler, *Methanex Corp. v. U.S.A.—Turning the Page on Nafta Chapter Eleven?*, 6 J. WORLD INV. & TRADE, 903, 919 (2005) (discussing the weak support for the tribunal’s statement).

⁹⁹⁶ This 2004 Model BIT seeks to narrow the protection afforded against noncompensated expropriation than that provided in the earlier 1994 Model BIT and NAFTA Chapter Eleven; see Stephen M. Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law*, 3-4 (discussing the “striking” differences between the 1994 and 2004 Model BITs).

⁹⁹⁷ 2004 Model BIT (emphasis added).

scientific study and analysis.⁹⁹⁸ Here, by contrast, the regulators acknowledged that “[n]o technical, theoretical, empirical studies, reports or documents were prepared or relied upon”⁹⁹⁹ The California action is not “designed and applied to protect legitimate public welfare objectives,” but rather was designed to prohibit a specific mining development altogether for an objective not covered by the regulation by disguising a political objective as a new reclamation objective.

D. The Federal Government's Creation Of New Discretionary Denial Authority And Continued Failure To Act With Respect To Glamis' Plan Of Operation Despite Rescission Of That Authority Comprise Measures Tantamount To Expropriation

511. As noted above in the context of California’s expropriatory legislation, there are typically three primary factors that tribunals evaluate when considering whether state action rises to the level of measures tantamount to expropriation: (1) the effect on the investor (usually the most important factor); (2) the level of interference with reasonable investment-backed expectations; and (3) the character of the state’s action. Applying these factors here, it is clear that when the Interior Department concocted a legally unsupportable veto authority, applied it so as to deny Glamis’ mining plan of operations and then refused to fully correct its error, choosing instead to condemn the plan to eternal bureaucratic limbo, it effected measures tantamount to an expropriation.

⁹⁹⁸ *Methanex Award* ¶¶ 4-19, 41-102.

⁹⁹⁹ SOF, ¶ 373.

512. The effect of Secretary Babbitt’s January 16, 2001, denial of Glamis’ mining plan of operation is self-evident, and there can be little dispute as to the severity of that effect. In fact, when Glamis learned that Secretary Babbitt officially denied the plan of operations for the Imperial Project, the company wrote off its then, \$14.3 million investment in the Imperial Project and adjusted downward its reported proven and probable reserves, as reported in the company’s annual report and financial statements for year end 2000.¹⁰⁰⁰ In an expropriation claim brought by Ponderosa Assets, L.P. against Argentina, OPIC determined that Argentine government interference with a license agreement that resulted in a similar investment write-off constituted a deprivation of “fundamental rights in the insured investment,” even though the claimant “retain[ed] full control of the assets... .”¹⁰⁰¹ The same analysis attaches here: although Glamis retained control of the nominal title to its mining claims – and continues to pay the BLM fees to hold those mining claims – BLM’s denial severely compromised the value of those mining claims, as was the case in *Ponderosa*.

513. Furthermore, while BLM’s denial authority was rescinded on November 23, 2001 based on Interior’s conclusion that the underlying legal analysis was infirm and the denial authority itself was fundamentally unfair, to date, BLM has never approved the plan or issued any further decision thereon. All that the agency did was rescind the denial and withdraw the faulty legal opinion that gave rise to it. No approval has been forthcoming, nor has there been any

¹⁰⁰⁰ See SOF ¶ 340 (describing Glamis Gold Ltd. Annual Report for 2000, at 29 (Mar. 6, 2001) (at GLA000928) (noting that the “Company will appeal this [denial] decision and intends to vigorously pursue all available means to protect its investment in this project”)); see also Statement of K. McArthur, ¶ 17.

¹⁰⁰¹ *Expropriation Claim of Ponderosa Assets, L.P./Argentina – Contract of Insurance No. D733*, Memorandum of Determinations at 13-14 (August 2, 2005).

indication that the application is the subject of any continuing review or analysis. The United States has simply abdicated its responsibility to process the application under the applicable laws. As a result, the substantial economic deprivation effected by BLM's denial remains uncorrected, and given that it has been five years since the rescission (and twelve since the plan first was filed), the deprivation associated with this refusal to act has long since satisfied the test of being more than "merely ephemeral."¹⁰⁰²

514. Moreover, putting aside the effects of the Federal Government actions in their own right, the facts demonstrate that the unreasonable and improper delays associated with Interior's more-than-six-year plan review process constituted the very reason that Glamis became subject to the California measures in December 2002. Had BLM's review process even approximated that of a typical review, Glamis' plan would have been approved in 1997 or 1998, several years prior to California's passage of the unprecedented complete backfilling and recontouring mandate for the Imperial Project. It is the combination of federal and state government acts and omissions that has effected an expropriation of Glamis' valuable mining investment. So, even if the Tribunal were to conclude – in the face of a 14.3 million dollar write-off – that the effects of the denial itself were not sufficiently severe, there is ample evidence that the effects of Interior's excessive and improper delay in the process facilitated California's total devaluation of Glamis' investment.

515. The overall character of the Federal Government's actions and Glamis' legitimate expectations each are discussed at length in Glamis' 1105 analysis below. Suffice it to say here that to the extent that Interior's goal was to protect and preserve cultural resources in a relatively pristine state, the means employed – hijacking the mining plan review process to allow for the

¹⁰⁰² See *Tippetts Award No. 141-7-2, III.1.*

creation of a legally unfounded administrative veto authority – was decidedly disproportionate to that goal. Moreover, given that the Imperial Project gave rise to that process and that it was the only project denied without compensation based on that unlawful veto authority, the discriminatory nature of the Federal Government’s action is beyond dispute.

516. In light of the substantial deprivation occasioned by the Federal Government’s delay in processing Glamis’ Imperial Project mining plan of operations, subsequent denial of and continued inaction on that plan, the character of the action, and the interference with Glamis’ reasonable expectations, these actions constitute measures “tantamount to expropriation” within the meaning of NAFTA Article 1110.

X. Respondent Has Breached Its Obligations Under Article 1105 Of NAFTA.

517. Article 1105(1) of NAFTA provides that:

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.¹⁰⁰³

The NAFTA Free Trade Commission’s subsequent re-interpretation suggests that Article 1105(1) “prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.” Nonetheless, the language of NAFTA’s Article 1105 must still be interpreted in “good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose,” as required under Article 31(1) of the Vienna Convention,¹⁰⁰⁴

¹⁰⁰³ Although only Article 1105(1) is at issue in this proceeding we note that at least one arbitral tribunal has determined that “Article 1105(2) does make it clear, however, . . . that Article 1105(1) is not limited to issues concerning the treatment of investments before the courts of the host state.” *Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, ¶ 95 (Award) (Oct. 11, 2002).

¹⁰⁰⁴ Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; see also NAFTA, *supra* note 8, art. 102(2) (“The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.”).

which requires that tribunals look to the “fair and equitable treatment” standard as it has evolved under customary international law.

518. Given that the international minimum standard of treatment is comprised of customary international law, the standard is an evolving one based on the general and consistent practice of states and *opinio juris*, as may be reflected in jurisprudence related to the interpretation and application of these treaties.¹⁰⁰⁵ All three parties to NAFTA accept that the Article 1105(1) standard is a dynamic one.¹⁰⁰⁶ In the words of the United States, “Article 1105(1) is intended to provide a real measure of protection of investments, and . . . having regard to its general language and to the evolutionary character of international law, it has evolutionary potential.”¹⁰⁰⁷ Thus, “that conduct which may have not violated international law [in] the 1920s might very well be seen to offend internationally accepted principles today.”¹⁰⁰⁸ Respondent’s treatment of Glamis must therefore be judged against the international law minimum standard of treatment, which incorporates current standards of fair and equitable treatment.

519. Moreover, the particular resources and levels of development of the host state play a role in the application of the standard to the particular circumstances.¹⁰⁰⁹ The levels of development, particularly the quality, strength and resources available for a system of “rule of

¹⁰⁰⁵ See OECD 2004, *supra* note 42, at 40.

¹⁰⁰⁶ See *id.* at 11-12.

¹⁰⁰⁷ *Mondev Award* ¶ 119; *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, ¶ 179 (Award) (Jan. 9, 2003) (Similarly, in *ADF*, the US accepted that “customary international law referred to in Article 1105(1) is not ‘frozen in time’ and that the minimum standard of treatment does evolve.”); See also *Mondev v. United States*, ICSID Case No. ARB(AF)99/2, 682-683 (Transcript of Hearing) (May 22, 2002) (“we [the United States] concur that the standard adopted in Article 1105 was that as it existed in 1994, the international minimum standard of treatment, as it had developed to that time. We also agreed, like all customary international law, the international minimum standard has evolved and can evolve.”).

¹⁰⁰⁸ Second Article 1128 Submission of the United Mexican States in the Matter of *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, 15 (July 22, 2002).

¹⁰⁰⁹ See Nick Gallus, *The Influence of the Host State’s level of Development on International Investment Treaty Standards of Protection*, forthcoming J. WORLD INV. & TRADE (2006).

law” vary among countries. The host state’s level of development has been considered by investor-state tribunals in determining whether the host state has failed to provide the investor with international law standards of treatment. In *X v. Central European Republic*, for instance, the tribunal took into account the special factual background to the dispute, including whether the claimant may “not have taken sufficient account that the country was still in a state of transition, in which the Government and public authorities were labouring to develop the newly born democratic system and to create a well-functioning market economy.”¹⁰¹⁰ Similarly, in *Generation Ukraine v. Ukraine*, the tribunal clearly stated that:

it is relevant to consider the vicissitudes of the economy of the state that is host to the investment in determining the investor’s legitimate expectations, the protection of which is a major concern of the minimum standards of treatment contained in bilateral investment treaties.¹⁰¹¹

For a highly developed legal system with relatively extensive resources and institutional stability, such as the United States, the international minimum standard thus, requires better conduct than what may be required for a less-developed country.

520. Though most international investment treaties require that investments and investors receive “fair and equitable” treatment, the precise meaning of this principle is not well-defined. Arbitral tribunals, courts and other authorities, however, have attempted to identify a number of sub-categories comprised within the fair and equitable treatment standard.¹⁰¹² In *S.D. Myers*, the tribunal stated that the fair and equitable treatment principle included in international agreements for the protection of foreign investments expresses “the international law

¹⁰¹⁰ *X v. Central European Republic*, SCC Case 49/2002, 141 (Final Award) reprinted in Stockholm Arbitration Report 2004:1 (2004).

¹⁰¹¹ *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, ¶ 20.37 (Award) (Sept. 16, 2003).

¹⁰¹² OECD 2004, *supra* note 42, at 26.

requirements of due process, economic rights, obligations of good faith and natural justice.”¹⁰¹³

The tribunal in *Waste Management*¹⁰¹⁴ reviewed the history of Article 1105 and the FTC interpretation, together with prior NAFTA tribunals’ discussions of the standard of fair and equitable treatment and concluded that a general standard was emerging from the NAFTA awards that have considered the meaning and scope of Article 1105. The tribunal stated:

Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.¹⁰¹⁵

521. Here, Glamis has been subjected to treatment that is “arbitrary, grossly unfair, unjust or idiosyncratic.” It has also been denied due process and good faith resulting from a lack of “transparency and candour in an administrative process.” As a result of Respondent’s arbitrary actions and failure to provide a transparent framework for investment under which Glamis’ legitimate expectations would be upheld, Glamis has been denied fair and equitable treatment, in violation of NAFTA Article 1105(1).

¹⁰¹³ *S.D. Myers* Partial Award ¶ 134.

¹⁰¹⁴ *Waste Management v. Mexico*, NAFTA/ICSID Case No. ARB(AF)/00/3 (Award) (30 April 2004).

¹⁰¹⁵ *Id.* ¶ 98. The *Waste Management* Tribunal’s definition of what constitutes a failure to accord “fair and equitable” treatment under NAFTA was criticized in *obiter dictum* by the *Methanex* Tribunal to the extent that it implies that Article 1105(1) imposes a duty of non-discrimination. *Methanex* Final Award Part IV, Chapter C, 12 ¶ 26. However, it did so in circumstances where the Claimant’s allegations of discrimination contrary to Article 1102 of NAFTA were rejected by the Tribunal, and where no additional basis was offered for the claim under Article 1105(1). Significantly, other NAFTA Tribunals have indicated that discrimination can be unfair and inequitable in the context of Article 1105(1). *See, e.g., Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, ¶ 135 (Award) (June 26, 2003) (“[a] decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law.”).

522. Before turning to a discussion on what must be shown in order to establish a breach of Article 1105, it should be noted that a claimant does *not* need to show that the host state acted in bad faith in order to demonstrate a breach of Article 1105. Indeed, such a requirement has been patently rejected in the NAFTA context. For example, the *Loewen* tribunal held that “[n]either State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice.”¹⁰¹⁶ Similarly, the tribunal in *CMS v. Argentina* stated that while the host state’s deliberate intentions or bad faith in adopting the measures in question “can aggravate the situation,” they are “not an essential element of the standard.”¹⁰¹⁷ Thus, Glamis need not show that the federal or state governments acted in bad faith when they, respectively, reinterpreted decades of mining law and practice to concoct a standard by which to deny Glamis’ mining plan of operation and imposed unprecedented complete backfilling and site-recontouring requirements in a targeted manner.

A. Fair And Equitable Treatment Includes An Obligation To Not Act Arbitrarily.

523. Many cases involving investor-state disputes approach their analysis of fair and equitable in light of the concept of arbitrariness. As stated in the *CMS v. Argentina* Award, “[t]he standard of protection against arbitrariness . . . is related to that of fair and equitable treatment. Any measure that might involve arbitrariness . . . is in itself contrary to fair and

¹⁰¹⁶ *Loewen* Award ¶ 132; *see also* *Mondev* Award ¶ 116.

¹⁰¹⁷ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, ¶ 280 (Award) (May 12, 2005).

equitable treatment.”¹⁰¹⁸ Tribunals and authorities have defined “arbitrary” in a variety of ways, including, for example, “an act that is unfair and unreasonable, and inflicts serious injury to established rights of foreign nationals, though falling short of an act that would constitute an expropriation”¹⁰¹⁹ and an act “not founded on reason or fact nor on the law.”¹⁰²⁰

524. In its Memorial in the *Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)* case, the United States acknowledged that affirmative guarantees of fair and equitable treatment are the functional equivalent of prohibitions against unfair or unreasonable conduct. The United States argued that “the prohibition of ‘arbitrary’ measures commits ‘the respective governments not to injure the investments and related interests of foreign investors by the unreasonable or unfair exercise of government authority.’”¹⁰²¹ It also “contended that ‘arbitrary actions’ include those which are *not based on fair and adequate reasons* (including sufficient legal justification), but rather arise from the unreasonable or capricious exercise of authority.”¹⁰²²

525. Thus, the U.S.’s suggestion that “arbitrary actions” are those which are “not based on fair and adequate reasons” indicates that there must be a legitimate reason or basis for government actions. Although the *ELSI* case did not involve an interpretation of the “fair and

¹⁰¹⁸ *Id.* ¶ 290; *see also S.D. Myers Partial Award* ¶ 263 (considering arbitrariness to be part of the fair and equitable standard when it stated that Article 1105 is breached “when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.”).

¹⁰¹⁹ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 712 n. 11.

¹⁰²⁰ *Lauder v. Czech Republic*, UNCITRAL, ¶ 232 (Final Award) (September 3, 2002).

¹⁰²¹ Sean D. Murphy, *The ELSI Case: An Investment Dispute at the International Court of Justice*, YALE J. INT’L L. 391(Summer 1991).

¹⁰²² Jose E. Alvarez, *Political Protectionism and United State International Investment Obligations in Conflict: The Hazards of Exon-Florio*, VA. J. INT’L L. 1 at fn. 694 (Fall 1989) (emphasis added) (citing Memorial of the United States (U.S. v. Italy) at 81, 83-86 [unpublished] (May 15, 1989)).

equitable treatment” standard, it interpreted a similar agreement’s prohibition on certain arbitrary and discriminatory measures in the context of due process of law.¹⁰²³ The Chamber stated that:

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law . . . It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial property.¹⁰²⁴

526. Later tribunals, such as the one in *Pope & Talbot*, have found that Article 1105 requires the fairness elements of the NAFTA protections to be applied “without any threshold limitation that the conduct complained of be ‘egregious’, ‘outrageous’ or ‘shocking’ or otherwise extraordinary.”¹⁰²⁵

527. Similarly, the *Mondev* tribunal explained that in determining whether Article 1105 has been breached as a result of arbitrariness, “the test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome”¹⁰²⁶ The *Mondev* tribunal further emphasized the need to decide “in light of all the available facts” whether the “impugned decision was clearly improper and discreditable.”¹⁰²⁷ In *Mondev*, the subsidiary of a Canadian real-estate development company sued the City of Boston for breach of a contract to develop a shopping mall in Boston. The subsidiary won in the trial court, but the Massachusetts Supreme Judicial Court reversed the judgment in 1998. *Mondev* then submitted claims against the United States under NAFTA, alleging, *inter alia*, a violation of Article 1105. Considering

¹⁰²³ *Elettronica Sicula S.P.A. (ELSI) (United States v. Italy)*, (Judgment) 28 I.L.M. 1109, I.C.J. Reports 15 (1989).

¹⁰²⁴ *Id.*

¹⁰²⁵ *Pope & Talbot Inc. v. Canada*, UNCITRAL, (Award on the Merits of Phase 2) (Apr. 10, 2001) (rejecting the criteria expressed in cases from the 1920’s, such as *Neer v. Mexico* (1929) R.I.A.A., in which the minimum standard was first articulated).

¹⁰²⁶ *Mondev Award* ¶ 127.

the totality of the circumstances, the tribunal found there was no 1105 violation where “it [was] not disputed by the Claimant that this decision was in accordance with Massachusetts law, and it did not involve anything arbitrary or discriminatory or unjust”¹⁰²⁸

528. The “clearly improper and discreditable” analysis from *Mondev* was also applied in the *Loewen* Award.¹⁰²⁹ In *Loewen*, a Canadian company in the funeral business, and its former Chairman and CEO brought NAFTA claims, including violation of minimum treatment, against the United States, alleging that the U.S. was liable for damages resulting from a jury verdict against the company in a Mississippi state court. Though the tribunal noted that “the whole trial (in local courts) and its resultant verdict were *clearly improper and discreditable* and cannot be squared with minimum standards of international law and fair and equitable treatment,” it nevertheless held that the trial conduct was not a violation of 1105 because Loewen was claiming damages from judicial measures (the jury verdict) that it had failed to appeal.¹⁰³⁰ Thus, while the claimants in *Loewen* were not successful on procedural grounds, the actions by the host state still serve as an example of conduct by the host state that is unacceptable under the minimum standard.

529. In *Waste Management v. Mexico*, a U.S. waste disposal company alleged breaches of Articles 1105 and 1110. Though Waste Management’s claims were dismissed in their entirety, the tribunal further expounded upon the emerging NAFTA and BIT jurisprudence regarding the

(...continued)

¹⁰²⁷ *Id.*

¹⁰²⁸ *Id.* ¶ 156.

¹⁰²⁹ *Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, (Award) (June 26, 2003).

¹⁰³⁰ *Id.* ¶ 137.

fair and equitable treatment standard, stating that a breach of Article 1105 can be determined if “the conduct is arbitrary, grossly unfair, unjust or idiosyncratic.”¹⁰³¹

530. In sum, these cases suggest that government actions are arbitrary and violate the fair and equitable standard when the conduct is “grossly unfair,” “unjust,” “clearly improper and discreditable” (though it need not be “egregious,” “outrageous,” “shocking” or “otherwise extraordinary”), such that it raises concerns about the judicial propriety of the outcome. Furthermore, the United States’ Memorial in *ELSI* further details that “arbitrary actions” include those which are “not based on *fair and adequate reasons* (including sufficient legal justification).” Thus, when there is an insufficient nexus between the government measure and the apparent objective, the government has acted arbitrarily, since its actions are not founded on fair and adequate reasons and lack legal justification.

531. As discussed in further detail below, Respondent has violated its obligation to provide fair and equitable treatment to Glamis by acting arbitrarily and unjustly. The Federal Government arbitrarily delayed and denied Glamis’ plan of operation on the basis of an unlawfully created discretionary mine-veto authority that was fabricated out of whole cloth and

¹⁰³¹ See *Waste Management Award* ¶ 98.

employed without adherence to notice and comment rulemaking procedures. Though the Federal Government has since rescinded the opinion that purported to find this new discretionary authority and has rescinded the denial of Glamis' mining plan, it has not taken any further action with respect to Glamis' pending plan. The Imperial Project is thus left in a state of limbo that prevents Glamis from developing its operation of the Imperial Project, and Glamis is denied the benefits of its investment. Furthermore, the State of California enacted complete backfilling and site-recontouring requirements, measures that are not based on fair and adequate reasons and lack sufficient legal justification. In fact, the measures imposed do nothing to reasonably further any legitimate purpose, such as protecting Native American sacred sites, yet they have successfully destroyed the value of Glamis' investment in the Imperial Project without compensation.

B. Fair And Equitable Treatment Includes A Good Faith Obligation To Protect Legitimate Expectations Of An Investor Through Establishment Of A Transparent And Predictable Framework

532. The fair and equitable treatment standard has also been recognized as requiring the protection of legitimate investment-backed expectations. The principle of "legitimate expectation," though not explicitly mentioned in Article 1105 or in other similar investment treaties, is considered to be part of the fair and equitable treatment standard as an expression and part of the "good faith" principle recognized in international law (although bad faith is not required for its violation).¹⁰³²

533. In *Tecmed*, the arbitral tribunal found that the "fair and equitable treatment" provision in the Spain-Mexico Agreement requires the "Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken

¹⁰³² *Tecmed* Award ¶ 153; see also OECD 2004, *supra* note 42, at 37-39.

into account by the foreign investor to make the investment.”¹⁰³³ The tribunal further elaborated on the significance of the investor’s expectations:

The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.¹⁰³⁴

The tribunal found that, upon making its investment, the “fair expectations of the Claimant were that the Mexican laws applicable to such investment . . . would be used for the purpose of assuring compliance with environmental protection, human health and ecological balance goals underlying such laws.”¹⁰³⁵ Instead, the government’s refusal to renew the claimant’s permit in *Tecmed* was “*actually* used to permanently close down a site whose operation had become a nuisance due to political reasons relating to the community’s opposition. . . .”¹⁰³⁶ Accordingly, the *Tecmed* tribunal held that Mexico’s behavior amounted to a violation of the duty to accord fair and equitable treatment.¹⁰³⁷

534. Similarly, in *CMS Gas Transmission Co. v. Argentine Republic*, in finding that Argentina had breached the “fair and equitable treatment” standard of the U.S. – Argentina BIT, the tribunal made clear:

*There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment.*¹⁰³⁸

¹⁰³³ *Tecmed* Award ¶ 154 (Interpreting Article 4(1) which states “Each Contracting Party will guarantee in its territory fair and equitable treatment, according to International Law, for the investments made by investors of the other Contracting Party.”).

¹⁰³⁴ *Id.*

¹⁰³⁵ ¶ 157.

¹⁰³⁶ ¶ 164 (emphasis added).

¹⁰³⁷ ¶ 174.

¹⁰³⁸ *CMS Gas* Award ¶ 274 (emphasis added).

In *CMS Gas*, after the investor purchased 30% stock in an energy company wholly owned by Argentina, Argentina suffered a severe economic crisis. During this time, Argentina temporarily suspended certain practices that were favorable to investors in the energy sector, limited the right to withdraw deposits from bank accounts and reformed the foreign exchange system through an emergency law. The claimant argued that the uncertainty surrounding during this period (2000-2002) dismantled “all the arrangements in reliance on which the investment had been made,” and thus, breached the fair and equitable treatment standard.¹⁰³⁹ Rejecting Argentina’s defense of exigent circumstances – hardly a defense available to Respondent here – the tribunal concluded that “the measures adopted resulted in the objective breach of the [fair and equitable treatment] standard laid down in Article II(2)(a)” of the BIT.¹⁰⁴⁰

535. The tribunal in *Metalclad* also highlighted the principle of “transparency” in NAFTA Article 102(1) in holding that the absence of a clear rule concerning whether a municipal permit for the construction of a hazardous waste landfill is required in Mexico amounted to a breach of Article 1105. The tribunal explained that it understood “transparency” to include:

the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.¹⁰⁴¹

In fact, the tribunal also held that in the event a Party would become aware of “confusion or misunderstanding” among investors concerning the legal requirements to be fulfilled, the Party would have “the duty to ensure that the correct position [would be] promptly determined and

¹⁰³⁹ *Id.* ¶ 269.

¹⁰⁴⁰ *Id.* ¶ 281.

clearly stated so that the investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.”¹⁰⁴²

536. Although this portion of the tribunal’s decision was rejected on review by the Supreme Court of British Columbia, (which nonetheless upheld the finding that there had been an expropriation), the tribunal’s decision nevertheless demonstrates the importance granted by the tribunal to the overall purpose of NAFTA – to “ENSURE a predictable commercial framework for business planning and investment.”¹⁰⁴³ By demonstrating “a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA”, Mexico failed to protect the investor’s legitimate expectations. Thus, Mexico’s failure to ensure a transparent and predictable framework for Metalclad’s business planning and investment was found by the tribunal to be a violation of the fair and equitable treatment standard.

537. In *Maffezini (Argentina) v. Kingdom of Spain*, the unauthorized transfer of claimant’s funds by a Spanish official was at issue.¹⁰⁴⁴ The tribunal found that the “lack of transparency with which this loan transaction was conducted is incompatible with Spain’s commitment to ensure the investor a fair and equitable treatment in accordance with Article 4(1)” of the Argentina-Spain Bilateral Investment Treaty.¹⁰⁴⁵ Though the tribunal did not elaborate further on the lack of transparency, the case underscores that such a principle has

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¹⁰⁴¹ *Metalclad* Award ¶ 76.

¹⁰⁴² *Id.*

¹⁰⁴³ *Id.* ¶ 71, referencing NAFTA Preamble ¶ 6.

¹⁰⁴⁴ *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (Award) (Jan. 25, 2000).

¹⁰⁴⁵ *Id.* ¶ 83.

become integral to the fair and equitable treatment standard that has evolved as part of the minimum standard of treatment provided by customary international law.

538. Furthermore, the tribunal in *Waste Management* also concluded that the minimum standard of fair and equitable treatment is “infringed by conduct attributable to the State and harmful to the claimant” if it (among other things) “involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a *complete lack of transparency and candour* in an administrative process.”¹⁰⁴⁶

539. As demonstrated by these cases, the fair and equitable treatment thus includes the principles of good faith, including the protection of legitimate expectations of an investor of a stable, predictable legal environment and transparency and candor in an administrative process. As detailed below, in Glamis’ case, a predictable framework was clearly lacking, as it was in *CMS Gas*, *Tecmed* and *Metalclad*. Respondent did not act in such a way that enabled Glamis to “know beforehand any and all rules and regulations that will govern its investments,” as required under *Tecmed’s* interpretation of the fair and equitable treatment standard. As a result, the actual outcome of Glamis’ investment in the Imperial Project is a far cry from its basic and legitimate expectations at the time of its investment.

¹⁰⁴⁶ *Waste Management* Award ¶ 98. The *Waste Management* Tribunal’s definition of what constitutes a failure to accord “fair and equitable” treatment under NAFTA was criticized in *obiter dictum* by the *Methanex* Tribunal to the extent that it implies that Article 1105(1) imposes a duty of non-discrimination. *Methanex* Final Award Part IV, Chapter C, 12 ¶ 26. However, it did so in circumstances where the Claimant’s allegations of discrimination contrary to Article 1102 of NAFTA were rejected by the Tribunal, and where no additional basis was offered for the claim under Article 1105(1). Significantly, other NAFTA Tribunals have indicated that discrimination can be unfair and inequitable in the context of Article 1105(1). See, e.g., *Loewen* Award ¶ 135 (“[a] decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law.”)

C. Respondent Has Breached Its Obligation Under Article 1105 To Provide Fair And Equitable Treatment By Acting Arbitrarily And Depriving Glamis Of The Legitimate Expectations Of Its Investment

540. Considering the object and purpose of NAFTA, the totality of the circumstances involved in the case,¹⁰⁴⁷ and the substance of the evolving fair and equitable standard's prohibition against arbitrary and unjust actions, it is clear that Respondent has denied Glamis the protection afforded by Article 1105. As shown by the cases above, the fair and equitable treatment standard includes an obligation to protect a foreign investor's legitimate expectations and to provide a predictable and transparent legal and business framework for the investor. Respondent has failed to honor either of these obligations with respect to its treatment of Glamis' investment in the Imperial Project.

541. In the instant case, Glamis filed a mining plan of operations in 1994 that initiated a well-known administrative approval process under which environmentally and technically sound mining operations on federal lands were assured approval, subject to reasonable mitigation conditions, even where lingering unavoidable impacts on cultural resources remained. Over the next seven years, several key issues emerged: first, it became clear that neither the Federal nor State government had any cognizable legal basis for denying approval of the plan of operations under the existing laws upon which Glamis made its investment. Nevertheless, both the federal and state governments saw a denial as a means to certain political ends, whether as a way to

¹⁰⁴⁷ In describing a tribunal's responsibilities in the context of evaluating a claim of unfair or inequitable treatment, the *Mondev* tribunal noted that an arbitral tribunal is

bound to pass upon that claim on the facts and by application of any governing treaty provisions. A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case. It is part of the essential business of courts and tribunals to make judgments such as these. In doing so, the general principles referred to in Article 1105(1) and similar provisions must inevitably be interpreted and applied to the particular facts.

Mondev Award ¶ 118.

advance a legislative change without the inconvenient necessity of actual legislation (in the case of the Federal government) or as a way to pander to an emerging constituent interest (in the case of the State of California). These political ends were irreconcilable with the existing law – so, both the federal and state governments forced the existing law to give way. In doing so, they blatantly manipulated the administrative processes and the law for the express purpose of advancing these political goals but at the sole expense of Glamis’ investment in the Imperial Project. That manipulation was unfair, unreasonable and inequitable, and as such it constitutes a breach of Respondent’s obligations under Article 1105.

1. The Record Of Decision Of Secretary Babbitt’s Denial Of Glamis’ Mining Plan Of Operations Demonstrates Respondent’s Violation Of Its Article 1105 Obligation To Provide Fair And Equitable Treatment To Glamis.

542. In the instant case, the fact-specific inquiry contemplated by the *Mondev* tribunal demonstrates a clear course of unfair and inequitable dealing culminating in a hijacking of the administrative approval process for mining plans of operations.

543. As demonstrated by *Loewen*, *Mondev*, and the U.S.’s Memorial in *ELSI*, arbitrariness arises in situations where imprecise criteria are implied. As shown below, Interior’s creation of a discretionary authority by which it could deny Glamis’ project goes beyond merely applying existing criteria in an imprecise fashion.

544. As of January 10, 1995, BLM viewed Glamis as a “good steward[.]” of the desert lands based on its existing open pit gold mining practices.¹⁰⁴⁸ Imperial County supported the existing and proposed new operations, as well.¹⁰⁴⁹ In 1996 and 1997, the draft EIS/EIR reports prepared by BLM and Imperial County recognized approval of the Imperial Project as the “preferred alternative” which was most consistent with applicable laws and policies.

545. As of May, 1998, BLM recognized that

The mining proposal appears to have merit under the 1872 mining law, the mining claims are properly recorded, a practical [plan of operations] was submitted consistent with 3809 regulations. *Thus, denial of the [plan of operations] could constitute a taking of rights granted to a claimant under the Mining Law.* If such a finding is made, compensation would be required under this option. While no precise estimate of mineral value is known by BLM, reasonable compensation can be expected to be substantial.¹⁰⁵⁰

546. The agency’s next step, beginning in late 1998, was to place the plan of operations in limbo while Interior – failing to find lawful means to stop the project (*e.g.* lack of economic value) – disregarded existing law and precedent to grant itself a discretionary authority to deny the Glamis Imperial Project, even though it met all legal and regulatory requirements for environmentally sound operation and reclamation. Interior was quite successful in that effort, eventually delaying action on the plan until January of 2001, more than six years after it had initially been filed. Initially, BLM concluded that the law and regulations as written and as interpreted for decades provided no basis for summary denial of Glamis’ plan. As a result, Interior’s only alternative was to arbitrarily disregard decades of settled law and practice under

¹⁰⁴⁸ SOF, ¶ 175.

¹⁰⁴⁹ *Id.*

¹⁰⁵⁰ *Id.* at ¶ 253 (quoting BLM, Draft Option Paper, Imperial Project (Chemgold) – Glamis Corp (May 7, 1998) (MV004193) (emphasis added)).

the guise of a “reinterpretation.” The result was Solicitor Leshy’s legal opinion, which in turn formed the basis for Secretary Babbitt’s denial of the plan of operations.

547. The Leshy Opinion disregarded decades of settled law and practice by taking the phrase “undue impairment,” which had always been equated with “unnecessary and undue degradation” and breathing into it a new discretionary mine-veto authority never previously known to exist. In essence, the Leshy legal opinion made an end-run around the legislative and rulemaking processes by fabricating a new mine-veto authority in contravention of the actual law to justify a desired end, namely, the protection of sacred sites. No matter how laudible the goal, it could not be accomplished under existing law – as BLM’s staff repeatedly recognized – and it should not have been accomplished at Glamis’ sole expense.

548. As stated in *Tecmed*, the “investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments”¹⁰⁵¹ Glamis reasonably expected BLM to apply its mining laws as they had been applied and interpreted for decades. It could not have fathomed, as it made nearly \$15 million in investment, that BLM would reinterpret years of mining and public land law to fashion such a denial authority. Glamis could never have planned its investment around such a reorientation of the applicable law. Respondent acted in an arbitrary and non-transparent manner, preventing Glamis from knowing “beforehand any and all rules and regulations that will govern its investments” as required under *Tecmed* and *CMS Gas*. Thus, Glamis has been denied fair and equitable treatment, as its investment in the Imperial

¹⁰⁵¹ *Tecmed* Award ¶ 154.

Project was treated arbitrarily and deprived of the “stable legal and business environment”¹⁰⁵² guaranteed by Article 1105.

2. That Glamis’ Mining Plan Of Operations Remains Unapproved Further Demonstrates Respondent’s Breach Of Article 1105.

549. Arbitrary conduct, often described as a decision that is without a reasonable link to a “good” or “legitimate” “reason,” is inconsistent with the standards of fair and equitable treatment established by Article 1105.¹⁰⁵³ Although it has been four years since both, the Leshy Opinion and the Babbitt denial have been rescinded, Respondent has offered no justification or basis for continuing to withhold approval of Glamis’ mining plan of operations. Indeed, to the best of Glamis’ knowledge, the only decision that the federal government has made in this matter since 2001 is the determination in September 2002 that Glamis’ mining claims are valid under the U.S. mining laws and do in fact contain gold deposits of substantial value.¹⁰⁵⁴

550. Faced with the possibility of an unpalatable political result, the federal government has simply abdicated its responsibility and refused to act. That sort of refusal to fairly administer the law – or indeed to administer it all – absent any legal justification, is precisely the sort of unfair and inequitable behaviour that the investment protections afforded by NAFTA’s Article 1105 were designed to combat. As recognized by Judge Schwebel in his dissenting opinion in *ELSI*, the “failure to correct an arbitrary measure constitutes a violation of the . . . treaty regardless of the existence of local remedies.”¹⁰⁵⁵ Furthermore, the “lack of orderly

¹⁰⁵² *CMS Gas Award* ¶ 274.

¹⁰⁵³ *See, e.g., CMS Gas Award* ¶ 290 (“The standard of protection against arbitrariness . . . is related to that of fair and equitable treatment. Any measure that might involve arbitrariness . . . is in itself contrary to fair and equitable treatment.”).

¹⁰⁵⁴ SOF, ¶¶ 347-49.

¹⁰⁵⁵ OECD 2004, *supra* note 42 at 30 (emphasis added).

process and timely disposition in relation to an investor . . . acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA” constitutes a violation of Article 1105.¹⁰⁵⁶

551. Furthermore, Respondent’s refusal to act upon or approve Glamis’ plan of operation since the rescission of the Leshy Opinion and Babbitt’s denial is a violation of its obligation under the fair and equitable treatment standard to protect the basic expectations of the investor by providing a predictable and stable legal framework. The *Metalclad* tribunal specifically included the principle of “timely disposition” in relation to an investor’s expectations as part of the fair and equitable treatment obligation under Article 1105.¹⁰⁵⁷ Glamis’ reasonable expectation was that its plan of operations would be approved within 2-3 years, as is typically the time range for approval of such projects. Interior’s actions (or inactions) with respect to Glamis’ investment have been anything but timely or in accordance with Glamis’ reasonable expectations. Thus, Interior’s continued refusal to approve the mining plan of operations – leaving it in suspended animation – is in violation of the fair and equitable treatment standard in that it is arbitrary and fails to protect the legitimate expectations of its investor.

3. California’s Unwarranted And Unprecedented Complete Backfilling And Site-Recontouring Requirements Demonstrate Violation Of Its Article 1105 Obligation To Provide Fair And Equitable Treatment To Glamis.

552. Following the rescission of the Babbitt denial in 2001, political opponents in California realized there was no federal or state law basis for stopping the Imperial Project. Once the federal government acknowledged its unlawful action and began the process of

¹⁰⁵⁶ *Metalclad* Award ¶ 99 (emphasis added).

¹⁰⁵⁷ *Id.*

remedying that error, opponents prevailed upon California to take a different approach, which it did. California simply changed the law in an unprecedented manner to prohibit any cost-effective operation of the Glamis mining claims. Although cloaked with more legitimacy, California's approach is nonetheless also characterized by arbitrariness and complete lack of candor and transparency – when they retroactively applied this targeted legislation to Glamis' long-pending plan of operation in violation of the fair and equitable treatment required by Article 1105.

553. California totally deprived Glamis of its property rights in order to gain political capital for the Governor by using emergency environmental powers to achieve a purpose – the protection of Native American sacred sites – without compensating the owner. Statements by the then-Governor of California confirm that the California actions were not motivated by a legitimate public interest, such as establishing a considered standard of reclamation for all open-pit mining in California, but rather to target and block the Imperial Project.

554. The lack of any technical or environmental justifications for the California legislation further demonstrates the arbitrariness of California's measures. The adopted measures represent a radical departure from conventional approaches to backfilling at other metallic mining operations in the United States and around the world. Two reports by the NAS/NRC (in 1979 and 1999) have recognized that the restoration of mining land to its original contours is “generally not technically feasible for non-coal minerals” and that such measures are “impractical, inappropriate and economically unsound.”¹⁰⁵⁸ “To restore the original contour where massive ore bodies have been mined by the open-pit method could incur costs roughly

¹⁰⁵⁸ SOF, ¶ 391.

equal to the original costs of mining. Although technically possible, such backfilling of a large open pit would be of uncertain environmental and social benefit and it would be economically impractical to mine some deposits under the current cost structure.”¹⁰⁵⁹ The imposition of such measures, despite any legitimate ties to its purported purpose, demonstrates a breach of Respondent’s obligation to provide Glamis with fair and equitable treatment.

555. In addition to being arbitrary, California’s actions were in violation of the good faith principle to protect the reasonable expectations of its foreign investors. The record demonstrates that the Interior Department had consulted the Quechan Tribe back in the late 1970s about sites of cultural significance to Native Americans, that the resulting information was reviewed by the Federal Government, and vast areas were set aside to protect sacred and other important sites identified during that consultation process, among others. The Imperial Project site was not among those sites designated as wilderness areas and accorded additional protections.¹⁰⁶⁰ Thus, California’s recent measures to protect vast and undefined spiritual pathways were completely unpredictable by Glamis. They also violated the 1994 Congressional promise – on which Glamis had relied – that there would be no “buffer zones” limiting authorized activities such as mining in areas near such wilderness areas.¹⁰⁶¹ The fair and equitable treatment obligation requires the host state to provide such a framework for investment that the foreign investor may know “beforehand any and all rules and regulations that will govern its investments.” California’s complete backfilling and site-recontouring requirements, initially enacted as emergency measures, were not only unprecedented, but unpredictable.

¹⁰⁵⁹ *Id.* ¶¶ 391-92 (citing National Research Council and National Academy of Sciences, Committee on Surface Mining and Reclamation, *Surface Mining of Non-Coal Minerals*, p. xxvii (1979)).

¹⁰⁶⁰ *See* Sebastian Report ¶ V.B, pp. 20-24; *see also* SOF ¶¶ 103-116.

556. In determining whether the Respondent's conduct rises to the level of a breach of Article 1105, the Tribunal should consider the entirety of its conduct rather than focusing on individual aspects of that conduct. "The record as a whole – not isolated events – determines whether there has been a breach of international law."¹⁰⁶² This is especially so in an extraordinary case such as this where the cumulative effect of this chain of measures over a period of more than a decade constitutes a flagrant violation of Glamis' right to fair and equitable treatment under Article 1105 of NAFTA. These measures, in combination, are demonstrably arbitrary, grossly unfair, unjust and idiosyncratic, and evidence a complete lack of good faith, transparency and candour.¹⁰⁶³ Accordingly, they constitute unfair and inequitable treatment for which the Respondent is liable under customary international law as embodied in Article 1105.

XI. Claimant Is Entitled To Compensation As A Result Of Respondent's Breach Of Articles 1110 And 1105 Of NAFTA

557. As detailed above, Respondent's violations of Articles 1110 and 1105 have injured Glamis by destroying the full value of its mineral rights comprising the Imperial Project. Under international law, compensation is called for where, as here, the damages cannot be made good by restitution. "The remedy should be commensurate with the loss, so that the injured party may be made whole."¹⁰⁶⁴ Here, while the violations of Articles 1110 and 1105 are distinct, the ultimate injury is the same – the total loss of valuable mineral rights. We discuss damages

(...continued)

¹⁰⁶¹ See *CMS Gas*, ¶ 275 (considering the guarantees given under the legal framework in deciding whether there had been a breach of the standard of protection afforded under the fair and equitable treatment).

¹⁰⁶² *GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, ¶ 97 (Final Award) (Nov. 15, 2004).

¹⁰⁶³ See *Waste Management Award* ¶ 98; See Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, J. WORLD INV. & TRADE 357, 373-74 (2005) (Commenting that the following, relevant to Glamis' claims against the Respondent, are practical examples of a breach of the fair and equitable treatment standard: (1) failure to ensure transparency and the protection of the investor's legitimate expectations; (2) failure to follow procedural proprieties and standards of due process; (3) and failure to act in good faith).

separately with respect to each Article, however, because the circumstances affect how the Tribunal should view the date of the injury and the total compensation due.

558. To assist the Tribunal in valuing the Imperial Project, Claimant engaged the services of Behre Dolbear & Company, Inc., a leading appraiser of mining companies and mineral properties since 1911. Behre Dolbear has valued mineral projects around the world for both private entities and governments, including Respondent, and it has done so for both buyers and sellers.¹⁰⁶⁵ As discussed further below, Behre Dolbear has concluded that as of midnight on December 11, 2002 – just before California’s emergency backfilling regulation went into effect – Claimant’s mineral property had a net present value of \$49.1 million. Thereafter and continuing forward, the value of the Imperial Project has been \$0 (actually a negative value).¹⁰⁶⁶

A. The Measure Of Compensation For The Article 1110 Expropriation

559. Paragraphs 2-6 of Article 1110 lay out the principles in accordance with which compensation must be paid in situations where an expropriation has occurred. These paragraphs generally require that compensation be equivalent to fair market value, be paid without delay, include a reasonable interest rate, be converted according to the prevailing market rate of exchange (if payment is made in a non-G7 currency), and that the compensation be fully transferable.¹⁰⁶⁷ Section 712(1) of the *Restatement*, similarly provides that: “just compensation”

(...continued)

¹⁰⁶⁴ *CMS Gas Transmission*, ¶¶ 399-401.

¹⁰⁶⁵ Behre Dolbear Report at 1-2.

¹⁰⁶⁶ *Id.* at 19.

¹⁰⁶⁷ NAFTA, *supra* note 8, art. 1110(2-6); *accord* RESTATEMENT (THIRD) OF FOREIGN RELATIONS §712(1).

must, “in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of the taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national.”

560. The underlying objective of compensation in expropriation cases is to “place the party to whom they are awarded in the same pecuniary position that they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion.”¹⁰⁶⁸ This includes compensation for the “loss suffered (*damnum emergens*), for example the expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have produced.”¹⁰⁶⁹ This principle of customary international law has been applied in many international arbitral tribunal awards, including *Texaco Overseas Petroleum v. Libya* (“*TOPCO*”), *Sedco Inc. v. the National Iranian Oil Co.*, and *Amoco International Finance Corp. v. Islamic Republic of Iran*.¹⁰⁷⁰

561. Article 1110 of NAFTA is consistent with the objectives of compensation under customary international law.¹⁰⁷¹ It requires that in determining fair market value, the going concern value, asset value (including declared tax value of tangible property) and other

¹⁰⁶⁸ See *Metalclad Corp. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/97/1, ¶ 256 (Memorial of Metalclad Corporation) (Oct. 13, 1997) (quoting *Sapphire International Petroleum v. National Iranian Oil Co.*, 35 ILR 136 (1963)).

¹⁰⁶⁹ *Metalclad* Memorial ¶ 256 (discussing *Sapphire*, which held that the measure of damages for the premature termination of a petroleum agreement with Iran included the present value of the reasonably ascertainable future earnings); see *AGIP Co. v. Popular Republic of Congo*, 21 I.L.M. 726, 737 (Award) (1982) (discussing the basic rule of compensation for material losses under Article 1149 of the French Civil Code as including both the loss suffered (*damnum emergens*) and the loss of profits (*lucrum cessans*)).

¹⁰⁷⁰ *Biloune*, 95 I.L.R. at 228.

¹⁰⁷¹ It is also consistent with U.S. takings law. For instance, in *Whitney Benefits*, 18 Cl.Ct. at 408-413, a leading U.S. mining case where a taking was held to have occurred, a discounted cash flow analysis to determine compensation based on the capitalization of projected income stream to value coal was accepted as a reliable method for determining the fair market value of the coal on the date of taking.

appropriate criteria be considered.¹⁰⁷² Here, as the Behre Dolbear Report points out, the Tribunal is confronted with the expropriation of a mining property which can be appraised using well-established mineral property appraisal techniques. Specifically, Behre Dolbear identifies that for mineral properties – like the Imperial Project – with proven reserves, net present value is determined by the discount cash flow (or income) approach. In addition, the exploration value of the property can be appraised through the so-called comparable sales approach.¹⁰⁷³

562. Based upon these approaches, the Behre Dolbear appraisal determined that before the December 12, 2002 expropriation, the value of the Imperial Project was \$49.1 million. After the imposition of the California mandatory backfilling measures, the value of the Imperial Project was totally destroyed and the resulting value was \$0; indeed, it had a negative value of -\$11.56 million. The Report concludes that “*no prospective purchaser would consider acquiring the Project, in Behre Dolbear’s opinion, if complete backfilling is required.*”¹⁰⁷⁴ The approach of the Behre Dolbear appraisal is non-speculative in nature, as described in the Report:

Behre Dolbear’s valuation is based on a visit to the Project site, a review of Glamis’ existing feasibility study and other project data. Behre Dolbear’s team of metallurgists, mining engineers, geologists, and environmental specialists reviewed the data for accuracy and reliability. Behre Dolbear determined that the data are of sufficient quality to assess the value with a high degree of certainty.

This conclusion is supported by the fact that the Project uses conventional open pit gold mining methods, which are similar to nearby gold mining operations, the Picacho Mine operated by Glamis from 1980 to 1999 and the Mesquite Mine operated until 2003 by Newmont Mining Corporation. Both mines are geologic and operational analogs of the Imperial Project and provide a valid basis for substantiating the low unit costs (both capital and operating) characteristic of these operations. The validity of the data is also supported by the thorough examination (sampling, reserves, claims,

¹⁰⁷² NAFTA, *supra* note 8, art. 1110(2).

¹⁰⁷³ Behre Dolbear Report, at 11-12.

¹⁰⁷⁴ Behre Dolbear Report ¶ 1.3.2 (emphasis added).

costs, and similar information) conducted by the U.S. Department of Interior Bureau of Land Management (BLM) as part of its 2002 mining claim examination and validation. Both Behre Dolbear and the BLM determined that the grade and nature of the deposit precludes underground mining and any mining method other than open pit.

The Project has defined reserves and resources and has been subject to extensive study and testing. Behre Dolbear's primary valuation method is, accordingly, the income approach, based upon an after-tax discounted cash flow model, supplemented by the market approach to value the upside exploration potential. Behre Dolbear's base case valuation is effective as of midnight on December 11, 2002, immediately prior to the imposition of the Mandatory Backfill Regulation.¹⁰⁷⁵

563. Behre Dolbear set forth its conclusion as follows:

Behre Dolbear concludes that the fair-market value of the Project, prior to imposition of the Mandatory Backfill Regulation, was \$49.1 million. Behre Dolbear also concludes that the Project had no value after imposition of the Mandatory Backfill Regulation, which effectively destroyed the entire value of the Project. Current increases in the gold price have had no material affect on this conclusion. The Project was rendered uneconomic on December 12, 2002, and was still uneconomic at the end of 2005, the latest year for which we have an average gold price.¹⁰⁷⁶

564. The basis for Behre Dolbear's appraised value is set out in detail in its report. Among other things, Behre Dolbear utilized a ten-year average approach for determining the relevant gold price to be used in the valuation.¹⁰⁷⁷ Behre Dolbear explained that it "does not project commodity prices, as over the life of typical mining cycles they may vary greatly based upon supply, demand, and perceptions of economic trends."¹⁰⁷⁸ The appraisal report explained

¹⁰⁷⁵ Behre Dolbear Report ¶ 1.2.

¹⁰⁷⁶ Behre Dolbear Report ¶ 1.5.

¹⁰⁷⁷ Behre Dolbear Report ¶ 4.1.1.

¹⁰⁷⁸ Behre Dolbear Report ¶ 4.1.1

further that the “10-year price methodology has consistently been used by Behre Dolbear in its valuation of mineral properties for its clients, including the United States government.”¹⁰⁷⁹

565. Accordingly, given that fair market value must be considered *before* the expropriation took place, and “is supposed to exclude any change in value occurring because the plan to expropriate had become known before the actual taking,”¹⁰⁸⁰ the Tribunal should award Glamis \$49.1 million in compensation, plus interest, from December 12, 2002, as a result of the total loss it has suffered due to the California mandatory complete backfilling regulations. In addition, the Tribunal should award Glamis the ongoing rental payments it must continue to make to Respondent - \$288,400 from 2003 through 2005 – just to maintain its mining claims even though they are sitting idle as a result of Respondent’s actions.¹⁰⁸¹

B. The Measure Of Compensation For The Article 1105 Denial Of The Minimum Standard Of Treatment.

566. Even if the Tribunal does not conclude that Respondent’s measures rise to the level of an expropriation, Glamis would be entitled to compensation for the injury resulting from Respondent’s failure to accord the Imperial Project the minimum standard of treatment guaranteed by Article 1105. Unlike Article 1110, Article 1105 does not specify the level of compensation due for a denial of fair and equitable treatment. NAFTA Chapter Eleven thus leaves the measure of compensation to customary international law.

567. Again, the tribunal’s discussion in *CMS Gas Transmission Co.* is instructive. There, the tribunal found a violation of the fair and equitable treatment standard of the relevant U.S.-Argentina Bilateral Investment Treaty, which like NAFTA, did not specify a measure of

¹⁰⁷⁹ Behre Dolbear Report ¶ 4.1.1.

¹⁰⁸⁰ Andreas F. Lowenfeld, *International Economic Law* 480 (2002).

¹⁰⁸¹ Statement of J. Utley ¶ 8.

damages. After surveying the authorities, the tribunal concluded that where the injury is to property, compensation should be based upon the property's "fair market value," quoting an internationally recognized definition:

The price expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy and sell and when both have reasonable knowledge of relevant facts.¹⁰⁸²

That is precisely the approach used by Behre Dolbear in reaching its valuation of \$49.1 million.¹⁰⁸³

568. Accordingly, under Article 1105, the Tribunal should award Glamis at least \$49.1 million plus interest and the continuing costs Glamis incurs annually paying Respondent for the mineral rights that Respondent has precluded it from exploiting. The Tribunal should also consider that the injury of Respondents arbitrary and discriminatory treatment began long before the ultimate expropriation in December 2002. As detailed above, by mid-1998, but for the unlawful and arbitrary acts, the Glamis Imperial Project should have been approved and Glamis would have begun earning a return on the approximately \$13.64 million it had invested to that point.¹⁰⁸⁴ Thus, in addition to the net present value, the Tribunal should award interest on Glamis' development costs, productive use of which was lost as a result of Respondent's unlawful and arbitrary measures.

¹⁰⁸² *CMS Gas* at ¶ 402 (quoting the International Glossary of Business Valuation Terms, American Society of Appraisers).

¹⁰⁸³ Behre Dolbear Report ¶ 3.2 ("The criterion that Behre Dolbear has used in establishing the fair-market value of the properties is the amount a willing buyer would pay a willing seller in an arm's length transaction, wherein each party acted knowledgeably, prudently, and without compulsion.").

¹⁰⁸⁴ Statement of J. Utley, Att. A.

XII. Conclusion

569. Through the measures identified above, Respondent has denied Glamis the minimum standard of treatment under international law (including full protection and security and fair and equitable treatment of its investment) guaranteed by Article 1105 and has expropriated Glamis' valuable mining property interests without providing prompt and effective compensation as guaranteed by Article 1110.

570. Accordingly, at a minimum, Claimant seeks compensation for the following:

- A sum not less than U.S. \$49.1 million in compensation for the net present value of Glamis' valuable mining property, the value of which Respondent destroyed by its violations of Articles 1110 and 1105;
- Such further damages that the Tribunal may deem appropriate for the United States' failure to accord Glamis the minimum standard of treatment, recognizing that Glamis has invested over \$14.83 million into the Imperial Project as of December 2002, and that most of that amount (\$13.64 million) had been invested by 1998, the year when the Imperial Project should have been approved by the U.S. Interior Department absent the admitted illegal and arbitrary conduct by that agency of the United States;
- Pre-award interest, at a rate to be fixed by the Tribunal, on Glamis' invested amounts in the Imperial Project from, no later than June 30, 1998 to December 12, 2002;
- Pre-award and post-award interest on the full net present value from December 12, 2002 forward at a rate to be fixed by the Tribunal; and

- Costs associated with these proceedings, including attorneys' fees and expenses, in an amount to be determined at the conclusion of the proceedings.

571. Finally, with respect to the suggestion of the Quechan Tribe in its statement of August 19, 2005, regarding the proposed transfer and extinguishment of the Glamis mining claims and mill sites on BLM-managed lands in the Indian Pass area of Imperial County,¹⁰⁸⁵ Claimant agrees with the Quechan Tribe that the formal transfer and extinguishment of these mining claims and mill sites to the United States would be an appropriate condition of this Tribunal's award of fair and just compensation to Glamis for the expropriation of the Imperial Project. After more than a decade of conflict over this subject matter, the Tribunal's award of full compensation should bring this controversy to a final and complete conclusion.

Respectfully submitted,

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May 5, 2006

¹⁰⁸⁵ In that submission in this case of August 19, 2005 (at pp. 14-15), the Quechan Tribe's counsel stated: "Of significant concern to the Tribe is whether a decision in favor of the Claimant would directly or indirectly result in the extinguishment of Glamis' claims to mine the area. If it does not, then it is possible that Glamis could both receive a monetary award and then also have the benefit of its allegedly valueless claims, meaning it could then presumably use or sell them."

IMPERIAL PROJECT TIMELINE

- 1976 Congress designates the 25-million acre California Desert Conservation Area in southern California and directs BLM to prepare a land use plan by 1980. The plan had to ensure that principles of multiple use governed land-use activities in the Desert.
- 1978 BLM consults with Native Americans, including Quechan Tribal elders, to identify important and sacred areas in the Desert. Per BLM's records, the Imperial Project area was not identified as an area of "high" or "very high" interest by Native Americans. In contrast, Pilot Knob, the Cargo Muchachos Mountains, and areas near Picacho Peak and along the Colorado River are identified as being of "very high" Native American interest. The records reveal no mention of the "Trail of Dreams" or any similar concept.
- 1980 BLM issues the California Desert Conservation Area Plan. That Plan establishes Wilderness Study Areas as areas with high identified environmental and Native American cultural values. These designations did not include the Imperial Project area, which remained open to multiple-use mineral development.
- 1987 After successfully opening and operating two other open-pit gold mines in the California Desert Conservation Area, Glamis acquires property interests in the mining claims that would later become the Imperial Project.
- That same year, BLM issues a management plan for the Indian Pass area just one mile north of the Imperial Project mining claim block and finds "no evidence" of contemporary Native American use in the area.
- 1987 – 1994 Glamis carries out an extensive exploration drilling program in the Imperial Project area with multiple BLM approvals. The Quechan Tribe never objects to, or appeals, the exploration drilling activities despite their Tribal historian's active involvement in the 1991 cultural-resource surveys in support of that drilling program.
- 1988 – 1992 During the time Glamis is exploring the area near Indian Pass and operating the nearby Picacho Mine, the Quechan Tribe's President applies for a grant from the U.S. Department of Interior to carry out mineral exploration for

“bulk mineable gold mineralization” on Quechan reservation lands which he says is “an exciting new economic development possibility.” The Tribe’s application expresses awareness of a gold discovery near Indian Pass and the Glamis Picacho operations, but expresses no opposition to those activities. The Tribe carries out drilling in 1992, along the southern edge of Cargo Muchachos Mountains, but does not find economic mineralization.

- October 31, 1994 The California Desert Protection Act of 1994 establishes two wilderness protection areas just north of the Imperial Project, and also sets aside more than 10 million acres for preservation in parks and wilderness areas. Native American religious uses of designated wilderness areas and parks is expressly protected. The legislation, however, expressly prohibits the creation of land-use “buffer zones” around the wilderness areas to limit multiple use activities. The Imperial Project area thus remains open to mineral exploration and development.
- Dec. 6, 1994 Glamis submits a mining plan of operation for the Imperial Project to BLM and Imperial County, formally initiating mine permitting and environmental and historic properties review.
- Jan. 10, 1995 The BLM California State Office prepares a status report to the Acting BLM Director identifying the operators of the Mesquite, American Girl, and Glamis Picacho mines as “good stewards” who share BLM’s “responsibilities for proper use, development and planned reclamation of desert lands.” Glamis’ plan of operation for a new mine is described. Imperial County is identified as supportive of “existing and proposed operations.” No Native American issues are identified.
- Summer 1995 Quechan Tribal historian Lorey Cachora actively participates in second intensive archaeological survey of the Imperial Project area. No mention is made of “Trail of Dreams” in the resulting report.
- August 1996 The Quechan Tribe opens the “Paradise Casino” on reservation lands (previously identified by the Tribe as having very high Native American cultural interest) along the Colorado River with projections that it could gross \$3.6 million per month.

ADDENDUM A

- Dec. 1996 BLM and Imperial County release a draft Environmental Impact Statement/Environmental Impact Report (“EIS/EIR”) for the Imperial Project, which identifies Glamis’ proposed plan of operation as BLM’s “preferred alternative.”
- Jan. 1997 The Quechan Tribe first expresses public opposition to the Imperial Project.
- Nov. 1997 A revised EIS/EIR is released by BLM and Imperial County and again identifies Glamis’ proposed plan of operation as BLM’s “preferred alternative.”
- Nov. 5, 1997 Ex parte political contacts are made by Francis Wheat, a resident of California and one of “100 environmental leaders” endorsing the Clinton-Gore re-election campaign in 1996, to Interior Deputy Secretary Garamendi (former California Chair of the 1992 Clinton-Gore campaign). Mr. Wheat advocates the denial of the Imperial Project and proposes a novel new legal theory upon which that denial could be based.
- Dec. 3, 1997 Interior Deputy Secretary Garamendi circulates Mr. Wheat’s proposal to senior officials within BLM and the Interior Solicitor’s Office.
- Dec. 16, 1997 The Quechan Tribe meets with the BLM State Director (along with representatives of the Sierra Club and a member of U.S. Senator Boxer’s staff) expressing unalterable opposition to the Imperial Project, because it would destroy sacred lands akin to Jerusalem or Mecca, according to Tribal historian Lorey Cachora.
- Jan. 5, 1998 BLM’s California State Director requests a Solicitor’s opinion regarding the impending conflict between the Quechan Tribe’s religious beliefs and the Glamis Imperial Project.
- Feb. 1998 An initial internal BLM analysis of the Imperial Project indicates that Glamis’ mining claims are valid and that the Imperial Project is economically viable.
- July 27, 1998 BLM’s “projected schedule” for the Imperial Project is to prepare a final EIS/EIR by September 18, 1998, and “Record of Decision/Conditions of Approval for Plan of Operations” by October 18, 1998.

ADDENDUM A

- Aug. 25, 1998 BLM requests the involvement of the Advisory Council on Historic Preservation (“ACHP”) in resolving issues over Glamis’ cultural resource impacts and mitigation options.
- Sept. 15, 1998 BLM initiates a formal mineral validity determination for the Glamis Imperial Project mining claims, citing the need for prompt action. (A final mineral exam report is not released for four years.)
- Sept. 21, 1998 The ACHP’s chief staff contact communicates with an Imperial Project opponent and expresses a predetermined view that the ACHP will ultimately recommend denial of the Imperial Project.
- Oct. 1998 BLM proposes a “withdrawal” of over 9,300 acres surrounding the Imperial Project to prohibit the location of any new mining claims in the area. The withdrawal is subject to valid existing rights. The express purpose of the withdrawal was to protect Native American values in the area.
- Oct. 30, 1998 Solicitor Leshy advises BLM’s California State Director that he has been in “intensive discussions” regarding the Imperial Project, which has his “substantial personal attention.” Solicitor Leshy directs BLM to “delay completion of the [mineral] validity examination and the final EIS.”
- Mar. 11, 1999 The ACHP holds an “unusual” public hearing and field visit in the California Desert. According to the ACHP’s Executive Director, the ACHP was “not playing by the normal rules of the Section 106 process” and BLM officials testify that they “don’t normally have meetings like this.”
- Oct. 19, 1999 The ACHP identifies the Imperial Project area as a premier cultural site for the Quechan Tribe, and urges the Interior Secretary to deny the permit for the mine.
- November 1999 The National Academy of Sciences/National Research Council (“NAS/NRC”) issues a report requested by the U.S. Congress on *HardRock Mining on Federal Lands*, finding the “overall structure of federal and state laws and regulations that provide mining-related environmental protection” to be “generally effective” It advises against the adoption of “inflexible, technically prescriptive standards.” In particular, the NAS/NRC re-states a central conclusion from a 1979 NAS/NRC study that for metallic

ores mined by the open-pit method, backfilling of large open pits “is generally not technically feasible for non-coal minerals, or has limited value because it is impractical, inappropriate or economically unsound.” The NAS/NRC report added: “Known ores constitute less than 0.01% of the metal content of the upper 1 km of continental crust. Thus, mines can only be located in those few places where economically viable deposits have been formed and discovered.”

- Dec. 27, 1999
and Jan. 14, 2000
- Interior Solicitor Leshy and Secretary Babbitt issue a novel legal opinion based in large part on the analysis in the earlier Wheat letter, finding that BLM has the discretionary authority to deny the Imperial Project and can do so based on the ACHP’s recommendations.
- Sept. 2000
- BLM issues its final EIS/EIR for the Imperial Project and identifies the “no action alternative” as its “preferred alternative.”
- Oct. 2000
- BLM finalizes the administrative land withdrawal of 9,300 acres surrounding the Imperial Project, subject to valid existing rights.
- Jan. 17, 2001
- Interior Secretary Bruce Babbitt denies the Imperial Project on the eve of his departure from office. His denial is expressly based upon Solicitor’s Leshy’s legal opinion and the October 19, 1999 ACHP letter. Secretary Babbitt found, in part, that the “proposed project would destroy portions of the Trail of Dreams, other trails, and related ceremonial areas providing a spiritual pathway between Pilot Knob, over 15 miles from the site, and Newberry Mountain, 115 miles away.” He added: “The Quechan and other tribes believe the project would impair the ability to travel, both physically and spiritually, along the Trail of Dreams”
- Oct. 23, 2001
- Interior Solicitor Myers, and Interior Secretary Gale Norton, issue a legal opinion reversing the Leshy Solicitor’s Opinion, stating that Secretary Babbitt lacked the regulatory authority to deny the Imperial Project based on the legal standards set forth in the Leshy’s Solicitor’s Opinion.
- Oct. 30, 2001
- Interior’s BLM rescinds a recent (effective January 19, 2001) regulatory codification of Leshy-Babbitt mine denial authority (which had been premised on Leshy’s Glamis Opinion), finding that rescission was required by “basic

fairness” and projected widespread job losses and economic harm to the Western States, and because “it would be very difficult to implement the standard fairly as it relates to significant cultural resource values.”

- Nov. 23, 2001 Interior Secretary Gale Norton rescinds Secretary Babbitt’s Imperial Project denial based on Solicitor’s Myer’s Legal Opinion.
- Feb. 2002 BLM re-initiates the long-delayed mineral validity exam of the Imperial Project.
- Aug. 26, 2002 Two proposed bills (SB 1828 and SB 483) are amended in the California Legislature to specifically incorporate language aimed at prohibiting the development of the Imperial Project.
- Sept. 15-18, 2002 The heads of major California agencies confidentially advise Governor Davis to veto SB 1828, a bill which was developed primarily to block the Glamis Imperial Project, but which would provide broad protections to all Native American “sacred sites” in California. The Governor was told that the bill “is discriminatory and would provide unique and special treatment for the protection of religious sites for a specified group . . .” and that the bill “would grant Native American Indian tribes vast powers to stop development virtually anywhere in the state.” The Governor eventually vetoes SB 1828 (on Sept. 30, 2002), but signs SB 483 (a bill that imposed mandatory backfilling requirements on the Glamis Imperial Mine). SB 483 does not go into effect because it was linked to SB 1828.
- Sept. 27, 2002 BLM releases its long-delayed Mineral Report, determining that Glamis’ mining claims and mill sites are valid existing rights and in compliance with federal mining laws, justifying further expenditures by a “person of ordinary prudence . . . with a reasonable prospect of success in developing a valuable mine.”
- Sept. 30, 2002 After reportedly receiving more than \$840,000 in campaign contributions from Native American groups from 2000 to July 2002, California Governor Davis states that he has directed his “Secretary of Resources to pursue all possible legal and administrative remedies that will assist in stopping” the Glamis Imperial Project.

ADDENDUM A

- Dec. 12, 2002 The California Mining & Geology Board adopts “emergency” backfilling regulations and identifies the Imperial Project as the sole emergency condition.
- Jan. 28, 2003 The California Legislature openly acknowledges that the purpose and intent of its proposed mandatory backfilling legislation – SB 22, which essentially de-linked SB 483 from SB 1828 – is to “urgently . . . stop the Glamis Imperial mining project in Imperial County proposed by Glamis Gold Ltd., a Canadian-based company.” No other metallic mine proposal had gone through the EIS/EIR process and remained pending State-wide.
- Mar. 20, 2003 Imperial County submits comments to the California Mining & Geology Board strongly opposing the mandatory complete backfilling regulations.
- Apr. 7, 2003 California Governor Davis signs SB 22, which requires mandatory and complete backfilling of all proposed open-pit metallic mines located within one mile of a Native America “sacred site,” stating that this “essentially stops the Glamis Gold mine proposal . . . [and] would make operating the gold mine cost prohibitive.” Select invitees for California bill signing ceremony include the Quechan Tribe President and legal counsel, and the President of the California Indian Gaming Commission.
- Apr. 10, 2003 The California Mining & Geology Board adopts its final mandatory complete backfilling regulation. The Board expressly states that no empirical studies or technical reports were relied on for the regulation.
- July 21, 2003 Glamis files its notice of arbitration and NAFTA claim on the United States.
- Dec. 9, 2003 Glamis formally files a claim for compensation under NAFTA.

GLOSSARY OF TERMS

ACEC	Area of Critical Environmental Concern – special management areas created by BLM under 1980 California Desert Conservation Area (CDCA) Plan in California Desert to protect important historic, cultural or scenic values
ACHP	Advisory Council on Historic Preservation – federal advisory body with consultation responsibilities under the National Historic Preservation Act of 1966
APE	Area of Potential Effects – region affected by a proposed project as determined by agency examining effect on historic properties under 1986 regulations implementing Section 106 of the National Historic Preservation Act
ATCC	Area of Traditional Cultural Concern – new term created by BLM in course of Glamis Imperial project
BLM	Bureau of Land Management, U.S. Department of the Interior
BIA	Bureau of Indian Affairs, U.S. Department of the Interior
CDCA	California Desert Conservation Area – large land area created pursuant to Section 601 of the Federal Land Policy and Management Act (FLPMA)
CEQA	California Environmental Quality Act – requires reviews of environmental impacts of state regulated development projects
COSMAR	Committee on Surface Mining and Reclamation – Committee of the National Academy of Sciences/National Research Council pursuant to 1977 act of Congress to study applicability and feasibility of coal reclamation practices for other minerals
EA	Environmental Assessment – Preliminary study of a proposed activity to determine if full Environmental Impact Statement (EIS) is warranted under the National Environmental Policy Act (NEPA)
EIS/EIR	Environmental Impact Statement/Environmental Impact Report – BLM and Imperial County joint study of project’s

ADDENDUM B

	effects on environment pursuant to NEPA and the California Environmental Quality Act (CEQA)
ESA	Endangered Species Act of 1973 – federal law protecting listed threatened and endangered species
FLPMA	Federal Land Policy and Management Act of 1976 – expanded and confirmed BLM’s authority to manage federal lands
IBLA	Interior Board of Land Appeals, U.S. Department of the Interior – administrative adjudicatory body which reviews BLM decisions
ICPBD	Imperial County Planning/Building Department
Interior	U.S. Department of the Interior
IMF	International Monetary Fund
KEA	KEA Environmental, Inc. – consultants hired by BLM to conduct 1997 cultural resource survey of Imperial Project
Mine Veto Authority	Substantial Irreparable Harm (SIH) – a new standard created by Interior Solicitor John Leshy and Interior Secretary Babbitt to grant BLM new discretionary authority to deny proposed mines; standard was rescinded in October 2001
MMPA	Mining and Minerals Policy Act of 1970 – reaffirmed federal policy encouraging mining in the U.S.
MOA	Memorandum of Agreement – agreement between agency and SHPO about how project’s effects on historic properties should be taken into account
NAS/NRC	National Academy of Sciences/National Research Council
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act of 1966
POO	Plan of Operations – BLM reviewed and approved plan to authorize exploration and mining activities
ROD	Record of Decision – final determination by Interior approving or denying project’s plan of operation
SB	California Senate Bill

ADDENDUM B

Section 106	Section of the National Historic Preservation Act directing federal agencies to take into account the effect of a federal “undertaking” on historic properties and afford the Advisory Council on Historic Preservation (ACHP) opportunity to comment.
SHPO	State Historic Preservation Officer – reviews and consults with federal agencies under the National Historic Preservation act regarding undertakings which may affect historic properties
SIH	Substantial Irreparable Harm (or “mine veto”) – new standard created by Interior Solicitor John Lesly and Interior Secretary Babbitt to grant BLM discretionary authority to deny proposed mines; SIH standard was rescinded in October 2001
SMARA	California Surface Mining and Reclamation Act of 1975 – regulates mining in California
SMCRA	Federal Surface Mining Control and Reclamation Act of 1977 – regulates coal mining nationwide and commissioned study by National Academy of Sciences/National Research Council on feasible reclamation of non-coal mines
SMGB	California State Mining and Geology Board
VER	Valid Existing Rights – valid mining claims or mill sites associated with valuable mineral deposits established pursuant to Mining Law of 1872
Withdrawal	Legislative or administrative action closing an area of federal land to mineral entry, <i>i.e.</i> , location of new mining claims
WSA	Wilderness Study Area – area evaluated by BLM pursuant to Section 603 of the Federal Land Policy and Management Act of 1976 for potential designation by Congress as a protected “Wilderness” under the 1964 Wilderness Act
3809 Regulations	BLM regulations promulgated at 43 C.F.R. Subpart 3809 in 1980 and revised in 2000 and 2001 to prevent “unnecessary or undue degradation” of the public lands

LIST OF KEY PERSONS

U.S. Interior Department Headquarters

Dave Alberswerth	U.S. Interior Department Deputy Director of Congressional and Legislative Affairs (under Secretary Babbitt)
Bob Anderson	BLM Senior Official, U.S. Interior Department (formerly Deputy State Director BLM, California)
Bruce Babbitt	U.S. Interior Secretary (1993-2001)
John Garamendi	U.S. Interior Department, Deputy Secretary (1995-1998)
Roger Haskins	BLM Minerals Staff, U.S. Interior Department
Karen Hawbecker	Solicitor's Office Staff Attorney, U.S. Interior Department
Lisa Hemmer	Solicitor's Office Staff Attorney, U.S. Interior Department
John Leshy	U.S. Interior Department Solicitor (1993-2001)
Patricia Morrison	Deputy Assistant Secretary, U.S. Interior Department (2001-2004)
William Myers	U.S. Interior Department Solicitor (2001-2003)
Gale Norton	U.S. Interior Department Secretary (2001-2006)
Peter Schaumberg	Deputy Associate Solicitor for Minerals, U.S. Interior Department
Janie Sheppard	Solicitor's Office Staff, U.S. Interior Department
Rebecca Watson	Assistant Secretary Land & Minerals, U.S. Interior Department (2002-2006)
Joel Yudson	Solicitor's Office Staff, U.S. Interior Department

U.S. Interior Department, California

Jan Bedrosian	BLM Public Affairs Specialist, U.S. Interior Department, California
Richard Grabowski	BLM California State Office, Deputy State Director, U.S. Interior Department
Jim Hamilton	BLM Staff, California State Office, U.S. Interior Department
Ed Hastey	BLM California State Director, U.S. Interior Department (1978-1999)
Russ Kaldenberg	BLM Archaeologist, U.S. Department of the Interior, California
Glen Miller	BLM Staff, U.S. Interior Department, California
David Nawi	Regional Solicitor, U.S. Interior Department, California
John Payne	Regional Solicitor's Office Staff Attorney, U.S. Interior Department, California
Mike Pool	BLM California State Director, U.S. Interior Department (2000-Present)
Terry Reed	BLM Area Manager, U.S. Interior Department
Tim Salt	BLM District Manager, California Desert District, U.S. Interior Department
Rob Waiwood	BLM Mineral Examiner, U.S. Interior Department, California
Al Wright	BLM Acting California State Director, U.S. Interior Department (1999-2000)

California Governmental Agencies

Robert Joehneck	California Department of Conservation Staff Counsel
Rich Thalhammer	California Deputy Attorney General
Cherilyn Widell	California State Historic Preservation Officer

Glamis Gold Ltd.

Steve Baumann	Chemgold/Glamis Gold, Project Manager
Gary Boyle	Glamis Gold Inc., Project Manager
Charles A. Jeannes	Glamis Gold, Ltd. Executive Vice President and General Counsel (1999 to Present)
C. Kevin McArthur	Glamis Gold, Ltd., President and CEO (1998-Present); Manager of Picacho and Rand Mines (1989-1997)
Dan Purvance	Glamis Gold, Ltd. (and affiliates), Geologist and Environmental and Reclamation Manager (1992-Present)
James Utley	Controller, Glamis Gold, Ltd. (1999-Present)
Kenneth F. Williamson	Director, Glamis Gold Ltd. (1999-Present)

Advisory Council on Historic Preservation

John Fowler	Advisory Council on Historic Preservation, Executive Director
Don Klima	Advisory Council on Historic Preservation, Staff Supervisor
Cathryn Buford Slater	Advisory Council on Historic Preservation Chairman
Alan Stanfill	Advisory Council on Historic Preservation, Primary Staff on Imperial Project
Ray Soon	Advisory Council on Historic Preservation, Appointed Member

Quechan Tribe

Lorey Cachora	Quechan Tribal Historian
Courtney Coyle	Quechan Tribe Attorney
Michael Jackson	Quechan Tribe President
Pauline Owl	Quechan Cultural Committee Chairman

U.S. Congress

Barbara Boxer	U.S. Senator, California
John Ensign	U.S. Senator, Nevada
Jim Gibbons	U.S. Representative, Nevada
Dan Hammer	U.S. Senator Barbara Boxer's Office Staff
Harry Reid	U.S. Senator, Nevada

State Representatives

John L. Burton	California State Senator and President pro Tempore of California State Senate
Gray Davis	Governor of California (1999-2003)
Mary Shallenberger	California State Senator John Burton's Office Staff
Jeff Shellito	California State Senator Byron Sher's Office Staff
Byron D. Sher	California State Senator

Glamis Experts

Bernard J. Guarnera	Behre Dolbear President and CEO
Thomas V. Leshendok	BLM Nevada Deputy State Director for Minerals, U.S. Department of the Interior (1983-2003)
Lynne Sebastian	Cultural Resource Specialist; SRI Foundation Director of Historic Preservation Programs (2001-Present)

Other

Michael Baksh	Tierra Environmental Services Ethnographer under contract for BLM
Eddie Harmon	Sierra Club Attorney
Thomas King	Imperial Project Opponent
Francis M. Wheat	Earth Legal Defense Fund Founder and Trustee