

NAFTA/UNCITRAL ARBITRATION RULES PROCEEDING

- - - - - x  
 In the Matter of Arbitration :  
 Between: :  
 GLAMIS GOLD, LTD. , :  
                     Clai mant, :  
                     and :  
 UNITED STATES OF AMERICA, :  
                     Respondent. :  
 - - - - - x Volume 1

HEARING ON THE MERITS

Sunday, August 12, 2007

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

The hearing in the above-entitled matter came  
 on, pursuant to notice, at 9:07 a. m. before:

- MR. MICHAEL K. YOUNG, President
- PROF. DAVID D. CARON, Arbitrator
- MR. KENNETH D. HUBBARD, Arbitrator

Also Present:

- MS. ELOÏSE OBADIA,  
Secretary to the Tribunal
- MS. LEAH D. HARHAY

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Assistant to the Tribunal

Court Reporter:

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3

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Claims and Investment Disputes  
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Investment Disputes  
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1 PROCEEDINGS

2 PRESIDENT YOUNG: Good morning. We are ready  
3 to start this morning. We appreciate everybody's  
4 willingness to join us early on a Sunday morning, as  
5 we commence this arbitral hearing on Glamis Gold,  
6 Limited, versus the United States of America.

7 We welcome both Claimant and Respondent and  
8 their representatives, as well as the public, who are  
9 viewing this in an off-site location to which this is  
10 being broadcast.

11 Let me start with just a few small logistical  
12 issues.

13 First, as we commence these proceedings, as  
14 we've discussed before, there will be some testimony  
15 that the parties have asked be considered  
16 confidential. In that regard, there are, in  
17 particular, three witnesses whose testimony we  
18 anticipate will be, largely at the request of the  
19 parties, kept confidential, as the testimony of  
20 Dr. Sebastian, Mr. Kaldenberg, and Dr. Cleland, all  
21 three of whom we will anticipate will probably be  
22 testifying tomorrow afternoon or at least sometime

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2 Is that largely correct?

3 MR. GOURLEY: That is correct.

4 PRESIDENT YOUNG: Okay. Thank you.

5 During the testimony of those three  
6 witnesses, we will--for the information of the public  
7 to let everyone know, we will be turning off the live  
8 feed during the testimony of those three witnesses.  
9 Otherwise, at least at the moment, we are not aware of  
10 other major portions of the hearings that will go  
11 off-line, but we anticipate that, at least with  
12 respect to those three witnesses.

13 There may be other brief occasions when  
14 references are made, again, to particular elements of  
15 the case that the parties asked to be kept  
16 confidential, but we will try to give everyone as much  
17 notice as we can prior to any references, but at the  
18 moment we are not really anticipating very much of  
19 that.

20 But as we start today, we will start with  
21 opening arguments today. Our schedule, as you know,  
22 runs from nine in the morning until 10:30, at which

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09:06:27 1 point we will take a break from 10:30 to 11:00; and  
2 then run from 11:00 to 12:15, and then commence again  
3 at 2:00, I think.

4 But, in light of the--to keep the flow of  
5 opening arguments as seamless as possible, what we  
6 would like to do today is Claimant will start and  
7 allow you to continue your opening statement and take

8 the break after your opening statement. We anticipate  
9 that will be just a little over two hours, and we will  
10 take the break after the opening statement and then  
11 turn to Respondent.

12 So with that, as we commence, we do have  
13 additional people with us today, as well as some from  
14 the general public who are viewing this, so we thought  
15 we would start with, as we did last time, with just  
16 brief introductions and allow people to go around the  
17 table to introduce themselves.

18 I'm Michael Young, Chairman of the Tribunal,  
19 and I will turn to my two co-arbitrators.

20 ARBITRATOR CARON: I'm David Caron, Member of  
21 the Tribunal.

22 ARBITRATOR HUBBARD: I'm Ken Hubbard,

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09:07:50 1 technologically challenged. I'm a Member of the  
2 Tribunal.

3 SECRETARY OBADIA: Elöise Obadia from ICSID,  
4 Secretary of the Tribunal.

5 MS. HARHAY: Leah Harhay, Assistant to the  
6 Tribunal.

7 COURT REPORTER: David Kasdan, from B&B  
8 Reporters.

9 PRESIDENT YOUNG: Thank you.  
10 Mr. Gourley.

11 MR. GOURLEY: Alan Gourley from Crowell &  
12 Moring, representing the Claimant Glamis Gold,  
13 Limited.

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14 MR. McCRUM: Tim McCrum, representing  
15 Claimant Glamis Gold, Limited.  
16 MR. SCHAEFER: Alexander Schaefer, also  
17 representing Glamis Gold, Limited.  
18 MR. ROSS: David Ross, also representing the  
19 Claimant.  
20 MS. HALL: Jessica Hall, also with Claimant,  
21 Glamis Gold.  
22 MS. HAQUE: Sylvia Haque, also with Crowell &

10

09:08:51 1 Moring, representing Glamis Gold.  
2 MR. FRANK: Wil Frank, technology consultant  
3 from Crowell & Moring.  
4 MR. JEANNES: Chuck Jeannes with Goldcorp,  
5 Inc.  
6 MR. McARTHUR: Kevin McArthur, Goldcorp, Inc.  
7 MR. PURVANCE: Dan Purvance with Goldcorp.  
8 MS. MCKEON: Jessica Mckeon, Assistant,  
9 Crowell & Moring.  
10 MR. LESHENDOK: Tom Leshendok, consultant to  
11 Glamis.  
12 MR. JENNINGS: Bill Jennings, consultant to  
13 Glamis.  
14 MR. GUARNERA: Bernard Guarnera, consultant  
15 to Glamis.  
16 DR. SEBASTIAN: Good morning. I'm Lynne  
17 Sebastian, consultant to Glamis.  
18 PRESIDENT YOUNG: Mr. Bettauer.  
19 MR. RONALD BETTAUER: Ron Bettauer from the



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20 State Department, Respondent.

21 MR. CLODFELTER: Mark Clodfelter also from  
22 the State Department, Respondent.

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09: 09: 44 1 MS. MENAKER: Andrea Menaker also  
2 representing Respondent United States.

3 MS. VAN SLOOTEN: Heather Van Slooten,  
4 representing the Respondent.

5 MR. FELDMAN: Mark Feldman, representing the  
6 Respondent.

7 MR. SHARPE: Jeremy Sharpe, also with the  
8 Respondent.

9 MR. BENES: Keith Benes, representing the  
10 Respondent.

11 MS. THORNTON: Jennifer Thornton,  
12 representing the Respondent.

13 (Introductions off the microphone.)

14 MS. GREENBERG: Sara Greenberg with the State  
15 Department.

16 MR. KACZMAREK: Brent Kaczmarek, Navigant  
17 Consulting.

18 MR. HOUSER: Conrad Houser with Norwest on  
19 mining consulting.

20 MR. HARRIS: Jim Harris with the Department  
21 of the Interior.

22 MS. HAWBECKER: Karen Hawbecker with the

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09:10:32 1 Department of the Interior.

2 MS. SEQUEIRA: Kiran Sequeira with Navigant  
3 Consulting.

4 PRESIDENT YOUNG: Thank you very much.

5 I do apologize to those who are listening to  
6 this via video feed. We will have microphones  
7 available for everyone at the table, but not--we do  
8 have some additional people around the perimeter of  
9 the room who do not have microphones. I apologize if  
10 you couldn't hear some of those.

11 Let me review the schedule now that I have  
12 been educated and updated on the schedule. As I say,  
13 the break is traditionally scheduled every day from  
14 10:30 to 11:00. Lunch will be from 1:00 to 2:15, and  
15 then there will be what the World Bank wonderfully  
16 calls "a healthy break" from 3:30 to 4:00, ending at  
17 6:00 every day. That schedule will be modified  
18 slightly today in light of--in light of opening  
19 arguments with our anticipation giving each party an  
20 opportunity to give its opening argument prior to the  
21 break, unless they anticipate it will well go over two  
22 hours, in which case we will take the break in

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09:11:37 1 between.

2 So, with that, I will first ask if either  
3 party has any issues they would like to raise with us  
4 before we commence opening statements.

5 Mr. Gourley?

6 MR. GOURLEY: Claimant has no issues at this  
7 point.  
8 PRESIDENT YOUNG: Thank you.  
9 Mr. Clodfelter?  
10 Nothing?  
11 Thank you.  
12 With that, we will turn the time over to  
13 Mr. Gourley, reminding everybody that we are recording  
14 time that each party takes, and that will be  
15 attributed against the number of hours that each party  
16 has been allocated for this hearing.  
17 Thank you.

18 OPENING STATEMENT BY COUNSEL FOR CLAIMANT

19 MR. GOURLEY: Good morning, Mr. President and  
20 Members of the Tribunal.  
21 Glamis Gold, Limited, comes to you today  
22 having merged with Goldcorp, another Canadian company,

14

09:12:34 1 to present its claims against the United States under  
2 NAFTA Chapter Eleven. Its claims are for compensation  
3 for the damages that actions and inactions by the  
4 United States of America and its subordinate entity,  
5 the State of California, have visited upon Glamis's  
6 Imperial Project in the Southern California Desert.  
7 Glamis's claim is straightforward. It has  
8 real property interests in 187 mining claims with  
9 associated mill sites located in Imperial County,  
10 California, in the Southern California Desert. Glamis  
11 came to the desert experienced. It operated the Rand

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12 Mine in California, and it operated the Picacho Mine,  
13 a mere eight miles away from the Glam - the Imperial  
14 Project Site.

15           It followed all the rules. It undertook  
16 extensive cultural resource surveys at the site. It  
17 filed a plan of operation that met all of the  
18 requirements of the applicable regulation. It did not  
19 ask for any special treatment or waivers, and yet, as  
20 you will hear over the next few days, very special and  
21 discriminatory treatment was visited upon it.

22           Under political pressure, first the Federal

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09: 13: 57 1 Government cavalierly and illegally changed the rules.  
2 They literally changed the standard and applied a new  
3 standard for mine approvals that was neither  
4 contemplated nor authorized under the existing law.  
5 And then, before that action could be completely  
6 corrected, the State of California stepped in,  
7 targeted the Imperial Project, and selectively imposed  
8 new requirements that were intended to, and did, make  
9 any beneficial use of Glami's property rights  
10 impossible-- a complete and full deprivation of its  
11 mining claims after a significant investment of over  
12 \$15 million.

13           Respondent prefers to ignore the facts, even  
14 though they're largely uncontested. It relies  
15 primarily on legal defenses, seeking to excuse its  
16 behavior and avoid liability to compensate Glami's for  
17 its loss. When it does describe Claimant's case, it

18 presents an exaggerated caricature and often distorts  
19 the record and the documents to which it cites.

20 We urge the Tribunal to examine closely the  
21 admittedly very large record and listen closely to the  
22 witnesses we will be putting forward today and over

16

09:15:15 1 the next few days. The evidence will show that  
2 Respondent's measures were tantamount to an  
3 expropriation under Article 1110 of NAFTA and  
4 Claimant's real property interest, and it constituted  
5 an expropriation of Claimant's real property interest  
6 in the mining claims.

7 It will also show that those measures  
8 violated the fundamental principles of fairness,  
9 stable and predictable business environment, and  
10 legitimate expectations for investors protected under  
11 the "fair and equitable treatment" standard in Article  
12 1105.

13 My purpose this morning is to briefly review  
14 with you the basic legal standards and some of the  
15 specific facts on which our claims are based.

16 To start first with the legal standards, with  
17 the--under Article 1110. Article 1110 provides that  
18 no party may directly or indirectly--no party to NAFTA  
19 may directly or indirectly expropriate an investment  
20 of an investor of another party, in this case Canada,  
21 in its territory or take a measure tantamount to  
22 expropriation of such an investment except if it's for

09:16:27 1 a public purpose, it's on a nondiscriminatory basis in  
2 accordance with due process of law, and with the  
3 payment of compensation.

4           Now, there are a number of issues where the  
5 parties do agree. We both agree that this is not a  
6 direct expropriation. The United States has not taken  
7 the mineral claims themselves. Rather, the pertinent  
8 question is whether the Government, whether the United  
9 States and its subentities have, through their actions  
10 and inactions, undertaken measures that are tantamount  
11 to an expropriation or would otherwise constitute an  
12 indirect expropriation.

13           In that regard, the parties also agree that  
14 under Article 1110, you apply the customary  
15 international law standard as to what constitutes  
16 indirect expropriation and measures tantamount to  
17 expropriation for which compensation is owing.

18           And the parties also agree that that  
19 international law is informed, as the Restatement,  
20 Foreign Relations 3rd Councils, that the--is informed  
21 by U. S. Fifth Amendment takings law. As the  
22 Restatement says, "In general, the line in

09:17:46 1 international law is similar to that drawn in United  
2 States jurisprudence for purposes of Fifth and  
3 Fourteenth Amendments to the Constitution in

4 determining whether there has been a taking requiring  
5 compensation. "

6 Now, under both customary international law  
7 and the Fifth Amendment jurisprudence, regulatory  
8 takings are distinguished or divided between those  
9 that are fully confiscatory and those that are of a  
10 more general nature applying to the public at large.

11 In this case--actually both of our experts,  
12 Solicitor General Olson and Professor Wälde--Solicitor  
13 General Olson has opined on the United States takings  
14 analysis, and Professor Wälde on the expropriation  
15 analysis under customary international law--they  
16 agree, we don't think it's seriously contested here  
17 that a full confiscatory measure that deprives the  
18 owner of the full use and benefit of their property  
19 has to be compensated, and that's what we allege  
20 occurred in this case.

21 Now, Respondent and its expert, Professor  
22 Sax, in trying to avoid this principle of full

19

09:19:10 1 compensation for a confiscatory regulatory measure,  
2 have relied on the principal expressed by the Supreme  
3 Court in Lucas on background principles, and it cites  
4 two that it says apply and constrict the bundle of  
5 rights that Glamis had in its mineral claims. The two  
6 that it cites are a 1975 California statute, 1975  
7 Sacred Sites Act, and the 1975 Surface Mining and  
8 Reclamation Act known as SMARA.

9 Solicitor General Olson's expert opinion

10 makes clear that neither of these preexisting statutes  
11 meet the requirements under Lucas for a background  
12 principle. And to do that, we need to look at Lucas.

13 Lucas made very clear that any confiscatory  
14 regulation, "cannot be newly legislated or decreed."  
15 In essence, the principle must inhere in the  
16 background principle. But "inhere" here doesn't mean  
17 closely associated with or similar to, as Respondent's  
18 argument would suggest; rather, the Supreme Court made  
19 clear it has to be an express manifestation of  
20 something that was always implicit in the preexisting  
21 law.

22 So, what the Supreme Court has said--and I'd

20

09:20:36 1 show it to you--"The use of these properties for what  
2 are now expressly prohibited purposes was"--and this  
3 is their emphasis--"always unlawful and (subject to  
4 other constitutional limitations) it was open to the  
5 State at any point to make the implication of those  
6 background principles of nuisance and property law  
7 explicit."

8 Now, interestingly, Respondent does quote  
9 that section of the Lucas Opinion in its Rejoinder at  
10 38, and its Note 108 notes that it has removed the  
11 emphasis on the word "always," which is, in fact, the  
12 key point of the passage.

13 So, if you go on, then, to--the Supreme Court  
14 follows up with that statement, saying, "When,  
15 however, a regulation that declares 'off-limits' all



16 economically productive or beneficial uses of the land  
17 goes beyond what the relevant background principles  
18 would dictate, compensation must be paid to sustain  
19 it."

20           And this point was further underscored when  
21 the Supreme Court in Lucas explained background  
22 principles. They had to be, "existing rules or

21

09:21:53 1 understandings," and counseled that the law or decree  
2 with confiscatory effect, "must, in other words, do no  
3 more than duplicate the result that could have been  
4 achieved in the Courts."

5           In short, for these two California statutes  
6 to be background principles restricting Claimant's  
7 rights in its mining claims, they would have had  
8 to--the State of California would have had to have  
9 been able to go into Court and impose those  
10 requirements under the existing law without the need  
11 of the regulation.

12           What Respondent would have you believe is  
13 that instead of saying, as it did, objectively  
14 reasonable application of the preexisting principles,  
15 that what they really meant to say was an objectively  
16 reasonable extension, and that's not what the Supreme  
17 Court said.

18           So, what does this mean to the--to the  
19 Respondent's argument? This is a debate between  
20 Solicitor General Olson and Professor Sax. What  
21 Mr. Olson makes clear in his rebuttal statement is

22 that--focusing again on the key word that these are

22

09:23:17 1 already preexisting requirements, is that a  
2 grandfather clause is wholly inconsistent with that  
3 notion. It's wholly inconsistent because if it's  
4 already unlawful, you can't grandfather that which is  
5 unlawful. You grandfather existing circumstances from  
6 new requirements and, indeed, Professor Sax's expert  
7 report refers to them as "new requirements." You do  
8 not grandfather preexisting circumstances. I mean,  
9 you do not grandfather from preexisting obligations.

10           And nor does Professor Sax's reliance on the  
11 Federal Circuit decision in *American Pelagic* save it.  
12 That case involved a fishing vessel in which the claim  
13 was, quite simply, that among the bundle of rights in  
14 the fishing vessel was the right to fish in a  
15 particular location in the North Atlantic, and the  
16 Court found that, no, in fact, there was, by statute,  
17 complete unfettered discretion for the United States  
18 either to grant a fishing permit to fish those waters  
19 or not. And there was no such right without that  
20 grant to fish in those waters; and, therefore, it  
21 could not be within the bundle of rights of an owner  
22 of the fishing vessel.

23

09:24:57 1           So, the preexisting--the background principle

2 there was the preexisting absolute discretion to give  
3 or withhold the fishing permit, and there was no such  
4 absolute discretion in the Department of Interior or  
5 the Bureau of Land Management to deny the plan of  
6 operation for Glamis until Solicitor Lesly unlawfully  
7 provided that discretionary veto to himself.

8           So, when viewed under the correct Lucas  
9 standard, neither statute relied on by Respondent  
10 gives rise to an ex ante enforceable prohibition that  
11 would limit Glamis's beneficial use.

12           And it's underscored further when you look at  
13 the statutes themselves. The first one, the 1976  
14 Sacred Sites Act, the short answer to Respondent's  
15 arguments there is it does not--despite their best  
16 efforts, they've provided nothing that proves that  
17 California--that it does, in fact, apply to Federal  
18 lands or that California ever intended it to. And the  
19 proof of that is really the Lyng Case that's discussed  
20 in the--in our Memorials and their Counter-Memorial  
21 and Rejoinder.

22           Lyng involved the very agency that the United

09:26:23 1 States says is charged with enforcement of the Sacred  
2 Sites Act, and it brought suit against the Federal  
3 Government to block a road which it alleged, "would  
4 cause serious and irreparable damage to the sacred  
5 areas which are an integral and necessary part of the  
6 belief systems and lifeway of the Northwest California  
7 Peoples."

8

They lost.

9

Most telling is they didn't even try to bring it, and they couldn't have brought a claim against the United States under the Sacred Sites Act for a project on U.S. Federal lands. What they tried to raise was a First Amendment argument, and they lost that.

14

Moreover, the evidence of the application of the sacred sites to Federal projects on Federal land can be seen by what the State of California actually does. In this process--and you will hear a lot about this and hopefully you've read a lot about it already--part of the review is the valuation from an environmental perspective of the Project, and it results in these areas in a joint Federal-State Environmental Impact Statement on the Federal side and

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09:27:51

1 environmental impact report on the State side. And  
2 during that, they cite all of the applicable statutes.  
3 Yet, for all of the final EIS/EIR reports that are in  
4 the record here, including the final one denying or  
5 recommending denial of the Imperial Project, not a one  
6 cites the Sacred Sites Act.

7

Nor has Respondent produced any other  
8 guidance or opinion of the Attorney General of the  
9 State of California suggesting that California thought  
10 they could enforce the Sacred Sites Act in--on Federal  
11 lands, on Federal projects and Federal lands.

12

And then finally, and most basically, if the  
13 Sacred Sites Act provided the protection that

14 Respondent asserts, then none of the measures would  
15 have been necessary because California could have gone  
16 into Court to enforce that limitation directly.

17           Similarly, with respect to the Surface Mining  
18 and Reclamation Act, SMARA, you had a statute by the  
19 State of California that--Respondent's contention is  
20 that it created a background principle that prohibited  
21 hardrock/metallic mining, open-pit mining, but not  
22 other types and without--unless there was complete and

26

09:29:20 1 mandatory backfilling and site recontouring. But this  
2 argument, too, fails, because neither SMARA nor its  
3 implementing regulation implicitly included any such  
4 limitation or prohibition. SMARA empowered the State  
5 Mining and Geology Board to issue regulations, and  
6 they did, and those regulations at the time that  
7 Glamis came to the California Desert to prospect for  
8 the Imperial Project site permitted--did not require  
9 full and mandatory backfilling or site recontouring.  
10 Rather, they suggested only reasonable reclamation  
11 standards.

12           And again, had those existing regulations and  
13 the statute already implicitly banned hardrock  
14 open-pit mining without complete backfilling and site  
15 recontouring, then the answer to Governor Davis's  
16 direction in September 2002, when he told his resource  
17 division to stop the Glamis mine, the answer would  
18 have been simple. They could have simply used the  
19 existing regulations and done so. But they didn't.

20 They enact new, unique, and unprecedented complete  
21 backfilling requirements.  
22 So, in short, Respondent's background

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09:30:59 1 principles defends to the confiscatory taking under  
2 either Fifth Amendment jurisprudence or international  
3 customary law is unavailing. Neither creates an  
4 enforceable preexisting limitation that could have  
5 been objectively reasonably applied through the courts  
6 to impose complete backfilling and site recontouring  
7 obligations on the Imperial Project.

8 Now, the parties also agree that where the  
9 expropriation--where the regulation is less than fully  
10 confiscatory, it has a severe impact but not a full  
11 deprivation of the beneficial use, then a more  
12 balanced approach needs to be undertaken between the  
13 rationale for the measure and its economic impact on  
14 the investor. And as we have shown in our memorial,  
15 under customary international law, this is expressed  
16 in the extent to which the investor's reasonable  
17 investment-backed expectations have been frustrated  
18 versus the character of the measure.

19 Now, I won't spend a lot of time on this  
20 because we don't believe this test applies, but even  
21 if it does, we say we would prevail, and that's  
22 because you still have to look at the character in

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09: 32: 29 1 terms of proportionality of the measure to its goals,  
2 discrimination, did it impose an undue burden on a  
3 small segment of society to achieve a larger good?

4           With respect to reasonable expectations,  
5 there's any number of ways to look at that. One thing  
6 that is not required is specific assurances. It is  
7 not mandatory that you show that you have a promise or  
8 a contract from the host Government to engage in the  
9 activity. Rather, the--as the Tecmed versus Mexico  
10 Tribunal suggested, you give careful weight to what  
11 the circumstances that the investor finds in the host  
12 country, that legal and regulatory regime, and you  
13 balance that against your expectation of an expected  
14 return.

15           So, while specific assurance is a factor--we  
16 don't deny that to consider--its absence is not fatal.  
17 And this is why the Thunderbird Gaming case is not  
18 supportive of the Respondent's position. That case  
19 involves an investor going to Mexico and seeking to  
20 have gaming machines without following the regulations  
21 within the laws within Mexico, believing that they  
22 would not be applied.

29

09: 34: 18 1           So, there, the Tribunal finds that the  
2 absence of an assurance is fatal, but it's only fatal  
3 because they were looking for an assurance that the  
4 preexisting legal regime would not be applied to them.  
5 They were, in essence, looking for a waiver.

6                   Glamis isn't looking for a waiver. It didn't  
7 look for any special treatment. It was trying to be  
8 of a--it wanted only that its Imperial Project would  
9 be evaluated according to the preexisting legal  
10 regime.

11                   Now, furthermore, as we put forth in our  
12 Memorial and in the Reply, there are--other types of  
13 international law will look to other types of  
14 assurances, including statements of officials charged  
15 with implementing the legal regime, as well as the  
16 legal regime itself. And the bottom line is that you  
17 look at all the circumstances to determine whether  
18 Glamis reasonably expected, based on the existing  
19 legal and regulatory regime, its experience with  
20 mining and particularly mining in the Southern  
21 California Desert, and its interactions with the  
22 California and Federal Government to show--to

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09:35:38 1 determine whether it was reasonable--and we will show  
2 that it is--that they would be permitted to mine at  
3 the Imperial site without complete backfilling or site  
4 recontouring requirements.

5                   So, some of the things--to elaborate on some  
6 of the elements of this balancing test, one is the  
7 character of the measures. Again, it does not apply  
8 if it is a full deprivation. Character is only  
9 important if it is something less than fully  
10 confiscatory.

11                   One thing that is clear in the international



12 law, as well as domestic U.S. law, is that there's no  
13 blanket exception for regulatory activity. So, in  
14 both Tecmed and Santa Elena, the tribunals clarified  
15 this point; and the Santa Elena case is instructive,  
16 where it specifically stated, "Expropriatory  
17 environmental measure, no matter how laudable and  
18 beneficial to society as a whole, are, in this  
19 respect, similar to any other expropriatory measures  
20 that a State may take in order to implement its  
21 policies. Where property is expropriated, even for  
22 environmental purposes, whether domestic or

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09:37:04 1 international, the State's obligation to pay  
2 compensation remains. "

3 Nor is there any basis, as Respondent has  
4 suggested in its Rejoinder, to foreclose your inquiry  
5 into its motivations. Again, as Tecmed instructs,  
6 such situation does not prevent the arbitral tribunal  
7 without thereby questioning such due deference from  
8 examining the actions of the State to determine  
9 whether such measures are reasonable with respect to  
10 their goals, the deprivation of economic rights, and  
11 the legitimate expectations of who suffered such  
12 deprivation.

13 So, it is perfectly appropriate, and we  
14 invite this Tribunal to examine the motivations what  
15 was try--what was the Department of Interior trying to  
16 accomplish when it stopped all work on processing the  
17 Imperial Project plan of operation in 1998 and work

18 towards a denial in January 2001.

19 Now, with regard to disproportionate benefit,  
20 again you look at does the burden of this regulation  
21 fall--it doesn't have to fall exclusively on the  
22 Claimant, but is it falling disproportionately on a

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09:38:45 1 very small universe in which the Claimant is a part  
2 who are bearing the cost of the--of the public benefit  
3 in their entirety. And this, again, the Supreme Court  
4 in Locke 471 U.S. 84 said this again: "The  
5 burdens...are not so wholly disproportionate to the  
6 burdens other individuals face in a highly regulated  
7 society that some people are being forced alone to  
8 bear public burdens which, in all fairness and  
9 justice, must be borne by the public as a whole."

10 Related to this burden and disproportionality  
11 concept is discrimination. Is it, in fact, targeted  
12 at a specific circumstance, or is it intended to apply  
13 in a more general--across a general segment of the  
14 economy or society? And the cases also made clear,  
15 again citing to some U.S. cases, that it's not--it's  
16 not just that the case is facially neutral--the  
17 statute or the regulation is facially neutral. You  
18 have to look behind what it was designed and intended  
19 to do, and, thus, in the Whitney Benefits case, which  
20 we say is identical to our situation in that there the  
21 Federal Government, the U.S. here was required to pay  
22 compensation to Whitney Benefits, not because they

09: 40: 22 1 took the coal that Whitney Benefits wanted, and not  
2 because they banned them from mining it. Rather, they  
3 prohibited, as the State of California has done here,  
4 the only economical way to get the mine, which was  
5 surface mining, not underground mining.

6           In other cases outside of the mining area,  
7 you have Sunset View Cemetery, a California case,  
8 where again the California Court of Appeals looks at  
9 an Emergency Ordinance prohibiting all commercial uses  
10 of a cemetery and determined it had no factual  
11 relation to the public health and welfare rationale  
12 that it cited, and it struck that down, as it did in  
13 Vienti with an Emergency Ordinance that was expressly  
14 designed to stop a particular project. California  
15 Court of Appeals there said, finding it clearly  
16 discriminatory and citing back to its earlier decision  
17 in Sunset Views said, "As in Sunset View, the only  
18 emergency was the pending action which the legislative  
19 body wanted to prevent." And, indeed, as we have  
20 pointed out in our Memorial, the only emergency cited  
21 by the State Mining and Geology Board in promulgating  
22 the emergency regulation mandating complete

09: 41: 56 1 backfilling and site regrading was the Imperial  
2 Project. That's what they wanted to get. That's what  
3 they did get, and they wanted to do it with as limited

4 impact on anyone else as possible.

5           In short, as we will see when I move next to  
6 the various strands of the fair and equitable  
7 treatment standard protected under Article 1105,  
8 should the Tribunal determine that the measures here  
9 did not entirely extinguish Glamis Gold's beneficial  
10 use of its mineral claims, such as what happened in  
11 Whitney Benefits, then it must balance Claimant's  
12 property rights and its reasonable expectations of  
13 being able to extract that mine in accordance with  
14 environmentally sound and safe practices proposed by  
15 its plan of operation against the discriminatory  
16 character of the measures that were visited upon it.

17           Now, the parties contest the scope and reach  
18 of Article 1105 and the fair and equitable treatment  
19 standard accorded. It's useful here to start with the  
20 language of Article 1105 itself. "Each Party shall  
21 accord to investments of investors of another Party  
22 treatment in accordance with international law,

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09: 43: 19 1 including fair and equitable treatment and full  
2 protection and security. "

3           Now, seeking to constrain, if not eliminate,  
4 the protection afforded by fair and equitable  
5 treatment, Respondent attacks our 1105 claims largely  
6 on legal grounds. First, it advances the proposition  
7 that the customary international law minimum standard  
8 of treatment embodied in Article 1105 is  
9 idiosyncratic, one that is somehow unique and divorced

10 from "fair and equitable treatment" standard afforded  
11 under thousands of similar investment treaties,  
12 multilateral and bilateral, including bilateral  
13 investment treaties to which the United States is a  
14 party, and using similar language, tying fair and  
15 equitable treatment to international law.

16           Second, Respondent implicitly suggests that  
17 "fair and equitable treatment" standard has no  
18 independent content in customary international law;  
19 rather, in each case, it's incumbent to survey State  
20 practice to show State acceptance of the precise legal  
21 consequences of each act that the Claimant complains  
22 of.

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09:44:39 1           Neither contention is correct. Fair and  
2 equitable treatment is well-known in customary  
3 international law, which is, in fact, as the *Mondev*  
4 Tribunal in another NAFTA case found, why it's  
5 included in so many multilateral and bilateral  
6 treaties. It is not the empty vessel the Respondent  
7 would have it to be. The question in each case for  
8 the Tribunal--and for this Tribunal here--is to  
9 determine whether the facts of a particular case  
10 violated those established and commonly accepted legal  
11 principles that comprise the fair and equitable  
12 standard of treatment under customary international  
13 law.

14           So, looking first at their--the argument that  
15 it's unique or idiosyncratic, we agree that Article

16 1105 places fair and equitable treatment firmly within  
17 the minimum standard of treatment to be accorded under  
18 customary international law. In fact, that's what the  
19 note from the Free Trade Commission, the FTC, in 2000,  
20 that's what it does. It ties the two together.

21 But it doesn't erase the words. It doesn't  
22 make the words "fair and equitable treatment"

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09:46:03 1 meaningless. And again, citing the *Mondev*, quoting to  
2 *Mondev*, in holding that Article 1105(1) refers to  
3 customary international law, the FTC interpretations  
4 incorporate current international law whose content is  
5 shaped by the conclusion of more than 2,000 bilateral  
6 investment treaties and many treaties of friendship  
7 and commerce.

8 The *Mondev* Tribunal also found that BITs,  
9 through their incorporation of the "fair and equitable  
10 treatment" standard, reflected both the State  
11 practice, as well as the sense of obligation, legal  
12 obligation, *opinio juris* required under customary  
13 international law. Indeed, the *Mondev* Tribunal faced  
14 the same arguments Respondent is raising here. The  
15 Respondent raised them there, and it answered them.

16 What Respondent would have you do is avoid  
17 any of the non-NAFTA tribunals and, indeed, it rejects  
18 many of the NAFTA tribunals as not meeting its burden,  
19 what it considers to be a burden of proof, on the  
20 grounds that "fair and equitable treatment" has no  
21 meaning of itself, and, therefore, in treaties, it's

22 quote-unquote, autonomous and only is unique and

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09:47:28 1 applied to that particular BIT. But rather, the  
2 Tribunal's--what it ignores or it dismisses is that  
3 the Tribunals that have addressed this issue have  
4 almost uniformly determined, at least in most of the  
5 cases, that--and with respect to the particular  
6 strands of the "fair and equitable treatment"  
7 principle that we rely on, that there is no difference  
8 between customary international law, what is required,  
9 and what would be required under, if you consider that  
10 an autonomous BIT standard.

11 Indeed, Respondent's argument, if taken  
12 literally, would render fair and equitable treatment  
13 simply an empty promise to investors of the United  
14 States, Canada, and Mexico. It's little wonder that  
15 they take this position because, as we have detailed  
16 in our Memorial and reply, there are numerous arbitral  
17 tribunals interpreting similar standards of "fair and  
18 equitable treatment" standard under BITs that also  
19 reference international law that have found the host  
20 States liable for breach of the minimum standard of  
21 treatment for actions that are very similar to those  
22 that Respondent has taken here.

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09:48:51 1 Indeed, I would say that the Respondent's

2 attempt to carve out a special place for itself is a  
3 dangerous position that the Tribunal should not  
4 readily fall into, as it would destroy the very  
5 international investment regime that the United States  
6 was the one to foster. Essentially, it would be  
7 asking the Tribunal to absolve the U.S. of violating  
8 "fair and equitable treatment" standard under  
9 customary international law under circumstances where  
10 numerous other countries have been found liable.

11 Now, their second argument, which is what do  
12 you have to do to prove under customary international  
13 law, is they essentially are saying that you would  
14 have to go--we would have the obligation to go and  
15 point to each act about which we complain and show  
16 that that violated State practice around the globe.  
17 But Claimant doesn't have that obligation. As Judge  
18 Schwebel opined, "The meaning of what is fair and  
19 equitable is defined when that standard is applied to  
20 a specific set of facts." You have to--closed quote.  
21 You have to look at the whole set of circumstances.  
22 It is universally recognized to incorporate a number

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09:50:17 1 of fundamental principles that are common to legal  
2 systems throughout the world. These principles are so  
3 basic that they're required, regardless of whether the  
4 standard is viewed through the lens of customary  
5 international law or the so-called autonomous Treaty  
6 standard. And these principles are the duty to act in  
7 good faith, due process, transparency and candor, and



8 fairness and protection from arbitrariness.

9           Now, in assessing whether these general  
10 obligations have been satisfied, tribunals have  
11 elucidated a number of types of protections that must  
12 be provided. They phrase it in terms of a stable or  
13 predictable framework or legitimate expectations and  
14 protections from arbitrariness, but the fact is that  
15 all of these strands are interrelated, which is why  
16 tribunals don't try to parse them separately.

17           Nor should you, looking at the Federal and  
18 State measures here, try to individually seriatim look  
19 at one individually. Rather, the obligation is to  
20 look at the whole and determine what the whole set of  
21 circumstances, the harm they cause to Claimant.

22           As the Saluka Tribunal noted, you consider

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09: 51: 39 1 the totality which includes, "assessment of the State  
2 law and the totality of the business environment at  
3 the time of the investment."

4           And you should look--consider the aggregate  
5 effects of the measures on Glam-Claimant's investment  
6 and whether the host State's actions, in essence,  
7 undermined and destroyed those reasonable  
8 expectations.

9           Now, these interrelated strands of the fair  
10 and equitable treatment provide protection both for  
11 arbitrariness and your legitimate expectations. These  
12 are analytical tools or lenses by which you assess did  
13 they provide due process, did the host Government act

14 in good faith, has justice been satisfied by the host  
15 State? You can ask these questions rhetorically:  
16 What is a denial of justice? What is good faith?  
17 Were the actions of the Government so--host  
18 country--so arbitrary as to result in a denial of  
19 justice? They all boil down to assessment of the same  
20 things, same types of things that you assess under the  
21 relative standard for expropriation when you have a  
22 nonconfiscatory expropriation. It's a balance between

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09:53:09 1 what could the investor, coming to the host country,  
2 reasonably rely on, given the nature and circumstances  
3 of that country, versus what were the powers of the  
4 Government and what was its rationale in changing it.  
5 Was it proportional? Was it nondiscriminatory? Did  
6 they accord due process?

7 Now, we don't argue, as Respondent has  
8 suggested, that the fair and equitable treatment is  
9 some sort of expropriation LITE. Now, there are  
10 overlaps, as I've just alluded to, but the  
11 expropriation 1110 really focuses primarily on the  
12 effect, the impact on the property interest, whereas  
13 fair and equitable treatment acknowledges and, indeed,  
14 is buttressed when there's a--there are valid existing  
15 rights, as were here, but it focuses more on the  
16 process, what did the host country do and how did it  
17 go about doing it? Did it accord the Claimant  
18 justice? Did it act in good faith?

19 Now, this point also answers Respondent's

20 false assertion that complaint--Claimant is somehow  
21 arguing that it's a relative standard across the  
22 globe. We do not. The standard is fixed. But,

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09: 54: 34 1 obviously, the application depends on the  
2 circumstances faced by the investor in a particular  
3 host country. That informs what were the reasonable  
4 expectations.

5 Now, what Respondent ignores in its analysis  
6 is that the legality of the host State's measures  
7 under domestic law doesn't answer the question of  
8 whether that conduct violates the fair and equitable  
9 treatment standard under customary international law.  
10 This was made clear by the Azurix v. Argentine  
11 Tribunal, again, a U.S. - Argentine BIT. The analysis  
12 is distinct. International claims can't simply be  
13 reduced to, as I said, "civil or administrative law  
14 claims concerning so many individual acts alleged to  
15 violate." Rather, you take them together and  
16 determine whether together they amount to a breach.

17 And a number of other tribunals have employed  
18 a similar approach to finding whether a host State's  
19 arbitrary actions and/or its failure to provide a  
20 stable and predictable framework infringes on the  
21 promises and legitimate expectations that the investor  
22 has, and, therefore, violated the fair and equitable

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Redacted Transcript, Day 1

09: 56: 05 1 treatment standard.

2           Now, Respondent takes particular issue with  
3 claims that fair and equitable treatment protects  
4 against arbitrary treatment or involves legitimate  
5 expectations. Again, they do so by saying you'd have  
6 to go and prove what those terms, those standards mean  
7 based on State practice. In the most recent ICSID  
8 review, in fact, Elizabeth Snodgrass has done that  
9 with respect to legitimate expectations and shows  
10 that, indeed, that concept is a principle common to  
11 many legal systems, but we needn't go there.

12           The NAFTA Treaty itself in its preamble,  
13 resolved, "that it was to ensure a predictable  
14 commercial framework for business planning and  
15 investment." So, you can't leave the host State free  
16 arbitrarily to alter that investment, alter those  
17 expectations and that environment after the investor  
18 has committed significant legal resources without at  
19 least compensation.

20           Now, their view of reading 1105 by itself  
21 without even reference to the NAFTA Treaty's own  
22 preamble is in stark contrast to what Article 31 of

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09: 57: 45 1 the Vienna Convention requires, which is you have to  
2 read the provisions together.

3           Finally, let's focus a little on some of the  
4 strands and some of the cases in which the tribunals  
5 have focused. The principles that they have found

6 under customary international law are part of fair and  
7 equitable treatment.

8 All the Members of the Tribunal in the  
9 Thunderbird Gaming v. Mexico NAFTA case accepted the  
10 notion that legitimate expectations was part of fair  
11 and equitable treatment under customary international  
12 law. In paragraph 147 of that decision, they state,  
13 "Having considered recent investment case law and the  
14 good-faith principle of international customary law,  
15 the concept of legitimate expectations relates within  
16 the context of the NAFTA framework to a situation  
17 where a contracting party's conduct creates reasonable  
18 and justifiable expectations on the part of an  
19 investor or investment to act in reliance on said  
20 conduct."

21 Similarly in Tecmed, they also interpreted  
22 the fair and equitable treatment there in a

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09:59:04 1 Mexican-Spanish BIT in light of this universal  
2 good-faith principle, and found that it did protect  
3 the investor from arbitrary actions: "The arbitral  
4 tribunal considers that this provision of the  
5 agreement, in light of the good-faith principle  
6 established by international law, requires the  
7 contracting parties to provide to international  
8 investment treatment that does not affect the basic  
9 expectations that were taken into account by the  
10 foreign investor to make the investment." They  
11 further clarified that this--that the host State is,

12 "to act in a consistent manner free from ambiguity and  
13 totally transparently in its relations with the  
14 foreign investor."

15           And the purpose is so that the investor, who  
16 is coming to that host State, investing in our case  
17 millions of dollars, can rely and know what the legal  
18 regime is that governs their investment before they  
19 put \$15 million into the host country's economy.

20           Now, the Tecmed Tribunal also went on to say,  
21 the foreign investor expects the host State to act  
22 consistently without arbitrarily revoking any

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10:00:36 1 preexisting decisions or permits issued by the State  
2 that were relied upon by the investor to assume its  
3 commitments. Again, the same notion, there's a  
4 reliance notion, which again is common principle in  
5 State practice throughout the world of good-faith  
6 reliance on existing regimes.

7           And this is again common. I won't belabor  
8 all these cases because they are in the memorials, but  
9 the LG&E versus Argentine case, again  
10 stating--analyzed whether State conduct could be  
11 construed as arbitrary and found that it could if what  
12 this Respondent did was without engaging in a rational  
13 decision-making process, not dissimilar to U.S. law,  
14 that to be saved from arbitrary, there has to be a  
15 rational basis for the Rule or regulation.

16           And the Saluka v. Czech Republic case.  
17 Azurix talked about Occidental Exploration and

18 Production Company v. Ecuador, PSEG-Turkey, CMS v.  
19 Argentina. There's a host--Enron v. Argentina more  
20 recently--host of which have found that stability of  
21 the legal and business framework is an essential or  
22 dominant element of fair and equitable treatment, and

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10:02:04 1 that they recognize that frustration of those  
2 expectations is proof of the failure to provide fair  
3 and equitable treatment.

4 So, those are the legal standards both under  
5 1110 and 1105, and I would like to spend the second  
6 part of my opening on how they apply in this case  
7 because weighed against those standards there is  
8 little doubt that the United States has breached its  
9 obligations to Glamis Gold, Limited, under both  
10 Articles 1110 and 1105.

11 Now, I first want to highlight the evidence  
12 that demonstrates Glamis Gold, Limited, had a  
13 legitimate expectation, both subjectively and  
14 objectively, that its plan of operation for the  
15 Imperial Project was fully consistent with the law  
16 that should have been applied to it, that existed at  
17 the time, and would have allowed it to enjoy the  
18 beneficial use of its property, the gold located in  
19 the 187 mining claims located at the Imperial Project  
20 Site.

21 This is grounded in the unique property  
22 interest that's granted for mining claims under

10: 03: 26 1 domestic United States property law, and again the  
2 parties agree that you look to the domestic law to  
3 determine the property interests of the Claimant.

4           Now, it's because these are unique vested  
5 rights--and you will hear the phrase throughout this  
6 proceeding of valid existing rights--that Claimant was  
7 entitled to rely on, the preexisting legal regime for  
8 the operation and reclamation of mining activities on  
9 Federal lands. Under that regime, if Claimant met the  
10 standards of a prudent operator--we will talk about  
11 that in just a minute--in taking reasonable, which  
12 meant economically feasible, measures to mitigate as  
13 best it could cultural impacts, it was entitled to  
14 approval of its plan of operation, even if it resulted  
15 in destruction of sacred sites and without having to  
16 incur the prohibitive cost of complete backfilling and  
17 site recontouring.

18           This is not like the Methanex case. It is  
19 nothing like Methanex, which the Respondent relies on  
20 so heavily. There were regulatory measures of general  
21 applicability issued after scientific study to protect  
22 the population generally of safety not targeting any

10: 04: 57 1 specific individual or company.

2           Here, we have a statutorily granted real  
3 property interest in mineral extraction that



4 Respondent specifically provided to induce investors  
5 to incur the significant costs of mineral exploration  
6 subject only to compliance with environmental safety  
7 regulation and such reasonable and economically  
8 practical reclamation measures as available to  
9 mitigate the identified harms.

10           So, let's talk a moment about the unique  
11 property interest in mining claims. The Mining Law of  
12 1872 embodies 130 years' statutory promise that  
13 prospectors may enter Federal lands, locate valuable  
14 mineral deposits, and return--and in return the  
15 Government grants them a vested property interest in  
16 those mineral deposits upon their, quote, discovery.

17           Now, the whole purpose of this statute is to  
18 encourage prospectors to go out to Federal lands and  
19 find the mineral resources and develop it, and that's  
20 exactly what Glamis Gold did through its U.S.  
21 subsidiary Glamis Imperial, Inc.

22           Now, the Ninth Circuit has further elaborated

10:06:19 1 on the nature of the property interest, which is not,  
2 as its name implies, merely a claim. As the Ninth  
3 Circuit says, "The phrase 'mining claim' represents a  
4 federally recognized right in real property." This is  
5 not personal property. The Supreme Court has  
6 established that a mining claim is not a claim in the  
7 ordinary sense, so the word a mere assertion of a  
8 right, but rather a property interest which is itself  
9 real property in every sense, and not merely an

10 assertion of the right. And that's the Shumway case  
11 at 199 F.3d 1093.

12 Shumway also teaches that it's a possessory  
13 interest. The Government cannot--having granted that  
14 interest, it can't exclude the claim holder from the  
15 surface of the property under which their minerals  
16 lie.

17 In short, it's Glamis's vested real property  
18 rights in the mining claims and mill sites that's at  
19 the core of both Hunter--the Article 1110  
20 expropriation claim and its Article 1105 fair and  
21 equitable treatment claim. This well and long  
22 established legal regime defined the property interest

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10:07:36 1 and provided the basis on which Glamis came to the  
2 California Desert to mine the Imperial Project with  
3 the expectation that it would be permitted, having  
4 discovered real and valuable gold reserves, to extract  
5 that gold and be free from extraordinary and targeted  
6 measures that were designed and intended exclusively  
7 to make that extraction cost-prohibitive.

8 Now, what were Glamis's expectations based on  
9 that preexisting legal regime? I will walk you  
10 through. Again, notwithstanding Respondent's  
11 arguments to the contrary, Claimant does not make  
12 the--any argument that its property right at issue was  
13 not subject to reasonable regulation. It was. Our  
14 argument is that, given a federally granted property  
15 right provided as the inducement for Glamis to

16 prospect for and locate valuable gold mineral  
17 deposits, neither the United States nor its  
18 subgovernmental agencies/entities can suddenly change  
19 in a discriminatory and targeted manner the  
20 preexisting legal regime whether by lawful, as the  
21 State of California's measures were, or unlawful, as  
22 what Secretary Babbitt and Solicitor Lesly did at the

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10:09:05 1 Department of Interior during the Clinton  
2 Administration, to effectively prohibit the extraction  
3 of the gold resources after Glamis had made its \$15  
4 million investment and proven the gold deposits  
5 prepared and submitted a fully acceptable plan of  
6 operation for the mine.  
7 Now, it was the clear expectation of  
8 Glamis--and you will hear the testimony of  
9 Mr. McArthur and Mr. Jeannes on these points--that  
10 when it came to the California Desert, it was  
11 comforted by the status of the law. It understood  
12 what the law required. It relied on the 1994  
13 California Desert Protection Act, which we will talk  
14 about in a moment, which promised--which withdrew  
15 certain lands and promised to hold others open for  
16 multiple uses without buffer zones, thereby meaning  
17 you could not, merely because of the--how close it was  
18 to a protected area restrict the multiple uses that  
19 were allowed; and that it was objectively reasonable  
20 for Glamis to have these beliefs based on what had  
21 happened in the California Desert since 1980, all the

22 mines that had been approved with similar size,

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10:10:33 1 circumstances, and cultural resources.

2           Now, that legal regime--and I'm going to walk  
3 you through this carefully--was premised on the  
4 Federal Land Policy and Management Act of 1976, which  
5 lots of people called FLPMA, but I have to say it all  
6 out or I won't remember what the acronym stands for.  
7 But what it did was in 1976 was gave the Secretary of  
8 Interior authority to prevent, "unnecessary or undue  
9 degradation," in approving projects on Federal lands.

10           That statute also established the California  
11 Desert Conservation Area which required two things  
12 important to this dispute: First, it launched a  
13 significant land planning exercise, which was designed  
14 specifically to balance between preservation and  
15 exploitation of the areas mineral's wor--wealth. Now,  
16 that land exercise resulted in the passage of a 1994  
17 Act, the California Desert Protection Act, which  
18 formally withdrew millions of acres of Federal land  
19 from any development based on what had been identified  
20 in this 20-year process, and you will hear some about  
21 how extensive that process was, of wilderness cultural  
22 values.

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10:11:59 1           The--in doing so, Congress in the 1994 Act

2 expressly stated that there could be no buffer zones,  
3 that neither BLM nor the State could use the withdrawn  
4 areas--Indian Pass, which we will hear about a lot  
5 about here as one of those withdrawn areas--as an  
6 excuse to impose further limitations on a multiple use  
7 area that was left open to development, such as the  
8 Class L land, in which the Imperial Project Site is  
9 located.

10 Now, second important aspect was sections of  
11 the 1976 Federal Land Policy Management Act was  
12 Section 601, which provided the Secretary authority  
13 through regulation--and this is an important point I  
14 will come back to--to create measures as may be  
15 reasonable--and this is a quote--"measures as may be  
16 reasonable to protect the scenic, scientific, and  
17 environmental values of the public lands of the  
18 California Desert Conservation Area against undue  
19 impairment." No such regulations have been adopted.

20 It was up to BLM to implement the Federal  
21 Land Policy and Management Act, which it did in 1980,  
22 and it did so through something we shorthand and

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10:13:29 1 called the 3908 regulations, which are in the Code of  
2 Federal Regs 43, subpart 3809. And in doing so, the  
3 Bureau of Land Management, BLM, deliberately tread  
4 carefully in light of the property rights granted to  
5 existing mine holders, mining claim holders, under the  
6 Mining Law of 1872. BLM specifically put new mining  
7 claim investors on notice of the standard that they

8 would be required to meet in order to extract gold and  
9 other minerals, a standard that's long known as the  
10 prudent operator standard.

11 Specifically, under the 3809 regulation, a  
12 mine operator was required to take, "such reasonable  
13 measures as will prevent unnecessary or undue  
14 degradation of Federal lands." That's what the  
15 statute said. But then the regulation goes further  
16 and defines it. It never defined it as all measures  
17 to avoid any kind of harm. It was always those  
18 reasonable measures to effect--to prevent unnecessary  
19 or undue degradation.

20 So, what did "unnecessary or undue  
21 degradation" mean? It was defined in the 1980  
22 regulation to mean surface disturbance greater than

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10: 14: 58 1 what would normally result when an activity is being  
2 accomplished by a prudent operator in usual,  
3 customary, and proficient operation of similar  
4 character and taking into consideration the effects of  
5 the operation on other resources and land use.

6 So, it was a reasonableness test.

7 What would a reasonably prudent operator  
8 extracting mines do? If a reasonable prudent operator  
9 couldn't do it because it was cost-prohibitive, it was  
10 not required under standard.

11 Now, BLM chose not to define or issue regs  
12 implementing Section 601 of FLPMA, the undue  
13 impairment standard for lands located in the

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14 California Desert Conservation Area, but rather chose  
15 to subsume and equate undue impairment with the  
16 unnecessary or undue degradation, which for those of  
17 us who are not mining lawyers like Mr. McCrum, would  
18 find eminently reasonable since they do sound and mean  
19 the same thing.

20 But let's take a look at how they got there.

21 Robert Anderson, the--one of the BLM  
22 individuals who we invited the United States to

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10:16:19 1 produce to this hearing, he was actually the person on  
2 the point, one of the two listed in the Federal  
3 Register Notice in 1980 as involved with the creation  
4 of the original 3809 regulation. And then he was also  
5 involved 20-some years later with the restoration of  
6 this principle after the Solicitor Leshy Opinion had  
7 been revoked; and what he told Ms. Hawbouwer  
8 then--Hawbecker then was we purposely did not define  
9 undue impairment in 1980 because we all concluded it  
10 meant the same as undue degradation.

11 Having declined to bring Mr. Anderson here  
12 or, in fact, any BLM witness who can comment on what  
13 the standard was at the time, it must be deemed to be  
14 admitted.

15 Now, BLM made this approach clear also in  
16 1980, when it established the actual California Desert  
17 Conservation area plan, which referenced the 3809  
18 regulations and stated that potential impacts on  
19 sensitive resources in Class L lands, such as where

20 the Imperial Project is located, would be identified,  
21 but it created the mitigation standard, "Mitigation  
22 subject to technical and economic feasibility will be

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10:17:56 1 required." Subject to technical and economic  
2 feasibility; that's the prudent operator standard.  
3 That's what Glamis relied on when it came to the  
4 California Desert to mine at the Imperial Project  
5 Site.

6 Now, the State of California also had  
7 regulations--we don't contend that they could not  
8 regulate the operation of mining, even on Federal  
9 land. They also sought the Surface--the SMARA,  
10 Surface Mining and Reclamation Act, also had the same  
11 sort of balancing as FLPMA did between the essential,  
12 as it said, need to provide for the extraction of  
13 minerals with a desire to prevent or minimize adverse  
14 effects. Projects were to be reclaimed consistent  
15 with planned or actual subsequent use at the site.  
16 And in the Southern California Desert, as we would see  
17 from each of the various mines, other that have been  
18 approved there, it was inevitably for future  
19 mining--you don't want to fill in a pit where there is  
20 the ability with further technological advance to mine  
21 further--or open space. You leave it open for use by  
22 wildlife and habitat.

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10:19:17 1           There was no mandatory backfilling  
2 requirement in the statute or in the implementing  
3 regulations.  
4           So, what expectation did this preexisting  
5 legal regime provide an investor such as Glamis?  
6 Well, it was well settled that any plan of operation  
7 meeting the prudent operator standard could not be  
8 denied. Thus, while Glamis has presented substantial  
9 evidence that it did not know--and Dr. Sebastian will  
10 opine it really could not have known--of the nature  
11 and extent of the Native American cultural sites at  
12 the Glamis site, at the Imperial Project Site, would  
13 be considered any differently from those present at  
14 many previously approved mining projects and other  
15 projects, the basic fact remains that the preexisting  
16 legal regime that formed Glamis's reasonable  
17 investment-backed expectation, it wouldn't have  
18 mattered if a wholly new cultural--significant  
19 cultural resource were found at that site under the  
20 law as applied Imperial Project was entitled to  
21 approval. And this is made clear in a number of  
22 things. I'll walk you through some.

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10:20:41 1           We will go to the preamble of the 1980  
2 version of the 3809 regulation. It expressly  
3 addresses this point. If there is an unavoidable  
4 conflict with an endangered species habitat, a plan  
5 could be rejected based not on Section 302 of the

6 Federal Land Policy and Management Act, the  
7 reclamation standard, but on Section 7 of the  
8 Endangered Species Act. So, there was an existing  
9 statute that said, if there is a protected wildlife  
10 protected species, endangered species, you can stop  
11 any development there. But if on--upon compliance  
12 with the National Historic Preservation Act the  
13 cultural resources cannot be salvaged or damage to  
14 them mitigated, the plan must be approved.

15           And that the lands were in the California  
16 Desert Conservation Area did not change that result.  
17 So, too, in a 1998 national resource bulletin which  
18 evalu--on evaluating cultural properties which is  
19 co-authored by the expert proffered by the Quechan  
20 Tribe, Mr. King, and a document included by Respondent  
21 in its Rejoinder, it makes the point again. One more  
22 point that should be remembered in evaluating

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10:22:08 1 traditional cultural properties is that establishing  
2 that a property is eligible for inclusion in the  
3 National Register does not necessarily mean that the  
4 property must be protected from disturbance or damage.  
5 Establishing that a property is eligible means that it  
6 must be considered in planning federally assisted and  
7 federally licensed undertakings, but it does not mean  
8 that such an undertaking cannot be allowed to damage  
9 or destroy it.

10           That's a 1998 document. That was the state  
11 of the law.

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12 In short, discovery of significant cultural  
13 resources at the site of the mine was never, under  
14 this preexisting legal regime that was applicable to  
15 the Imperial Project, a lawful basis to deny a plan of  
16 operation.

17 Now, furthermore, as our Memorial  
18 demonstrates, this principle of vested rights, of  
19 valid existing rights, was repeatedly acknowledged  
20 during the review of Glamis's plan of operation.  
21 Thus, in a meeting with the Quechan Tribe in  
22 December 1997, the state BLM director, Ed Hastey,

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10: 23: 25 1 says, "BLM is kind of hamstrung when it comes to 1872  
2 Mining Law rights, and doesn't have the same  
3 discretion as oil and gas leasing," et cetera. He  
4 said he had instructed Field Manager Terry Reed to  
5 take another look at the ACEC designations and the  
6 need for further mineral withdrawals, but added that  
7 would not resolve this situation since claims already  
8 exist.

9 That's Exhibit 96 to our Memorial.

10 Dr. Cleland prepared a letter--another of  
11 Respondent's witnesses--prepared a letter to the Tribe  
12 in September of 1997. Has: "The same proposed project  
13 is a nondiscretionary action. That is, the BLM cannot  
14 stop or prevent the Project from being implemented,  
15 pursuant to the 1872 Mining Act, provided that  
16 compliance with other Federal, state, and local laws  
17 and regulations is fulfilled. As a consequence, there

18 is a strong possibility the proposed mining project  
19 may be approved."

20 It's Exhibit 89 to our memorial.

21 Similarly, in May of 1998, an internal BLM  
22 option paper acknowledged the legitimacy of Claimant's

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10:24:50 1 plan of operation and that failing to approve it could  
2 constitute a taking under the Fifth Amendment. This  
3 is Exhibit 112 to our Memorial.

4 It states: "The mining proposal appears to  
5 have merit under the 1872 Mining Law, the mining  
6 claims were properly recorded, a Practical P00," a  
7 plan of operation, "was submitted consistent with 3809  
8 regulations. Thus, denial of the P00 could constitute  
9 a taking of rights granted to a claimant under the  
10 Mining Law. If such finding is made, compensation  
11 would be required under this option."

12 And similarly, BLM officials, like State  
13 Director Ed Hastey, assured Glamis, as you will hear  
14 in the testimony, that while consideration of the  
15 cultural resources found at the site might result in  
16 extra time, approval would come. These written and  
17 oral statements all reflect that the understanding  
18 both on Respondent's side and Glamis's side that there  
19 was no lawful basis to deny the plan of operation.

20 Indeed, Respondent's contemporaneous  
21 acknowledgement of a mining claim holder such as  
22 Glamis's legitimate expectations can be seen when you

10:26:17 1 look at the treatment of plans and operation when they  
2 rewrote the 3809 regulations in 2000. That was a  
3 rewrite of the regulations undertaken at Solicitor  
4 Leshy's direction to provide the unbridled  
5 discretionary veto power that Congress had refused to  
6 provide the Department of Interior.

7           Nonetheless, even then, the proposed  
8 regulations specifically exempted pending plans of  
9 operations from new performance requirements. So, the  
10 reg states: If your unapproved plan of operation is  
11 pending on January 20, 2001, which was the effective  
12 date of the reg, then the plan content requirements  
13 and performance standards that were in effect  
14 immediately before that date apply to your pending  
15 Plan of Operations.

16           In sum, consistent with the unique form of  
17 real property interest conveyed under the 1872 Mining  
18 Law, Respondent has long acknowledged the legitimate  
19 expectations of mine claim holders and having their  
20 plans of operations approved when they meet the  
21 requirements, the pre-existing requirements, of the  
22 3809 regulation. And that's the conclusion of our

10:27:42 1 expert, Thomas Leshendok, who you will hear from in  
2 the next few days. Mr. Leshendok has 30-plus years of  
3 experience in regulatory management of hardrock and

4 other mineral mining developments on public lands. He  
5 was the Deputy State Director for BLM in their Nevada  
6 office for 20 years, and he served on the task force  
7 charged with rewriting the 3809 regulations that  
8 resulted in the 2000 rewrite.

9           And having closely examined the Glamis  
10 Imperial Project and compared it to numerous other  
11 projects, including Picacho, Mesquite, American Girl  
12 Mines, all in the Imperial County, he concluded that  
13 the Glamis Imperial Project met the applicable 3809  
14 regulations, as well as the requirements of the joint  
15 Federal and state environmental assessments.

16 Accordingly, Glamis's expectation that its plan of  
17 operation would be approved is objectively reasonable.

18           But if there were any doubt on this point,  
19 it's answered again by the Respondent itself, when, in  
20 the September 2002, it issues a Mineral Report signed  
21 by no fewer than 11 certified mineral examiners,  
22 supervisors, and geologists in which it officially

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10:29:03 1 concludes, "Within the scope and limitations of this  
2 investigation, we conclude that Glamis could mine the  
3 Imperial Project as proposed and process gold from  
4 mineralized rock on the property at a profit as a  
5 surface mine, but not as an underground mine."

6           "We also analyzed the possibility of  
7 backfilling these pits at the end of operations and  
8 determined that it was not economically feasible. We  
9 conclude that Glamis has found minerals within the

10 boundaries of the 187 lode mining claims and the  
11 evidence is of such a character that a person of  
12 ordinary prudence would be justified in the further  
13 expenditure of labor and means with a reasonable  
14 prospect of success in developing a valuable mine. "

15           Again, not a single one of the authors of  
16 that report will come before this Tribunal and deny  
17 what Respondent found in that official document.

18           In short, wholly part from the significant  
19 questions that surround the nature and extent of  
20 cultural resources at the Imperial Project Site or the  
21 significance of that particular tract of land, as  
22 opposed to the vast area claimed as sacred ancestral

10:30:29 1 lands by the Quechan Tribe, the regulatory regime, in  
2 its consistent past practice, the assurances provided  
3 by the CDCA Plan, California Desert Conservation Area  
4 plan, the assurances of the California Desert  
5 Protection Act, the assurances of the BLM officials  
6 all provide indisputable support for the  
7 reasonableness of Claimant's investment-backed  
8 expectation that it could enjoy the only use of the  
9 real property it had to extract gold in an  
10 environmentally sound and safe method, as its Plan of  
11 Operations proposed.

12           But, even if the Tribunal were to employ the  
13 balancing approach to expropriation, which we contend  
14 would not apply to this confiscatory expropriation,  
15 the balance of the measure to the public goods sought

16 to be achieved, then you would be dealing with the  
17 same facts as those that establish a violation of the  
18 fair and equitable treatment standard under 1105.

19           The primary focus of Glamis's claim of 1105  
20 or the actions by the Federal and State Government,  
21 which we say you have to look at together, that  
22 deliberately delayed the Project, denied Glamis

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10:31:50 1 justice and due process, and arbitrarily refused to  
2 permit a project that everyone, including the United  
3 States, knew to be in full conformance with  
4 preexisting law and regulation. The actions of the  
5 State, while lawful, State of California were lawful,  
6 were designed specifically to injure Glamis in a  
7 discriminatory fashion by stopping, as Governor Davis  
8 had directed, the Imperial Project. In so doing,  
9 Respondent has demonstrated both the Federal and state  
10 levels the kinds of lack of good faith, denial of  
11 justice, and discriminatory treatment that entitled  
12 Glamis to compensation under Article 1105, as well as  
13 were the lesser nonconfiscatory regulatory  
14 expropriation standard under Article 1110.

15           Now, the facts have been laid out extensively  
16 in the Memorial, the Reply, the Counter-Memorial, the  
17 Rejoinder. What I want to do is focus you at the  
18 start of this hearing on a few key facts that  
19 demonstrate the fundamentally unjust way in which  
20 Glamis was treated at both the Federal and State level  
21 in trying to commence mining operations at the



22 Imperial Project Site.

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10: 33: 06 1 Now, in doing so I want to pause for a moment  
2 and again reemphasize that it's not our obligation, as  
3 Respondent argues, to prove each act by the Federal  
4 and State Government as a violation of a specific  
5 legal prohibition. Rather, it's for the Tribunal to  
6 assess the totality of the circumstances in  
7 determining whether those measures deprived Glamis of  
8 fair and equitable treatment and/or expropriated its  
9 property even under the balancing standard.

10 In this process, Respondent's actions and  
11 measures are not immune from close examination, as  
12 Respondent would have the Tribunal believe. It's true  
13 that it's not for this Tribunal to judge or  
14 second-guess the wisdom of particular Government  
15 action. The action is what it is, but that's not the  
16 same, and numerous tribunals have so found, as  
17 evaluating the State's motives and actions in  
18 determining whether its measures, lawful and rational  
19 as they may claim to be, deprived Claimant of the  
20 protections that customary international law provides.

21 Again, a few examples, the Saluka versus  
22 Czech Republic case, Respondent quotes from the

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10: 34: 28 1 decision, "clearly not for this Tribunal to

2 second-guess the Czech Government's privatization  
3 policies." What it doesn't go on to then tell you,  
4 however, is that immediately following that statement,  
5 the Saluka Tribunal added that that prohibition  
6 doesn't relieve the Czech Government from complying  
7 with its international obligations. As the Tribunal  
8 stated, "The host State must never disregard the  
9 principles of procedural proprietary--propriety and  
10 due process."

11           And in the Thunderbird decision at paragraph  
12 127, that NAFTA Tribunal noted, "The role of Chapter  
13 11 in this case is therefore to measure the  
14 conduct"--there Mexico--"of [the host State] towards  
15 [the foreign investor] against the international law  
16 standards set up by Chapter 11 of the NAFTA. The  
17 perspective is of an international law obligation  
18 examining the national conduct as a fact." That's all  
19 the Tribunal is asked to do. What were the facts?  
20 What did, in fact, they do? Is it reasonable? Was it  
21 proportional? Did they act in good faith?

22           Respondent may wish to avoid these facts, but

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10:35:49 1 there is no basis under international law for the  
2 Tribunal to turn a blind eye to what are largely  
3 undisputed facts that demonstrate Respondent did not  
4 deal with the Imperial Project in good faith and in  
5 accordance with applicable customary international law  
6 standards of justice, protection of  
7 limited--legitimate expectations, and

8 nondiscriminations.

9           So, now I want to walk you through some of  
10 these facts. Again, not all of them, but enough to  
11 give you the underlying basis for our claims.

12           First of all, there is no real dispute that  
13 the Respondent deliberately delayed approval of the  
14 Project which, by all accounts, was ready for  
15 approval, at least by early 1999. To revisit the  
16 chronology, in December 1994, it files a--its plan of  
17 operation, having proven the re--that there were  
18 valuable gold resources there, that it had gotten the  
19 protection of the 1994 Desert Protection Act that its  
20 claim--its site would not be withdrawn.

21           Two years later, which was not that abnormal,  
22 in 1996, a Draft EIS/EIR recommends the Imperial

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10:37:09 1 Project as the preferred alternative, the equivalent  
2 of recommending approval. They go back and do some  
3 more study of the cultural resources at the site  
4 resulting in a November 1997 Draft EIS/EIR, again,  
5 recommending the plan of operation as the preferred  
6 alternative or in essence recommending approval.

7           Everyone expected there would be  
8 consultations under the National Environmental Policy  
9 Act, the NEPA process. That would be required, but  
10 all understood that those consultations, as I have  
11 just been through, couldn't stop the Project.  
12 The--I'm sorry, the National Historic Preservation  
13 Act--and that they provided for only economically

14 feasible mitigation.

15 Now, Solicitor Leshy directed, at least by  
16 October of '98, we have this document--there are other  
17 documents that suggested occurred earlier, to stop  
18 working on the final EIS/EIR, but nonetheless, we  
19 also--from the Respondent's own documents, we can  
20 verify that the Mineral Report was virtually done by  
21 late 1998. So, in Exhibit 156, we have an E-mail from  
22 Mr. Waywood, who was the principal drafter of the

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10:38:41 1 Mineral Report, stating that he finished all the  
2 fieldwork and acquired all pertinent data from the  
3 company, and analytical work on the assays had been  
4 completed.

5 Exhibit 167, we have a fax to Bob Anderson,  
6 again the Bob Anderson that the Government declined to  
7 bring, in which it's reported to him--he's the Deputy  
8 State Director in California--that the VER, the valid  
9 existing rights report, was progressing and could be  
10 completed by January 1999 to March 1999 time frame.

11 At this point in time, there were no  
12 California measures that would have blocked the  
13 Project--we are four years away from any such  
14 measures--and so had BLM done what it was supposed to  
15 do, approved the Project by early 1999, the mine would  
16 be operating today and enjoying the extraordinary spot  
17 prices.

18 Indeed, the fact that it was likely to  
19 approve--you can also look that at this point in time,

20 Glamis had a very favorable reputation in the  
21 California Legislature, a - Exhibit 114 - an assembly  
22 resolution by member Jim Battin specifically commends

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10:40:25 1 Glamis on the reclamation that it performed at the  
2 Picacho Mine. That it takes great pleasure in  
3 commending the Glamis Gold Corporation for its  
4 environmentally sensitive treatment of the environment  
5 at the Picacho Mine and for its ground breaking  
6 reclamation techniques that have earned it the 1997  
7 Excellence in Reclamation Award from the California  
8 Mining Association.

9 Now, Respondent doesn't want the Tribunal to  
10 hear from BLM witnesses about the delay. Rather, they  
11 choose to make generalized assertions about delay,  
12 permitting in the United States being longer on  
13 average than elsewhere in the world. But those  
14 generalities cannot undermine the specific proof of  
15 deliberate delay in the Imperial Project case at the  
16 BLM level and the specific expert analysis of  
17 Mr. Leshendok, who has compared the approval times  
18 that occurred at similar sized and located projects in  
19 the California Desert, and has shown that those are  
20 significant - - Glamis was subjected to significantly  
21 greater delays even up to the denial, putting aside  
22 the next four years, and that's at Mr. Leshendok's

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10: 41: 47 1 April report at 34, Table 1, and you will see that  
2 Glamis, the third one down, six years and nine months,  
3 whereas the others are all in the less than three  
4 years.

5 Now, second: While we wouldn't contend that  
6 deliberate delay by itself would be enough to violate  
7 customary and international law, but it does inform  
8 what transpired and support our claim of a denial of  
9 justice.

10 It can't be seriously disputed that Solicitor  
11 Leshy deliberately and unlawfully changed the  
12 standards for operations applicable to the Imperial  
13 Project with the intended purpose and effect of  
14 halting the Project and denying Glamis its legitimate  
15 expectation of being able to extract the gold. This  
16 action, by elevating the quote-unquote undue  
17 impairment standard to a new discretionary veto over  
18 mines otherwise proposed in accordance with the 3809  
19 regulations, was no mere mistake or interpretive Rule,  
20 as Respondent suggests. Rather, Section 601 of FLPMA,  
21 Federal Land Management Policy Act, specifically  
22 stated that the invocation of the undue impairment

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10: 43: 12 1 standard had to be by regulation, not by solicitor  
2 interpretation, and that was what BLM had done when it  
3 equated the two, as Mr. Anderson said, in the 3809  
4 regulation with unnecessary and undue degradation.

5 And it was this defect, this gross violation

6 of the statutory basis for undue impairment, that  
7 formed the grounds of Solicitor Myers in the next  
8 administration revoking the Leshy Opinion as unlawful.  
9 And that opinion, Solicitor Myers, remains  
10 Respondent's legal interpretation today. It has never  
11 been revoked itself.

12 Now, if the undue impairment standard had  
13 been so vague and discretionary as Leshy suggested, it  
14 is quite clear that investors such as Glamis would  
15 have never invested in projects within the California  
16 Desert Conservation Area. They would simply invest  
17 millions of dollars to be held up at the last moment  
18 on a wholly unfettered discretion. And that is, in  
19 fact, exactly what the mining industry told Congress  
20 in the mid-nineties when the Clinton Administration  
21 had proposed a change to the Mining Law to permit such  
22 unfettered discretion. Congress refused.

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10:44:47 1 And without the Leshy rationale, this new  
2 discretionary veto power that he found, Secretary  
3 Babbitt would have had no basis to issue the Record of  
4 Decision that he did on the eve of leaving office in  
5 January 2001.

6 Now, the third set of facts demonstrate that  
7 Imperial Project was subjected to discriminatory  
8 treatment in a variety of ways, as set forth in our  
9 Memorial and our reply. For example, both before and  
10 after the denial of the Imperial Project, significant  
11 projects with similar cultural characteristics were

12 approved without complete backfilling and despite  
13 severe impacts to cultural resources and areas of  
14 cultural concern. Indeed, the Quechan Tribe for years  
15 had maintained that the entire area between Pilot  
16 Knob, which is down on the U.S. - Mexican border, and  
17 Avikwaame, which is north of Blythe by the--about a  
18 hundred miles north, were sacred. And you can see in  
19 today's New York Times an extensive article  
20 documenting again the Quechan claims of all sites, in  
21 this vast area of the southern desert on both the  
22 California and Arizona side, as sacred.

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10:46:12 1 Now, as Dr. Sebastian has testified, and you  
2 will hear further from her this week, there is nothing  
3 found at the Imperial Project Site that would  
4 distinguish it from other areas of this part of the  
5 California Desert, including areas impacted by various  
6 project sites. Before the Imperial Project, BLM had  
7 approved mining operations at the American Girl Mine,  
8 and just--

9 (Pause.)

10 MR. GOURLEY: You have the American Girl Mine  
11 down here about eight miles away. It's in an area of  
12 very high cultural concern. You have got Picacho  
13 right next to Picacho Peak in an area of high cultural  
14 concern. You can see the Mesquite Mine land--Mesquite  
15 Mine, the original proposal, right next to the Singer  
16 area of cultural--Critical Environmental Concern,  
17 ACEC.



18                   Those had already been approved. Those were  
19 already in mining operations at the time that  
20 Imperial--the time that Glamis came to the Imperial  
21 Project Site. In fact, one of the benefits since  
22 Glamis was responsible for the Picacho, was mining the

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10:48:25 1 Picacho Mine, they had hoped to be able to transition  
2 that mining team, too.

3                   Now, we also know because of the recent  
4 production of Boma Johnson's map of the Xam Kwatcan  
5 Trail that other projects directly and significantly  
6 damaged the very Trail of Dreams that was proffered as  
7 the factual basis for the denial in this case, and  
8 these include, and again you will hear more about this  
9 in the testimony, the Mesquite Mine expansion in 2002,  
10 again a mine about 10 miles away from the Imperial  
11 Site directly abutting the Singer Geoglyph ACEC, one  
12 of the region's most significant prehistoric  
13 resources; the North Baja Pipeline in 2002, which had  
14 a final EIS/EIR for a new expansion just this past  
15 June of 2007, is an underground pipeline intersects  
16 and scars multiple segments of the Xam Kwatcan trail  
17 network. The Mesquite Landfill, which is next to the  
18 Mesquite Mine, it required a redrawing of the Singer  
19 Geoglyph ACEC, so a preexisting area of critical  
20 environmental concern was redrafted to avoid--to  
21 truncate--to allow the landfill to go forward, and  
22 that landfill property would truncate prehistoric

10:49:55 1 segments that follow the general alignment of the Xam  
2 Kwatcan Trail as depicted by Boma Johnson's map.

3           It would also create mountains of garbage  
4 that would be significantly higher than any of the  
5 remaining piles projected at the Imperial Project.

6           Now, Mr. Leshendok, in his expert opinion,  
7 has already addressed the approval processes for these  
8 and the inconsistency of approving those and denying  
9 the Imperial Project, and Dr. Sebastian will testify  
10 similarly about the impact of these projects on the  
11 Xam Kwatcan Trail.

12           But this disparate treatment of similarly  
13 situated projects is not only evidence of arbitrary  
14 and discriminatory treatment of the Imperial Project,  
15 there is other evidence. As Dr. Sebastian has  
16 testified, the NHPA process followed by the BLM and  
17 the American Council for Historic Preservation in this  
18 case deviated significantly in a discriminatory manner  
19 from that employed in other cases. Dr. Sebastian  
20 teaches this, the process, to Government officials.

21           Indeed, the arbitrary and novel  
22 identification of an area of traditional cultural

10:51:19 1 concern--you will hear more about this from  
2 Dr. Sebastian and Dr. Cleland--they in essence draw,  
3 arbitrarily draw something called an ATCC, a novel

4 concept, around the Project, to define it as "the  
5 Project site," and that turns the process on its head  
6 because, as Dr. Sebastian will testify, you are to  
7 identify traditional areas of traditional cultural  
8 concern by ethnographic study. Dr. Baksh performs  
9 such a study at the Imperial Project Site and found no  
10 such area of traditional cultural concern. Couldn't  
11 verify one.

12           And by tying, what it did was take the  
13 Running Man to the south of the project and tie it to  
14 the Indian Pass withdrawal area, the petroglyphs at  
15 Indian Pass, it did exactly what the 1994 California  
16 Desert Protection Act said you couldn't do, which was  
17 use an existing withdrawn area as a ground for  
18 restricting operations at a site left open for  
19 multiple uses. Yet again, that's exactly what  
20 Secretary Babbitt's Record of Decision did.

21           Turning then--continuing on to the California  
22 measure, they, too, are clearly discriminatory and

10:52:48 1 targeted at this mine. Again, Respondent will make  
2 the best case it can that these are general, but they  
3 cannot deny and avoid the overwhelming evidence that  
4 each measure was motivated by this mine and this mine  
5 only.

6           They will try to hide behind the deference  
7 that it says you should give. Again that goes to--we  
8 don't challenge the lawfulness of the reg. What we  
9 challenge is that we bore the brunt of this

10 extraordinary change in reclamation standards.

11 So what does that evidence include?

12 Exhibit 257, start in September. He vetoes-- Governor  
13 Davis vetoes a bill that would have stopped, but  
14 because he had to veto it, he directs the resource  
15 division to pursue all possible legal and  
16 administrative remedies that will assist in stopping  
17 the development of the Glamis Gold Mine. That is the  
18 start of the regulations. Mr. Parrish can argue what  
19 he wants as to the rationale, but they can't deny this  
20 is what started the process.

21 Exhibit 258: This is an E-mail between  
22 someone in the--between the allies in the California

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10:54:18 1 Legislature and the resource agency in the legal  
2 office, actually in the California Executive Branch,  
3 stating what the Senator complaining that--the  
4 Senator's aide complaining, I thought Allison Harvey  
5 and I were working with the resources agency/DOC on an  
6 informal and collegial basis to help stop the Glamis  
7 Mine, something that has been significantly  
8 complicated by the Governor's veto of S.B. 1828, the  
9 prior bill that Governor Davis had vetoed and vetoed  
10 because it would have burdened the State of  
11 California. It's okay to burden the private investor.

12 Exhibit 273: And this document confirms that  
13 Senate Bill 483, which is what--what Senate Bill 22  
14 would authorize after the veto of the earlier bill,  
15 two points: These changes to the statute are urgently

16 needed to stop the Glamis Imperial Mining project in  
17 Imperial County, proposed by Glamis Gold, Limited, a  
18 Canadian-based company, targeted against its Canadian  
19 heritage.

20 And furthermore, saying the author believes  
21 the backfilling requirements established by S.B. 483  
22 make the Glamis Imperial Project infeasible. They

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10:55:51 1 knew what they were doing was to make it  
2 cost-prohibitive.

3 Exhibit 276: Some more of the legislative  
4 history of S.B. 22, confirming that--here that it was  
5 the only one that would qualify. In California, one  
6 site would qualify: Glamis Imperial Mining project.  
7 They wanted to get this one.

8 Exhibit 284. Governor Davis, press release  
9 after the passage of S.B. 22, and linking it to the  
10 emergency regulations which had just become final,  
11 that he had commissioned.

12 Three things. The measure sends a message  
13 that California sacred sites are more precious than  
14 gold. The notion that the purpose was to make it  
15 cost-prohibitive. The reclamation and backfilling  
16 requirements of this legislation would make the  
17 operating the Glamis gold mine cost-prohibitive.

18 And then finally, looking at the regs noting  
19 that it had been drafted narrowly. State Mining and  
20 Geology Board will require backfilling of all metallic  
21 mines in the future. The regulation will apply

22 statewide to new metallic metal mines which constitute

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10:57:13 1 only 3 percent of the industry. Again, carved out to  
2 impose the burden on Glamis and at most a few other.

3 Now, Respondent hasn't even attempted to  
4 argue that S.B. 22 has affected any other mine. It  
5 doesn't. They can't show that it affected any other  
6 project in California.

7 Now, with respect to the new emergency regs  
8 that became final, so-called regulation 3704.1, they  
9 argue, well, that is a general--a regulation of  
10 general applicability such that no expropriation  
11 should be found under the less restrictive balancing  
12 test for regulations not resulting in total loss of  
13 real property use.

14 Now, it presents the testimony of  
15 Mr. Parrish, a former Executive Director of the Board,  
16 purportedly to provide a rationale for why mandatory  
17 metallic--mandatory backfilling and site recontouring  
18 is necessary for new metallic open-pit mines, but not  
19 for existing ones, and not for the many other kinds of  
20 open-pit mineral mines that exist in California.  
21 Neither point is persuasive. First, as Governor  
22 Davis's press release documented the regulation,

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10:58:37 1 picked a new open-pit mine for less than 3 percent of

2 the industry.

3           Putting aside for a moment what you will hear  
4 about the unusual Golden Queen Mine proposal and  
5 whether that's really comparable to the Imperial  
6 Project--and we will show that it's not--even assuming  
7 the regulation has a rational basis, it unjustifiably  
8 invested the entire burden of this new policy on a  
9 very small universe, a universe that to date has  
10 really only affected Glamis.

11           And the significance of this point can be  
12 found to--to the test can be found in Justice  
13 Kennedy's concurring opinion in the Lucas case, where  
14 he wrote, "The State did not act until after the  
15 property had been zoned for individual lot  
16 developments and most other parcels had been  
17 approved--had been improved throwing the whole burden  
18 of the regulation on the remaining lots. This, too,  
19 must be measured in the balance."

20           As I have suggested, the burden of this  
21 regulation has been predominantly, if not exclusively  
22 borne, as it was intended to, on Claimant.

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10:59:49 1           And Respondent can't just hide from the fact  
2 that the Imperial Project was specifically targeted,  
3 treated like none other and uniquely burdened with the  
4 cost of this new policy.

5           In any event, we expect the cross-examination  
6 of Mr. Parrish to show that at least with respect to  
7 the measures of mandatory complete backfilling and

8 site recontouring, there is no rational basis to  
9 distinguish metallic open-pit mines from other large  
10 open-pit mines, whether for safety or for restoration  
11 to future unspecified uses.

12 Unlike Methanex, again, Respondent cannot  
13 show that California has engaged in any scientific  
14 study to support the distinctions its regulation was  
15 making. None was performed, and none was needed  
16 because Governor Davis had issued the directive: Stop  
17 the Glamis mine.

18 In short, the actions at both the Federal and  
19 state level were designed to, and did, destroy  
20 Glamis's real property interest in the mining claims  
21 and Imperial Project.

22 And that leaves us, then, to damages, and we

11:01:03 1 will expect you will hear a lot of testimony on this  
2 very contested point.

3 There are two issues to consider: First,  
4 there is the expropriation under Article 1110, and  
5 this goes to the value of the mining claims on the  
6 date of expropriation. We find that date to be  
7 December 12, 2002, based as in Whitney Benefits, on  
8 the fact that where you have a new statute that  
9 without possibility of waiver or a way out imposes a  
10 standard that you cannot meet, that that's when the  
11 taking occurs.

12 Under Article 1105, under customary  
13 international law, the Tribunal has much more



14 discretion to fashion a remedy, ranging anywhere from  
15 Claimant's restitution interests, which exceeds  
16 \$15 million today; it continues to rise because each  
17 year to maintain its property interest, it pays  
18 Respondent now \$100,000.

19           And it certainly includes--can go up to the  
20 value of the mine at the date of expropriation,  
21 expropriation, which is \$49.1 million. And it could  
22 even, if you were to accept Navigant's extraordinary

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11:02:31 1 projection of the current value, you could fashion a  
2 remedy that would be based on what Claimant would be  
3 earning today had Respondent approved the mine, as it  
4 should, no later than early 1999.

5           Now, we are not asking for that. We are  
6 asking for the value of the mine. And Respondent  
7 hasn't challenged the amount incurred by Glamis in  
8 seeking to permit the restitution interest of  
9 \$15 million. It has contested the valuation of the  
10 mine both as of December 12, 2002, and later, as  
11 proffered this absurdly \$150 million current value  
12 based on recent spot price.

13           You will hear in the testimony that the  
14 market denies there is no any such value to this  
15 stigmatized property. The Tribunal would have to  
16 believe that every mining company in the world is  
17 irrational, including Glamis, not to immediately take  
18 this property, submit for a complete backfilling plan  
19 and site regrading to obtain even just the

20 \$110 million differential between Glamis's claim and  
21 this alleged 159 million value.

22 As of the valuation at the time of

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11:04:10 1 expropriation, which is really the only valid time to  
2 assess the value--you don't look at the present--the  
3 experts disagree on a number of issues about which you  
4 will hear. Our expert is Bernard Guarnera, President  
5 of Behre Dolbear. He is a certified mineral appraiser  
6 of with some 40 years of experience. Behre Dolbear is  
7 relying on its standard and long proven mineral  
8 property valuation methods which it has employed for  
9 Government and private owners, for buyers and sellers  
10 and has determined that the mining claims were worth  
11 49.1 million just before the expropriation and a minus  
12 8.9 million immediately thereafter.

13 Respondent's experts, Navigant and Norwest,  
14 on the other hand, have virtually no experience on  
15 valuing metallic mineral deposits and as you will hear  
16 have made numerous unsupported assumptions and relied  
17 on flawed engineering and geological analysis in their  
18 effort to demonstrate that California was wrong; that  
19 in despite of imposing the mandatory backfilling, it  
20 unsuccessfully made it cost-prohibitive. According to  
21 them, the Imperial Project retains significant value  
22 even after imposition of the complete backfilling at

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11:05:34 1 the end of the Project and site recontouring to  
2 achieve the strict height limitations.

3 Norwest and Navigant are wrong, and we  
4 respectfully request that the Tribunal award the full  
5 49.1 million plus interest requested.

6 Thank you very much.

7 PRESIDENT YOUNG: Thank you very much.

8 We will now take a half-hour break. It's  
9 11:00, approximately 11:10. We will meet back here at  
10 11:40.

11 If you give us a moment here while we confer.  
12 (Tribunal conferring.)

13 PRESIDENT YOUNG: I have been overruled. My  
14 first decision overruled already.

15 I think what we will do, in light of the hour  
16 to make sure that Respondent can continue its argument  
17 uninterrupted, we will actually take the lunch break  
18 now, have just a slightly longer lunch break and come  
19 back at 1:00, if that works for everyone. We had  
20 planned to take lunch at 12:00, and if we give a  
21 half-hour break now, that only leaves you 20 minutes  
22 to get started and then we break again. So we

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11:07:33 1 will--would you--would Respondent prefer that we  
2 structure this differently?

3 MR. CLODFELTER: Mr. President, we think that  
4 with the break that you have scheduled for this  
5 morning we could finish before lunch or thereabouts,

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6 so we would think we would take the break now.

7 MS. MENAKER: What time was the lunch? Was  
8 it--

9 PRESIDENT YOUNG: Well, we'd anticipated  
10 12:00.

11 MR. CLODFELTER: Oh, at 12:00. Oh, I'm  
12 sorry. I thought it was 1:00 you announced earlier.

13 PRESIDENT YOUNG: Well, no. What we had  
14 imagined was actually breaking now until 1:00 and then  
15 starting your argument at 1:00, instead of taking a  
16 half-hour break now, coming back for 20 minutes and  
17 then breaking, that we would start to break, and we  
18 would just start the lunch break now and end at 1:00.

19 The alternative, I suppose, is we--we could  
20 move lunch, take a break now and then come back and  
21 allow to you go until one and then take the lunch  
22 break, if you prefer to do that.

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11:09:08 1 MR. CLODFELTER: Mr. President, if you're  
2 going to resume at 1:00 after the lunch break, that  
3 would be sufficient.

4 PRESIDENT YOUNG: Thank you. Then we will do  
5 that. Then we'll resume back here at 1:00.

6 Thank you.

7 (Whereupon, at 11:09 a.m., the hearing was  
8 adjourned until 1:00 p.m., the same day.)

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11: 09: 19 1

AFTERNOON SESSION

2           PRESIDENT YOUNG: Good afternoon.  
3           We are ready to commence again, and at this  
4 point we will turn the time over to Respondent for  
5 their opening statement.

6           OPENING STATEMENT BY COUNSEL FOR RESPONDENT

7           MR. RONALD BETTAUER: Mr. President, Members  
8 of the Tribunal, it is my privilege to begin the  
9 United States' s presentation at this hearing. John  
10 Ballinger, the Secretary of State' s legal advisor,  
11 asked me to tell you that he would have been honored  
12 to assume this role himself had he not been away. But  
13 I can say that I and the entire U. S. team are pleased  
14 to be here today, and we will do all we can to fully  
15 explain our positions and answer your questions.

16           This afternoon I will make some general  
17 remarks. Then Mr. Clodfelter will highlight some of

18 the key points that we believe it will be useful to  
19 have in mind as you hear testimony to be presented  
20 during Glamis's presentation.

21 Ms. Menaker will conclude our opening  
22 statement by providing a summary outline of the

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12:59:01 1 arguments we will make during the presentation of our  
2 case-in-chief later in the week.

3 Mr. President, Members of the Tribunal, by  
4 now you know full well what this case is about. The  
5 United States and California Governments have  
6 important responsibilities both to protect the  
7 environment, historical and cultural values, and to  
8 provide appropriate regulation of mining activities.  
9 Here, both the U.S. Federal and California State  
10 Governments, through their regular and democratic  
11 processes, took responsible steps that balanced all  
12 the interests involved. The outcome of those  
13 processes was a reasonable one, and it did not violate  
14 any treaty or customary law or international  
15 obligation of the United States.

16 Now, Glamis accepts that it is permissible to  
17 take such steps, but argues that when they are taken,  
18 they must entail compensation. In our presentation  
19 today and this week, we will show why this is neither  
20 true nor reasonable. If democratic governments need  
21 to pay for every reasonable regulatory measure that  
22 they take as part of the process of balancing

13:00:33 1 important public interests, they would be driven to  
2 inaction, no public interest would be served, and they  
3 could not govern responsibly.

4           In our presentation today and throughout the  
5 week, the U.S. team will show that no expropriation  
6 occurred for multiple reasons. Among them, we will  
7 show that the 1975 California Surface Mining and  
8 Reclamation Act, or SMARA, and the 1976 California  
9 Native American Historical, Cultural, and Sacred Sites  
10 Act, or Sacred Sites Act, clearly alerted any  
11 potential mining investor in the California Desert  
12 Conservation Area that activities there could be  
13 subject to stringent regulation.

14           We will also show that at all times the  
15 Federal Government diligently processed Glamis's plan,  
16 followed all applicable procedures, and made  
17 reasonable and defensible legal determinations.

18           In any event, we will show that Glamis  
19 remains free to pursue required Federal and state  
20 approvals and that it would be economically viable for  
21 Glamis to proceed with its project in compliance with  
22 California's reclamation measures; and its investment

13:02:09 1 cannot, therefore, be said to have been taken either  
2 directly or indirectly.

3           We will also show that the United States did

4 not violate Article 1105, that we did not fail to  
5 provide Glamis's investment the customary  
6 international law minimum standard of treatment.  
7 Glamis, in fact, has not demonstrated that the  
8 purported rules on which it bases its claims are  
9 actually rules of customary international law; that  
10 is, that those rules derive from a general and  
11 consistent practice of nations followed by them out of  
12 a sense of legal obligation.

13           Glamis essentially charges that both the  
14 Federal and California Government's conduct in this  
15 area was arbitrary, but has not made a case that there  
16 is a relevant rule of international law prohibiting  
17 the conduct in question. In any event, our team will  
18 show that the U.S. conduct was not arbitrary.

19           Now, this case is quite important. It raises  
20 fundamental issues as to a nation's prerogative to  
21 regulate mining activities and the use of public  
22 lands. As you know, mining is a highly regulated

13: 03: 39 1 activity in the United States. We encourage mining,  
2 but we also place greater importance on protection of  
3 public health and safety and the environment,  
4 including historic and cultural values. Glamis's  
5 claim attacks this fundamental prerogative.

6           Glamis knew when it sought to exploit mining  
7 resources on Federal lands that it would need to  
8 comply with a multitude of Federal and State laws and  
9 regulations. These span the spectrum, from the



10 Federal Land Policy and Management Act to the National  
11 Environmental Policy Act, the California Environmental  
12 Quality Act, and SMARA, to name just a few. Entire  
13 sections of the U. S. Federal and State--of U. S.  
14 Federal and State agencies are devoted to  
15 administering these complex regulatory schemes.

16           When processing Glamis's plan of action, the  
17 Federal Government took care in administering this  
18 regulatory scheme. California likewise acted lawfully  
19 and responsibly when it enacted and later clarified  
20 environmental regulations and legislation. While it  
21 is well-known that mining is highly regulated in the  
22 United States, it is equally well-known that no legal

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13:05:17 1 system is more protective of property rights and due  
2 process rights than that of the United States.

3           I note this simply to make the point that  
4 U. S. administrative processes are protective of  
5 property rights, and there are available both  
6 administrative and judicial review mechanisms to  
7 address any asserted errors. Had Glamis wanted a  
8 review of factual determinations made by  
9 administrative agencies during the processing of its  
10 Plan of Operations and a de novo review of their legal  
11 conclusions, it could have gone to U. S. Court, as it  
12 has done on numerous past occasions, but it did not do  
13 that. Glamis availed itself of its option under the  
14 NAFTA to come to this forum.

15           It now seeks to have its grievances decided

16 under international law. This is another reason why  
17 this case is so important. Glamis's claims implicate  
18 two areas of customary international law. One is the  
19 area of expropriation law that is codified in NAFTA  
20 Article 1110. The other is the customary  
21 international law minimum standard of treatment of  
22 foreign investments more generally, which is

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13:06:45 1 referenced in NAFTA Article 1105. This case is  
2 important to establishing the manner in which the  
3 rules of customary international law in these two key  
4 areas are determined and elucidated.

5 Article 1110 lays out the most important of  
6 the applicable customary international law rules  
7 concerning expropriation: Property shall not be  
8 expropriated except for a public purpose on a  
9 nondiscriminatory basis in accordance with due process  
10 of law and on payment without delay of the fully  
11 realizable equivalent of the fair market value of the  
12 investment.

13 Article 1110 also makes clear that indirect  
14 expropriation or, to state it another way, a measure  
15 tantamount to nationalization or expropriation, is  
16 governed by the same requirements. These principles  
17 reflect customary international law.

18 What is laid out in Article 1110 or under  
19 customary international law is how a tribunal is to  
20 determine whether measures constitute an indirect  
21 expropriation. It is clear under this Article and

22 under customary international law that there is a well

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13:08:17 1 established Rule prohibiting indirect expropriation  
2 without compensation, but the situations in which that  
3 Rule applies require elaboration.

4 Here, the U.S. system has the greatest expert  
5 experience in reasoning through the contending  
6 interests involved in indirect expropriation claims  
7 and has confronted a vast array of different fact  
8 situations. On this point Glamis agrees. In its  
9 Memorial Glamis notes that U.S. jurisprudence  
10 concerning indirect expropriation has had a seminal  
11 influence on expropriation jurisprudence around the  
12 world and that the line for determining whether an  
13 indirect expropriation has occurred in international  
14 law is similar to the line drawn in U.S. Fifth and  
15 Fourteenth Amendment cases. This is stated in  
16 paragraph 417 of Glamis's Memorial, and was stated  
17 this morning when Claimant said that international law  
18 is informed by U.S. law on this issue.

19 Thus, both parties agree that this Tribunal  
20 can find guidance and the reasoning used by U.S.  
21 Courts with respect to indirect  
22 appropriations-- expropriations. This is a crucial

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13:09:44 1 point. We have shown in our written submissions, and

2 will demonstrate during this week's hearing, that U.S.  
3 law would reject Glamis's claim.

4           Let me be clear that I'm not arguing that  
5 U.S. law governs this proceeding. Of course, the U.S.  
6 recognizes that compliance with domestic law is not a  
7 defense to a claim of violation of international law.  
8 But in this case, as I have just said, U.S. law  
9 provides useful guidance. And, as I just mentioned,  
10 no legal system is more protective of property rights  
11 than U.S. law. Thus, it would really not be credible  
12 to argue that customary international law in this area  
13 had developed more stringent protections. To find in  
14 favor of Glamis would be a result so incongruous as to  
15 invite doubt concerning the process of international  
16 adjudication of investor-State claims.

17           Let me now turn briefly to Glamis's Article  
18 1105 claim. In making this claim, instead of relying  
19 on any well established Rule of customary  
20 international law, we pointed out in our pleadings  
21 that Glamis asked you to invent new rules.

22           Now, today for the first time, Glamis

13:11:21 1 characterized this case as involving a denial of  
2 justice. There is a well established set of customary  
3 international law rules concerning denials of justice.  
4 So, that Glamis--so Glamis finally seems to realize  
5 the importance of bringing its 1105 claim into the  
6 framework of an established set of rules, but Glamis  
7 has not demonstrated in its pleadings or today how the

8 measures it complains of violate the specific accepted  
9 criteria for application of those rules; rather, it  
10 makes broad characterizations with no backup. This is  
11 how it proceeds with its other 1105 allegations. It  
12 is asking you to adopt new customary international law  
13 rules that would have you second-guess every aspect of  
14 a State's administrative, regulatory, and legislative  
15 processes. It would have this Tribunal engage in  
16 de novo review of factual determinations made by  
17 agencies and legal conclusions drawn by agencies on  
18 issues of first impression. It urges this Tribunal to  
19 disagree with those expert determinations to fine-tune  
20 those determinations in a way it prefers, and find  
21 liability on that basis.

22 In effect, it would also have this Tribunal

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13: 13: 03 1 scrutinize regulations and legislation and impose  
2 liability on the United States should the Tribunal  
3 find that those regulations and legislation were less  
4 than perfect, but this is not what customary  
5 international law provides.

6 Because of the critical importance of this  
7 point, I want to focus very briefly on the task before  
8 you. By its terms, Article 1105 is grounded in  
9 international law standards. As I noted earlier, and  
10 as you know, customary international law is the law  
11 that is formed from a general and consistent practice  
12 of states followed by them out of a sense of legal  
13 obligation or opinio juris.

14                   As an international tribunal applying  
15 customary international law, your task is not like  
16 that of a domestic court applying common law. Unlike  
17 those courts which create common law, international  
18 tribunals do not create customary international law.  
19 Only nations create customary international law. It  
20 is your task to identify the content of customary  
21 international law and then to apply that law to the  
22 facts of this case.

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13: 14: 35 1                   To establish the content of applicable rules  
2 of customary international--of the customary  
3 international law minimum standard of treatment, the  
4 Tribunal must look to the general and consistent  
5 practice of States followed by them out of a sense of  
6 legal obligation. Glamis has not done this in  
7 advancing its claim. Instead, it relies principally  
8 on statements made in other arbitral awards, many of  
9 which are taken entirely out of context. In some of  
10 the cases, those tribunals were not even interpreting  
11 customary international law. In other cases, while  
12 the Tribunal may have been bound by customary  
13 international law, the Award shows no indication that  
14 the Tribunal actually considered whether the  
15 obligation that it stated was supported by a general  
16 and consistent practice of States followed by it or  
17 followed by the States out of a sense of legal  
18 obligation.

19                   A rigorous approach to the application of

20 customary international law is critical to the  
21 stability of the international investment protection  
22 regime. Adopting the radical approach relied on by

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13: 15: 59 1 Glamis would create rights far broader than those  
2 recognized in U.S. law or anywhere else, inviting the  
3 same kind of doubts about the process of  
4 investor-State adjudication that I mentioned earlier  
5 in connection with indirect expropriation.

6 Mr. President, Members of the Tribunal, thank  
7 you for your attention. This concludes my brief  
8 presentation. With these points in mind, I invite the  
9 Tribunal to call on Mr. Clodfelter, who will continue  
10 the U.S. opening remarks.

11 MR. CLODFELTER: Thank you, Mr. President,  
12 Members of the Tribunal.

13 It's obvious to the Tribunal that the parties  
14 see this case in very different ways. Not only do we  
15 disagree on the ultimate question whether the United  
16 States has violated its international obligations  
17 under NAFTA, but we disagree on what issues are  
18 fundamental to your deciding that question. This is  
19 evidenced by the party's very different approaches to  
20 this hearing.

21 As Mr. Gourley suggested this morning, the  
22 United States views this dispute as one that hinges on

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13:17:14 1 legal principles and the application of those  
2 principles to the facts.

3           Glamis has indicated that it believes  
4 resolving factual issues is key. As a result, while  
5 the United States will devote the vast majority of its  
6 time to oral argument, Glamis has chosen to present  
7 its case largely through witness testimony. In our  
8 view, much of this testimony is likely to be  
9 irrelevant and unhelpful in assisting the Tribunal in  
10 determining whether there has been a breach of NAFTA.

11           Of course, Glamis has the burden of proof on  
12 all questions in this case. We believe that they have  
13 failed to meet that burden, obviating, in response to  
14 Mr. Gourley's comment this morning, any need on our  
15 part to summon additional witness testimony on our  
16 behalf.

17           Now, Mr. Bettauer has described for you our  
18 views on the appropriate sources for the legal  
19 principles to be applied in this case. In addition,  
20 what we want to do this morning is give you a summary  
21 of the arguments that we will be making and to outline  
22 for you in some detail how we will present our defense

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13:18:22 1 later in this week.

2           But before Ms. Menaker does that, what I  
3 would like to do is to lay out some of the key  
4 considerations we would request that you bear in mind  
5 as you hear the testimony and argument presented by



6 Claimant during the next few days.

7           Claimant's counsel has skillfully attempted  
8 to paint a picture of a company undertaking a mining  
9 project no different from any others which has been  
10 the victim of an illegal conspiracy at both the  
11 Federal and state levels of Government to thwart its  
12 business ambitions under the pretext of protecting  
13 important public values, a company beset by political  
14 enemies, confronted at every turn by procedural  
15 irregularities, targeted because of what it is, and  
16 surprised by policies applied to them for allegedly  
17 purely political reasons that changed the economics of  
18 their project.

19           But in every respect, this portrayal is  
20 false. The conspiracy that Glamis describes is  
21 nothing more than the normal functioning of a  
22 democratic system. What Glamis sees as enemies were

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13:19:29 1 members of the public who advanced competing interests  
2 in the public property on which Glamis's project was  
3 to be located; and what Glamis sees as co-conspirators  
4 were public officials whose job it is to make tough  
5 decisions regarding those interests. Those interests  
6 were recognized and protected by law long before  
7 Glamis ever made its investment. And at every step,  
8 at both levels of Government, consideration of  
9 Glamis's interest, as well as of these competing  
10 interests, was given by authorized officials in strict  
11 in accordance with procedures set forth in law.

12 Policy outcomes unfavorable to Glamis  
13 emerged, not because of who or what Glamis was, but  
14 because of how Glamis planned to use the public  
15 property on which its mining claims were located.  
16 The results of these developments may have  
17 been a business setback for Glamis, but the risk of  
18 these developments was always present and always  
19 knowable by Glamis. And importantly, while they  
20 changed the economics of the Project, these  
21 developments were by no means fatal to it. They left  
22 Glamis with a still valuable project, which it is

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13:20:46 1 still free to pursue.

2 In processing Glamis's Imperial Project Plan  
3 of Operations, two events occurred that forced Federal  
4 and state decision makers to reconcile competing  
5 public policy objectives relating to mining. First,  
6 Glamis proposed to develop its mine in an area that  
7 was determined to contain a wealth of archeological  
8 features evidencing the area's cultural and religious  
9 importance to Native Americans.

10 And second, it became evident to California  
11 officials charged with implementing the Surface Mining  
12 and Reclamation Act that the less than full  
13 backfilling that local Governments had permitted to  
14 date was not achieving compliance with the Act's  
15 requirements for reclamation of mine sites to a usable  
16 condition.

17 These two events put the Imperial Project in

18 direct conflict with interests long protected by  
19 Government policies and long reflected in law: That  
20 sacred Native American sites not be destroyed; that  
21 the practice of Native American religion should not be  
22 interfered with; and, as just mentioned, that open-pit

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13:22:04 1 metallic mines should be reclaimed to a usable  
2 condition that poses no danger to public health or  
3 safety.

4           Glami s is disappointed with the resolution of  
5 that conflict that emerged, and its disappointment may  
6 be understandable, but the risk that Glami s would face  
7 Government action to prevent the harms identified was  
8 a risk that Glami s took, and international law does  
9 not guarantee against such risks. As was stated by  
10 the Tribunal in the Azinian Chapter Eleven case  
11 against Mexico, and you can see on the screen, it is a  
12 fact of life everywhere that individuals may be  
13 disappointed in their dealings with public  
14 authorities. NAFTA was not intended to provide  
15 foreign investors with blanket protection from this  
16 kind of disappointment, and nothing in its terms so  
17 provides.

18           Now, despite these events and despite the  
19 governmental actions taken in response to them, Glami s  
20 could, as I mentioned, still have pursued the Imperial  
21 Project, albeit with a revised Plan of Operations.  
22 Instead, Glami s announced, and Mr. McCrum's July 21,

13: 23: 20 1 2003 letter to the Department of Interior that,  
2 "Glami s Gold believes that the underlying issues have  
3 become so intractable that new avenues must be  
4 pursued." And those new avenues, of course, included  
5 this arbitration.

6 But by doing so, Glami s acted prematurely.  
7 By failing to pursue approval of a Plan of Operations  
8 with BLM and failing to seek approval of a Reclamation  
9 Plan from the State of California, Glami s has suffered  
10 the application of no adverse Government Decision  
11 against it, except the 2001 Record of Decision that  
12 was quickly rescinded.

13 And with respect to the California measures,  
14 contrary to Mr. Gourley's statement this morning that  
15 Glami s is the only investor affected, in fact, Glami s  
16 has not been affected at all by either the regulations  
17 or the legislation because there is not softer  
18 application. As a result, as we have shown, Glami s  
19 has no claim to raise under international law. Its  
20 claims simply are not ripe.

21 This is more than just a theoretical issue.  
22 This is demonstrated by what is actually happening

13: 24: 43 1 today. And as we have seen in the latest witness  
2 statements and as we will hear more about this week,  
3 as Mr. Gourley mentioned, another company proposing to

4 mine gold in the California Desert, Golden Queen,  
5 believes that it can mine profitably in compliance  
6 with California's reclamation requirements, and is  
7 seeking approval of a Reclamation Plan under the  
8 regulations.

9           Now, Mr. Leshendok has opined and will no  
10 doubt testify this week that he does not believe that  
11 Golden Queen's revised Reclamation Plan complies with  
12 California law. Of course, the plan's detailed  
13 compliance with the regulations is something for  
14 California officials ultimately to decide; and it  
15 wouldn't be at all unusual if the plan had to undergo  
16 further revisions.

17           But the point is that Glamis cannot simply  
18 say that it would have been prevented from mining at  
19 the Imperial Project Site where it has not even sought  
20 approval to do so.

21           As a result, Glamis's claim is not ripe for  
22 adjudication under the standards of NAFTA Chapter

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13: 25: 52 1 Eleven.

2           But even if Glamis's claims were ripe, it  
3 still cannot prevail in this arbitration. Glamis  
4 claims that by being subjected to the measures at  
5 issue, fundamental rights of ownership were taken from  
6 it in violation of international law--that Glamis has  
7 yet to establish that it enjoyed any rights that were  
8 affected by those measures. Exactly what rights does  
9 Glamis have?

10           It certainly has the right to mine gold from  
11 publicly owned lands on which it has located its  
12 claims, but Glamis holds no right to conduct that  
13 Mining Act activity in any manner that it chooses.  
14 Its right to mine was always qualified by the need to  
15 conform with all Federal and State laws. It has to  
16 obtain approval of a plan of operations, an objective  
17 that it gave up on in favor of this arbitration, and  
18 it has to have a Reclamation Plan approved by State  
19 officials.

20           Now, neither of these processes would have  
21 required Glamis to provide any extra benefit to the  
22 public. They would not even have required Glamis to

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13:27:08 1 pay for the gold that it removed from the public  
2 lands. At most, they would have required Glamis to  
3 undo some of the damage that it itself would cause  
4 through its mining activities. Glamis was never  
5 entitled to be free from such a requirement; that is,  
6 free from the requirement to undo damage that it  
7 caused, because from the time that it obtained rights  
8 in its Imperial Project mining claims, it has been the  
9 subject of legal principles prohibiting such damage.  
10 The very existence of these principles limit the  
11 extent of Glamis's extraction rights or, as we have  
12 argued, limit the bundle of rights that inhere in its  
13 mining claims. As a result, none of the measures  
14 Glamis now complains about impacted any property  
15 rights that it enjoys in its mining claims.

16           As we will discuss further later this week,  
17 the ability to mine, no matter what damage is caused  
18 to important public values was simply not part of the  
19 bundle of rights that Glamis acquired and, therefore,  
20 could not have been expropriated or denied by the  
21 measures at issue in this case.

22           Instead of being based upon actual rights

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13: 28: 26 1 that it enjoyed, much of Glamis's case is based upon  
2 what it asserts were its expectations or, more  
3 precisely, based upon the disappointment of its  
4 business expectations. Glamis asserts that it has  
5 suffered an indirect taking of its mineral claims  
6 because the actions of the Federal and State  
7 Governments frustrated reasonable investment-backed  
8 expectations. And it contends that it meets a test  
9 proffered in some recent arbitral tribunals for  
10 determining violations of the customary international  
11 law minimum standard of treatment because the  
12 Government's actions dashed its so-called legitimate  
13 expectations.

14           We will show that what happened with respect  
15 to the Imperial Project could not, in the  
16 circumstances that arose, have disappointed any  
17 investor's reasonable expectations. We will also show  
18 that the disappointment of legitimate expectations  
19 alone cannot constitute a violation of the minimum  
20 standard of treatment.

21           But for now, what I would like to do is to

22 note that there are all kinds of expectations, but not

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13:29:40 1 all are the kind that affect an indirect expropriation  
2 analysis. Glamis itself has been all over the field  
3 in its formulation of the test, but by mixing up  
4 different kinds of expectations, Glamis has attempted  
5 to gloss over the fact that it lacked the kind of  
6 expectations that are legally relevant when assessing  
7 an indirect expropriation claim. So, it's important  
8 as you listen to the testimony offered over the next  
9 few days over this issue to discern whether the  
10 expectations on which Glamis's witnesses testify are  
11 of the kind that are given consideration in the law.

12 Let me review some of the ways in which  
13 Glamis has attempted to muddle this issue. For some  
14 time, Glamis contends that it had a protected  
15 expectation that its investment would not be  
16 expropriated. For example, at paragraph 150 of its  
17 Reply, as you can see on the screen, Glamis stated:  
18 "There was no way for even the most prudent of  
19 investors to recognize that so-called  
20 cultural-resource protection would yield an  
21 expropriation of Glamis's Imperial Mining claims."

22 Of course, this sort of formulation is of no

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13:31:01 1 help at all because it begs the very question at issue



2 in an indirect takings claim

3           Other times, Glamis contends that it had a  
4 relevant expectation because it had concluded that it  
5 was probable that it would be able to go forward with  
6 the project as it had proposed to do. Thus, for  
7 example, at paragraph 479 of its Memorial, Glamis  
8 states: "Glamis's understanding of and reliance on  
9 the CDPA and the process leading up to it, its  
10 understanding as to the Quechan Tribe's position on  
11 the Imperial Project area, its understanding of the  
12 applicable standards governing BLM permitting of  
13 mining plans of operations, and its understanding of  
14 applicable state reclamation and mitigation  
15 requirements all led Glamis to the expectation that  
16 the Imperial Project would be viable."

17           Mr. President, this is merely a statement of  
18 probability. It's an assessment of the probability  
19 that their project would go forward. That it may have  
20 been reasonable for Glamis to conclude that it was  
21 probable that it could go forward, as it had proposed,  
22 is not the same thing as saying that it was reasonable

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13: 32: 20 1 for Glamis to exclude as possibilities other outcomes,  
2 such as those that actually occurred. The mere  
3 reasonableness of probability assessments is not what  
4 is protected by the law. Results of Government action  
5 other than predicted results occur all the time in  
6 business.

7           One last example: At other times, Glamis

8 invokes the fact that it did not expect the discovery  
9 of variable cultural resources on the Imperial Project  
10 Site. For example, at page--at paragraph 451 of its  
11 Memorial, Glamis stated: "At no point in that lengthy  
12 and detailed evaluation process could Glamis have  
13 suspected that the Quechan Tribe had grave concerns  
14 about the Project area."

15 But this and other of Glamis's statements are  
16 not references to the risks of adverse Government  
17 Decisions. They are references to external facts. No  
18 liability can attach to Government measures taken in  
19 response to discovery of external facts that are  
20 contrary to the public interest. This is seen in the  
21 Hunziker versus Iowa case that we cite in our written  
22 materials, where discovery of an Indian burial ground

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13: 33: 46 1 after the investment was made was the basis for the  
2 refusal to issue a building permit for a housing  
3 department or development. It was irrelevant that the  
4 investor in that case could not have predicted the  
5 discovery of the burial mound.

6 It is also seen in the case of Good versus  
7 the United States, another case that we discussed,  
8 where the designation and discovery of endangered  
9 species after the investment was made led to a refusal  
10 to authorize wetlands to be developed. It was  
11 irrelevant whether the investor was reasonable in not  
12 expecting certain species to be added to the  
13 endangered species list after his investment or not to

14 expect that those species would be found on his

15 property.

16           The discovery of external facts is simply not

17 a risk--is simply a risk of investing, and the law

18 does not burden the public Treasury with that risk.

19           The real task for determining whether

20 reasonable investment-backed expectations have been

21 frustrated here is whether Glamis could reasonably

22 have expected that if highly valued Native American

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13: 34: 58 1 cultural values were discovered on its site, there was

2 still no real possibility that it would be prevented

3 from mining gold in the manner it had planned to do.

4 Or whether it was reasonable for Glamis to expect that

5 there was no real possibility that additional

6 backfilling would be required, if it was shown, based

7 on experience, that the reclamation techniques

8 employed at existing open-pit metallic mines in the

9 California Desert were not effective in assuring

10 compliance with preexisting law requiring the

11 reclamation of lands to usable condition.

12           Both of these are the kind of expectations

13 that are to be considered in an indirect takings

14 analysis, and it is our contention that Glamis could

15 not reasonably have had either expectation. This is

16 true for Glamis's expectation with respect to the

17 California measures, but it is also true with respect

18 to its expectation with respect to the Federal

19 measures, including, as we will show, application of

20 the undue impairment standard.

21           Glamis's expectations on which were the only

22 expectations discussed in this morning's

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13: 36: 26 1 presentation--odd, since that's--the application of  
2 that standard was so short-lived.

3           Mr. President, contrary to statements in  
4 Glamis's Reply Memorial, this is not to accuse Glamis  
5 of being blind or foolish or of acting unreasonably.  
6 All investment decisions are taken in the face of  
7 risks. Whether it was reasonable for Glamis to make  
8 its investment here in the face of these particular  
9 risks is not for us to say, but it is for us to say  
10 that it would have been unreasonable for Glamis not to  
11 have figured in its investment calculus the real  
12 possibility that the Government would take these  
13 actions; that is, actions to protect and ensure access  
14 to Native American sacred sites, as well as to ensure  
15 that lands are returned to a usable condition.

16           And that is why Glamis could not have had any  
17 reasonable expectation that these risks were not real,  
18 and the public cannot be expected to guarantee against  
19 any failure by Glamis to do so.

20           Now, it's hard to escape the conclusion that  
21 in the end, what Glamis is really arguing is that it  
22 was reasonable for it to expect that the specific

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13: 37: 56 1 regulatory requirements it faced when it made its  
2 investment would not be changed. While Glamis says it  
3 doesn't question that Government regulations may  
4 change over time, in reality its claim is based upon  
5 an assumption that it is entitled to be held harmless  
6 from the economic effects of such changes. Nowhere is  
7 this more evident than when Glamis contends that the  
8 customary international law minimum standard of  
9 treatment includes an obligation for States to act  
10 transparently. In paragraph 548 of its Memorial,  
11 Glamis states, "Glamis could not have fathomed, as it  
12 made its nearly \$15 million in investment, that BLM  
13 would reinterpret years of mining and public land law  
14 to fashion such a denial authority. Respondent acted  
15 in an arbitrary and nontransparent manner, preventing  
16 Glamis from knowing, "beforehand any and all rules and  
17 regulations that will govern its investments," as  
18 required under Tecmed and CMS gas."

19           In effect, then, according to Glamis here,  
20 the right to know, "beforehand any and all rules and  
21 regulations that will govern the investment," means  
22 that they must be compensated for the effects of any

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13: 39: 22 1 changes made to the existing rules and regulations  
2 after the investment is made because it could not have  
3 known about them in advance.

4           Now, Mr. President, as we will show, neither  
5 case cited in their quotation really stands for that

6 proposition, but what is important here is to  
7 recognize that this proposition is what is at the  
8 heart of Glamis's case. Glamis is seeking public  
9 indemnification for the economic effects of any and  
10 all changes to the regulations governing its  
11 activities made after its investment, and that is why  
12 Glamis's claims are without merit.

13 Now, from what I have just described, it is  
14 clear that Glamis's claims depend, in large part, on  
15 allegedly disappointed expectations relating to the  
16 cultural resources sought to be protected, first by  
17 the rescinded Record of Decision, and later by Senate  
18 Bill 22. It appears that as it did in its written  
19 submissions, Glamis intends during this hearing to  
20 devote a great deal of attention to cultural resource  
21 issues since it's called to testify not only its own  
22 expert on cultural resources, but the archaeologist

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13: 40: 48 1 whose firm completed some of the Imperial Project  
2 cultural resource surveys and a BLM archaeologist.  
3 You will be likely be hearing a lot about  
4 archeological features and trail identification over  
5 the next few days.

6 The evidence and testimony that Glamis has  
7 proffered and which it intends to proffer on these  
8 topics, however, is simply irrelevant. It is a  
9 distraction that need not occupy your time. Clearly,  
10 it is not this Tribunal's function to definitively  
11 determine the course of the Quechan sacred trail

12 network. This is not an international arbitration  
13 concerning a boundary dispute where the Tribunal is  
14 asked to make factual findings on disputed questions  
15 like that. Nor is it a domestic administrative  
16 tribunal. Even a domestic Court wouldn't delve into  
17 factual issues such as these.

18 So, what is Glamis's point in spending so  
19 much time on these issues? Although it doesn't come  
20 out and say it directly, Glamis is clearly trying to  
21 discredit the Quechan Tribe. There is really no  
22 getting around the fact that a large part of its case

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13: 42: 01 1 is based on having this Tribunal conclude that the  
2 Tribe is hypocritical. It wants to leave the  
3 impression that the Tribe conjures up claims that  
4 areas have spiritual importance when it suits its  
5 interest, such as when it would prefer for some other  
6 unknown reason not to have a mine developed, but makes  
7 no claims when its own interests are at hand, as when  
8 it wants to engage in profit-making activities.

9 Glamis has not said this as bluntly. In  
10 fact, in her second report, Dr. Sebastian has  
11 disavowed any such strategy. But there can't be any  
12 mistake about it. That is what Glamis is alleging and  
13 that is what they are asking you to determine. What  
14 other possible relevance to the case is there to the  
15 fact that it had been reported that the Quechan may  
16 seek to building a casino on its reservation? This is  
17 recent news. It has nothing at all to do with

18 Glamis's proposed Imperial Project, yet Glamis has  
19 gone out of its way to submit recent news reports  
20 about this proposal, notwithstanding the fact that  
21 those reports also convey the fact that the Tribe  
22 itself is torn about the proposed casino and its

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13:43:16 1 location, and it does not appear that any final  
2 decision has been made.

3           Glamis claims that the casino is proposed to  
4 be built in an area that has been identified by the  
5 Quechan as sacred. The only possible reason for  
6 Glamis to introduce this fact is its desire to have  
7 the Tribunal conclude that the Quechan are not sincere  
8 in raising claims that areas have spiritual and  
9 religious significance to them.

10           Why does Glamis spend much time focusing on  
11 the North Baja Pipeline project? The cultural  
12 resource survey for that project was begun in 2000,  
13 well after the cultural resource surveys for the  
14 Imperial Project were completed. Yet, Dr. Sebastian  
15 devoted considerable attention to that project in all  
16 of her reports. She actually traveled to the area  
17 before submitting her last statement to take pictures  
18 of the pipeline's path in attempt to match that path  
19 to a map of trails that is in evidence.

20           For what purpose was this done?  
21 Dr. Sebastian concludes in her statement that the Baja  
22 Pipeline project destroyed trails that had been



13: 44: 28 1 identified by the Quechan as sacred, but that  
2 conclusion is directly contradicted by the cultural  
3 resource survey for that project, which showed that  
4 the Quechan did not oppose the Project because all  
5 ceremonial features and sacred trail segments were  
6 avoided. Dr. Sebastian doesn't base her contrary  
7 conclusion on information she obtained from the  
8 Quechan, nor from the archeological site records of  
9 that project. Rather, she bases it on her estimation  
10 of where the trail network and pipeline were likely to  
11 intersect.

12 By introducing such hypothetical conclusions,  
13 Glamis again seeks to leave the impression that the  
14 Quechan are selective when resisting encroachment upon  
15 areas of religious, spiritual, or cultural  
16 significance to them.

17 The United States has absolutely no reason to  
18 believe that the Quechan have acted hypocritically or  
19 insincerely when seeking protection for sacred sites.  
20 Nor could the Tribunal make any such finding on the  
21 evidence before it. But even if this were the case  
22 and even if the Tribunal had such evidence before it,

13: 45: 36 1 what would it prove? Absolutely nothing. The Quechan  
2 are not on trial here. The United States is the  
3 Respondent in this action, and there is absolutely no

4 basis whatsoever to conclude, one, that the Quechan  
5 lied when informing the United States and cultural  
6 resource surveyors that certain sites were sacred to  
7 them; and two, that the United States knew or should  
8 have known about this. To the contrary, there is  
9 every reason to believe that the Quechan were and are  
10 sincere in their claims, that the area of the proposed  
11 Imperial Project retains cultural and religious  
12 significance for them. In fact, we have and will  
13 demonstrate that undisputed archeological evidence  
14 corroborated their claims that the area was used for  
15 ceremonial purposes. And even if this conclusion  
16 could be called into doubt based on the Quechan's  
17 actions in connection with other more recent projects,  
18 which we vigorously dispute, it would still be  
19 irrelevant because this information postdates the  
20 United States's actions taken in connection with the  
21 Imperial Project, and this could not have influenced  
22 them.

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13: 46: 50 1           There is simply no evidence that the United  
2 States had any reason to doubt the veracity of the  
3 information that was conveyed to archeological  
4 surveyors and integrated into the cultural resource  
5 surveys. It was on the basis of this voluminous  
6 archeological and ethnographic information that  
7 Federal and State Government decisions were made. In  
8 fact, for Glamis's theory to have any relevance, this  
9 Tribunal would have to find that a team of

10 professional archaeologists, the BLM, the California  
11 State Historic Preservation Office, the Advisory  
12 Commission on Historic Preservation, and the entire  
13 Department of Interior had reason to believe that the  
14 claims made by the Quechan were false, but  
15 nevertheless credited those claims. But not even  
16 Glamis makes such a far-ranging suggestion.

17 As we have and will demonstrate, there was  
18 ample evidence supporting the conclusions public  
19 officials reached with regard to the cultural  
20 resources in the proposed project area. If these  
21 conclusions were factually incorrect, that is legally  
22 irrelevant and cannot provide a basis for holding the

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13: 48: 00 1 United States internationally liable. Likewise, all  
2 of the testimony and evidence regarding the Quechan's  
3 actions in connection with projects that postdate the  
4 actions taken with respect to the Imperial Project are  
5 legally irrelevant.

6 For these reasons, we would suggest that  
7 Glamis's focus on the cultural resource issues is  
8 misplaced.

9 Mr. President, the next subject I would like  
10 to touch on as we prepare to hear testimony is the  
11 issue of valuation. As Mr. Gourley noted earlier, you  
12 will hear a lot of testimony on valuation issues this  
13 week. Now, we certainly agree that these issues are  
14 of utmost importance to this case, not so much for  
15 purposes of damages, which is where Mr. Gourley

16 relegated them, but because they're fundamental to the  
17 issue of whether there has been a violation of the  
18 NAFTA.

19 This is a very important issue, but again, in  
20 our view, much of the witness testimony in this area  
21 will prove to be unnecessary.

22 Now, typically, in an arbitration of this

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13: 49: 19 1 nature, one of the most difficult tasks presented to a  
2 tribunal is to make determinations in highly technical  
3 areas where there are dueling experts. But in this  
4 case, the Tribunal can be spared that conundrum since  
5 there are contemporaneous documents internal to Glamis  
6 containing the very information that the two parties'  
7 experts have been asked to produce. Glamis itself  
8 performed valuations of the Imperial Mining claims  
9 that remain the most authoritative representations of  
10 Glamis's true view of the economics of the Imperial  
11 Project, even with full backfilling taken into  
12 account. As it happens, the United States's experts'  
13 conclusions corroborate the conclusions that had been  
14 reached by Glamis itself. It is only Glamis's expert,  
15 retained for purposes of this arbitration, that has  
16 reached results that are so far outside the range of  
17 results not only of the United States's experts, but  
18 of its own client as to render that expert's reports  
19 unreliable.

20 The very existence of Glamis's  
21 contemporaneous documents, we submit, renders

22 extensive witness testimony regarding valuation issues

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13: 50: 48 1 unnecessary.

2           Now, Glamis has tried to distance itself from  
3 the implications of these internal analysis and will  
4 undoubtedly continue to do so this week. Indeed, we  
5 heard no mention of them whatsoever this morning. So  
6 I would like to make a few points in advance of this  
7 testimony.

8           One way in which Glamis has tried to divert  
9 attention from its own internal valuations is to adopt  
10 a novel theory first proffered by Professor Wälde, and  
11 that is that in accordance with the view that  
12 objective measures of value are to be preferred,  
13 Glamis's own accounting write-off is the best evidence  
14 of economic impact in this case.

15           Now, there are numerous problems with this  
16 theory, not the least of which is that Professor Wälde  
17 is neither a valuation expert nor an accounting  
18 expert, and he is to be forgiven, therefore, for not  
19 understanding that the way the write-down is stated in  
20 Glamis's financial reports reserves the possibility of  
21 substantial value providing significant latitude to  
22 the reporter and thus is far from objective.

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13: 52: 06 1

In addition, however, the write-down cannot

2 constitute evidence of the economic impact of the  
3 California measures because it was made almost two  
4 years before the first of those measures was even  
5 adopted. But the meaninglessness of an accounting  
6 write-off like the one Glamis made is best  
7 demonstrated by the fact that on the same day that it  
8 announced its write-off of the Imperial Project,  
9 Glamis also announced the write-off of the Cerro  
10 Blanco Project in Guatemala, which it has since  
11 revived and is actively pursuing as we speak. So,  
12 accounting write-offs obviously have their limits as  
13 reflections of value.

14 But most significantly, Professor Walde does  
15 not explain why such an accounting device should be  
16 preferred as an objective gauge of value over Glamis's  
17 own valuation calculations performed two years later  
18 for its own internal use in decision making and  
19 specifically in response to the California measures.

20 The second way in which Glamis tries to  
21 establish distance between it and its own confidential  
22 calculations is to denigrate them. Later in the week

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13:53:30 1 we'll show why they cannot be considered to be mere  
2 back-of-the-envelope calculations as Glamis now  
3 portrays them to be. Suffice it to say now that until  
4 it procured the services of its valuation expert in  
5 this case, Glamis never disavowed the data in those  
6 analyses. We know, for example, that they were not  
7 superseded by any more formal analyses within Glamis

8 because none have been cited by Glamis and none were  
9 produced to the United States during discovery. There  
10 was no evidence that Glamis independently considered  
11 the data in those analyses to be wrong, whether they  
12 were back of the envelope or not; and this is crucial  
13 because that data completely contradicts the economic  
14 impact Glamis has claimed in this arbitration as the  
15 basis for its expropriation claim.

16 Here is what Glamis stated in paragraph 437  
17 of its Memorial: "Operation of the Imperial Project  
18 under California's novel reclamation requirement would  
19 result in multi-million dollar losses, rendering the  
20 value of Glamis's property to be zero, as of adoption  
21 of the California measures on December 12, 2002."

22 But the data set forth in Glamis's internal

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13: 55: 06 1 calculation show that at the price of gold that both  
2 Behre Dolbear and Navigant agree should be used, the  
3 Project had a substantial value, even with complete  
4 backfilling, at least \$9.1 million. That's what  
5 Glamis's own data shows at the price of gold its own  
6 experts say should be used, and \$9.1 million is not  
7 zero, the value Glamis claimed in its Memorial.

8 So, how does Glamis try to get around this  
9 devastating fact? Very simply. It invented an  
10 entirely new theory for the degree of economic impact  
11 sufficient to claim an indirect expropriation, the  
12 theory of economically strategic profit. But before  
13 looking at this new theory, it would be instructive to

14 look at how Glami s originally characterized that  
15 impact. You recall that in the same paragraph of this  
16 Memorial I just quoted, Glami s stated: "Like the  
17 property owners in such cases--in cases such as  
18 Tecmed, Metalclad, Lucas, and Whitney Benefits, Glami s  
19 has been absolutely precluded from any beneficial use  
20 or enjoyment of its property--property right as a  
21 result of Government measures that render its right to  
22 extract gold worthless. "

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13: 56: 37 1 But here is how Glami s attempts to reconcile  
2 its zero-value and no beneficial-use assertions with  
3 its internal analyses showing a \$9.1 million value.  
4 Glami s states in paragraph 103 of its Reply Memorial,  
5 "A company will not move forward with a 15-year  
6 project that involves moving hundreds of millions of  
7 tons of material simply to turn an infinitesimal  
8 profit. It must turn an economically strategic  
9 profit." And Glami s' s back-of-the-envelope analysis  
10 in January 2003 confirmed that such a result was not  
11 possible given the new mandatory backfilling  
12 regulation. If the anticipated profit is insufficient  
13 to attract a reasonable mining company to proceed with  
14 extraction, then the property--the mineral  
15 rights--have no value.

16 So, now, under its new theory of economically  
17 strategic profit, the Government measures involved did  
18 not preclude all beneficial use and enjoyment as  
19 Glami s originally alleged, but only economically



20 strategic use and enjoyment. That is, zero value  
21 means any value lower than Glamis might obtain through  
22 an alternative investment. So, the Imperial Project

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13:58:00 1 wasn't worthless to Glamis. It just wasn't worth as  
2 much as Glamis would have liked it to be, given the  
3 other possible uses it had for its capital. Now  
4 Glamis wants the U.S. public to pay for this claim  
5 shortfall.

6 Mr. President, Members, no testimony you will  
7 hear this week will speak more eloquently or  
8 pervasively as to the value of Glamis's investment,  
9 even taking into account compliance with the  
10 challenged regulations, than Glamis's own internal  
11 contemporaneous documents. And those documents  
12 clearly demonstrate that the impact of the Government  
13 measure at issue in this case was insufficient to  
14 support a claim of indirect expropriation.

15 Let me just make one more point concerning  
16 valuation. In considering Glamis's claim, the  
17 Tribunal should not lose sight of a crucial fact.  
18 Glamis continues to this date to hold its mining  
19 claims and continues to pay annual fees to the U.S.  
20 Government to maintain those supposedly worthless  
21 claims, as Mr. Gourley confirmed this morning. Why  
22 would a company continue to pay \$100,000 a year to

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13: 59: 16 1 maintain worthless mining claims? We will have more  
2 to say about this later in the week, but the point to  
3 be made now is that the Imperial Project is, in fact,  
4 more valuable today, even with complete backfilling,  
5 than it ever was. Today, with gold prices surging to  
6 almost \$675 an ounce, Glamis has, as I mentioned,  
7 revised the Cerro Blanco Project and could just as  
8 well revise the Imperial Project. Indeed, as of 2006,  
9 as we have shown, the Imperial Project was worth an  
10 estimated \$159 million and can be expected only to  
11 increase in value.

12           Mr. President, I would respectfully request  
13 that Members of the Tribunal, as you listen to all of  
14 the testimony and argument you are likely to hear  
15 about how Glamis suffered mistreatment, you keep this  
16 fundamental fact in mind.

17           Finally, Mr. President, I would like to say a  
18 few words about the character of the California  
19 measures that Glamis is challenging. Much as the  
20 Claimant in the Methanex case attempted to do, Glamis  
21 has argued that certain statements in the legislative  
22 and regulatory history of the California measures show

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14: 00: 44 1 that those measures were targeted at Glamis, and it  
2 claims that the Tribunal should conclude that the  
3 measures were intended to prevent its proposed  
4 Imperial Project from going forward.

5           Now, we are all familiar with the political

6 process. We all know that on any issue there are a  
7 range of views, and a range in the intensity with  
8 which those views are held, and this is true for  
9 members of the public, as well as legislators and  
10 administrators. You heard some of those views  
11 portrayed this morning, and you will undoubtedly hear  
12 more about some of the views expressed on the measures  
13 over the next few days, but nothing has been presented  
14 to demonstrate that Glamis was in any way  
15 discriminated against.

16 The evidence demonstrates that neither the  
17 California regulation nor Senate Bill 22 prevents the  
18 Imperial Project from going forward. They merely  
19 require and were, by their very terms intended to  
20 require, that any company proposing to operate a  
21 metallic open-pit mine in an area where the measures  
22 apply to institute complete backfilling. These

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14:01:59 1 requirements do not apply solely to the Imperial  
2 Project. They apply generally to all similarly  
3 situated proposed mines in California.

4 Indeed, as I mentioned, the reclamation  
5 requirements of the regulation have been applied to  
6 another mining company, Golden Queen. And Senate Bill  
7 22 would apply to any future open-pit metallic mine  
8 that falls within its coverage. Neither is limited to  
9 Glamis's project in California Desert.

10 The fact that Glamis is mentioned in the  
11 legislative history and the administrative record as

12 being a source of the problem that California sought  
13 to correct does not make the California measures  
14 discriminatory. As it happens, Glamis's project,  
15 especially as it was proposed to be conducted, was the  
16 Project on the table when the continuing threats posed  
17 by open-pit metallic mining came to the fore.

18           What California did is what state  
19 legislatures and agencies do all the time: It  
20 responded to these problems by promulgating a  
21 regulation and enacting legislation. That Glamis's  
22 proposed project may have been the thing that brought

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14:03:15 1 these problems to light is legally irrelevant. Though  
2 the Imperial Project was clearly impetus for these  
3 measures, Glamis was not targeted by the regulation or  
4 by the legislation, any more than Methanex was.

5           Both of these measures are applicable  
6 generally, and neither of them prevents Glamis from  
7 exercising its mining rights, however much some may  
8 have wished or even believed otherwise.

9           Mr. President, Members of the Tribunal, those  
10 are the key points that we hope you will bear in mind  
11 as we proceed to the Claimant's case-in-chief, but we  
12 would also like you to consider the full range of our  
13 arguments in defense, so we thought it would be  
14 helpful to conclude our opening with a summary survey  
15 of the United States's case. So, as I thank you for  
16 your attention to my remarks, I would ask you to call  
17 upon Ms. Menaker to carry out that task.

18 Thank you.  
19 PRESIDENT YOUNG: Thank you.  
20 Ms. Menaker.  
21 MS. MENAKER: Thank you, Mr. President,  
22 Members of the Tribunal. Good afternoon.

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14: 04: 23 1 As Mr. Clodfelter noted, I will briefly  
2 summarize for you the manner in which we intend to  
3 prevent--present our defense later this week. Now,  
4 I'm not going to present detailed responses to the  
5 legal arguments that we heard this morning from the  
6 Claimant, but rest assured that during the course of  
7 presenting our defense later in the week, we will  
8 respond in detail to every one of the arguments that  
9 Claimant did make this morning. But rather, what I'd  
10 like to do now is to just spend a few minutes  
11 describing how we intend to organize our defense in  
12 order so that I can highlight for the Tribunal what  
13 the United States considers to be the relevant issues  
14 that need to be determined in this case.

15 And we are going to be organizing our  
16 presentation in much the same way as we have presented  
17 our defense in our written submissions, so that is we  
18 will separately address the California measures and  
19 the Federal measures, and will also first address  
20 Glamis's expropriation claim, and then we will address  
21 its minimum standard of treatment claim.

22 When addressing Glamis's expropriation claim,

14: 05: 28 1 we'll begin by showing that neither of the California  
2 measures exacted an expropriation of Glamis's mining  
3 claims, and so let me just make a couple of  
4 preliminary remarks before setting out exactly what  
5 we'll be demonstrating when we address Glamis's claim  
6 that the California measures were expropriatory. And  
7 the first point that I would like to make is just to  
8 remind the Tribunal that there are two distinct  
9 California measures at issue in this case: That is  
10 the SMGB regulation and Senate Bill 22.

11           And as we have noted throughout our written  
12 submissions and as we will continuously note  
13 throughout our oral presentations, those two measures  
14 are separate and distinct measures that were adopted  
15 by different branches of the California government to  
16 address different issues.

17           And although it may appear somewhat confusing  
18 at first glance because we are dealing with a piece of  
19 legislation and a regulation, it's important to note  
20 that the regulation at issue does not implement the  
21 legislation. So, in other words, the SMGB regulation  
22 is not implementing legislation for--is not an

14: 06: 34 1 implementing regulation for the Senate Bill 22.

2           The SMGB regulation was enacted pursuant to  
3 SMARA, not pursuant to Senate Bill 22, and quite apart

4 from all of the other reasons, it's quite clear that  
5 this is the case when you look at the time line of  
6 events because you will recall that the emergency SMGB  
7 regulation was adopted at least four months prior to  
8 the time that Senate Bill 22 was even enacted.

9           So, keeping the distinction between the two  
10 California measures clear is important for a number of  
11 different reasons. First, throughout various portions  
12 of our argument, we will be referring to the purposes  
13 of the measures, and the purposes of the two measures  
14 was very different. Glamis has also emphasized its  
15 expectations with respect to the regulatory and the  
16 legislative regime that governs mining in California;  
17 and while neither of the measures could have upset an  
18 investor's legislative expectations, this is also for  
19 different reasons, as each of the measures was adopted  
20 pursuant to a different regime and for a different  
21 purpose.

22           And finally and importantly, Glamis alleges

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14: 07: 50 1 that both measures have been applied to it, and that  
2 both measures impose on it the same reclamation  
3 requirements. Thus, if the Tribunal finds that either  
4 one of the California measures is not expropriatory,  
5 then Glamis's expropriation claim must fail because  
6 Glamis, by its own admission, would have had to comply  
7 with the very same requirements pursuant to the other  
8 nonexpropriatory measure.

9           So, in other words, it's unnecessary for the

10 United States to show that both the SMGB regulation  
11 and Senate Bill 22 are not expropriatory; we will do  
12 that. However, once the Tribunal concludes that one  
13 of the measures is nonexpropriatory, its analysis can  
14 stop there.

15 The second preliminary note that I will raise  
16 is in connection with our rightness defense, which  
17 Mr. Clodfelter also mentioned this afternoon. So you  
18 will recall that it is our submission that Glamis's  
19 expropriation claim with regard to the California  
20 measures should fail because neither of those measures  
21 has been applied to it and, therefore, Glamis's claim  
22 is not ripe. But rather than addressing this argument

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14:09:03 1 separately, throughout our presentations we will  
2 simply note where the lack of rightness is apparent,  
3 and we will show how that defeats Glamis's  
4 expropriation claim at every step of the way.

5 Our defense that neither of the California  
6 measures expropriated Glamis's property will be  
7 divided into two parts. First, we will demonstrate  
8 that even assuming that Glamis's mining claims would  
9 be rendered worthless if California's reclamation  
10 requirements were applied to its proposed Imperial  
11 Project, that its claim would fail because neither of  
12 the measures interfered with any property right that  
13 Glamis holds in its unpatented mining claims. It's  
14 axiomatic that there can only be an expropriation if  
15 there has been a taking of a property right or a



16 property interest that is owned by the Claimant, and  
17 here Glamis claims that it has been subjected to the  
18 reclamation requirements in both of the California  
19 measures, but we will show that Glamis's rights in its  
20 mining claims did not include the right to mine in a  
21 manner that would cause the very harm that each of the  
22 California measures was designed to prevent.

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14: 10: 10 1           When Glamis's claims were located, both SMARA  
2 and the Sacred Sites Act were already part of  
3 California's property law. SMARA requires that mined  
4 lands be returned to a usable condition readily  
5 adaptable for alternate use post-mining, and that such  
6 mines pose no danger to public health and safety. And  
7 the Sacred Sites Act requires that persons that  
8 operate on public property refrain from actions that  
9 would irreparably damage Native American sacred sites  
10 or interfere with Native American's ability to  
11 practice their religion.

12           Glamis's mining claims were always subject to  
13 these preexisting legal limitations. Because the  
14 SMGB's regulation did no more than specify the manner  
15 in which SMARA's standard should be applied to  
16 open-pit metallic mines, and because Senate Bill 22  
17 did no more than specify how such harm to Native  
18 American sacred sites and religious practices can be  
19 avoided where there is a hardrock open-pit mining  
20 operation in the vicinity of a Native American sacred  
21 site, neither of the California measures can be

22 considered expropriatory.

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14:11:19 1            In other words, because Glamis never had a  
2 right to mine in a manner that produced the kind of  
3 harm that each of these measures was designed to  
4 prevent, neither measure interfered with any property  
5 interest held by Glamis.

6            This is a threshold inquiry that must be  
7 addressed in every expropriation claim. If the  
8 Tribunal finds that Glamis had no property right that  
9 was interfered with by either of the California  
10 measures, as we will show, then Glamis's expropriation  
11 claim fails. This is, again, regardless of the  
12 economic impact that the California measures have or  
13 may have on Glamis's proposed mining operations. No  
14 other issues in connection with Glamis's expropriation  
15 claim based on the California measures would need to  
16 be considered by the Tribunal.

17            Even if the Tribunal were to find that  
18 Glamis's property interest was not limited by the  
19 background principles under SMARA and the Sacred Sites  
20 Act, however, Glamis's expropriation claim based on  
21 the California measures would still fail, as we will  
22 show.

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14:12:20 1            We will do this by analyzing each of the

2 three factors that tribunals and courts commonly  
3 consider when analyzing a claim for indirect  
4 expropriation. And those three factors are assessing  
5 the economic impact of the challenged measure, the  
6 investor's reasonable expectations, and the character  
7 of the measure. And we will show that each of these  
8 factors weigh strongly in favor of a finding of no  
9 expropriation with respect to each of the California  
10 measures.

11 Now, tellingly, when Glamis this morning  
12 discussed these factors, it skipped over the economic  
13 impact of the challenged measures altogether. It  
14 argued that if the California measures didn't result  
15 in a taking of all of the mining claims value, then  
16 the Tribunal would need to balance Glamis's  
17 expectations against the character of the measures.  
18 But this is simply wrong. The Tribunal needs to  
19 balance the economic impact of the measures with a  
20 reasonable investment-backed expectations and along  
21 with the character of the measure. And, in fact, if  
22 an analysis of the first of these factors, the

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14:13:30 1 economic impact of the measure, reveals that the  
2 impact was not substantial enough to result in a  
3 taking of the property, then the expropriation claim  
4 fails, and that, we contend, is the case here.

5 In this respect, we will demonstrate that  
6 Glamis's mining claims retain significant value, even  
7 if one assumes that the reclamation requirements in

8 the SMGB regulation and in Senate Bill 22 have been  
9 applied to it. As Mr. Clodfelter noted, although  
10 there are voluminous valuation reports on this subject  
11 in from both of the parties, in our view it's quite  
12 unnecessary for the Tribunal to get embroiled in  
13 issues of valuation because we are fortunate to have  
14 contemporaneous documents that Glamis itself prepared  
15 to calculate the cost of complying with California's  
16 reclamation requirements set forth by the SMGB  
17 regulation. Those documents prove that the  
18 reclamation requirements do not render Glamis's mining  
19 claims worthless, as Glamis now argues, and again,  
20 although Glamis has tried to distance itself from  
21 those documents, international tribunals, like  
22 domestic courts, repeatedly have held that

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14: 14: 39 1 contemporaneous documents produced in the ordinary  
2 course of business are more reliable than evidence  
3 that disputing parties produce after a dispute has  
4 arisen.

5 In any event, as Mr. Clodfelter also noted,  
6 our experts have conducted independent valuations that  
7 corroborate the calculations that Glamis itself made  
8 before it hired a valuation expert for purposes of  
9 this arbitration, and we'll go over these reports in  
10 some detail. And while we do that, we will  
11 demonstrate that the expert report that Glamis has  
12 commissioned for this arbitration is deeply flawed and  
13 unreliable.

14                   Because Glamis's mining claims retain such  
15 significant value, even assuming that Glamis was  
16 subjected to both of the challenged California  
17 measures, Glamis's expropriation claim fails, and  
18 again the Tribunal need not go further, any further in  
19 its analysis to dismiss that claim. But we will,  
20 nevertheless, analyze each of the two remaining  
21 factors and likewise demonstrate that those factors  
22 only strengthen the conclusion that neither of the

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14:15:41 1 California measures expropriated California--excuse  
2 me, Glamis's investment.

3                   In this respect, we will show, for example,  
4 that the regulatory regime governing mining, including  
5 California's passage of SMARA and the Sacred Sites Act  
6 years before any of Glamis's mining claims were  
7 located, as well as the fact that Glamis never  
8 received any specific assurance from the Government  
9 that it could mine in a manner that would cause the  
10 harm that each of the California measures was designed  
11 to address, Glamis could not have had any reasonable  
12 expectation that it would not be subject to the  
13 reclamation requirements imposed by each of the  
14 California measures.

15                   We will also demonstrate the applicability  
16 here of the presumption under international law that  
17 nondiscriminatory regulatory measures of general  
18 application are not expropriatory. We will show that  
19 both the SMGB regulation and Senate Bill 22 were

20 adopted for distinct public policy purposes and that  
21 both measures are not discriminatory. As such, we  
22 will demonstrate that these remaining factors

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14:16:50 1 conclusively show that neither of the California  
2 measures could have exacted an expropriation of  
3 Glamis's mining claims.

4           We will then turn to Glamis's argument that  
5 the Federal Government expropriated its mining claims  
6 and show that that claim, too, is unmeritorious.  
7 Although the precise underpinning for this is not all  
8 that clear to us, Glamis--it appears that Glamis  
9 argues that the temporary denial of its Plan of  
10 Operations by virtue of the later rescinded Record of  
11 Decision, as well as the fact that to date the Federal  
12 Government has not approved its Plan of Operations  
13 constitutes an expropriation of its mining claims. We  
14 will show that neither of these allegations is  
15 correct. And specifically, we will demonstrate that  
16 at all relevant times the Federal Government  
17 conscientiously processed Glamis's Plan of Operations,  
18 stopping only when Glamis instructed it to do so, and  
19 that none of its actions could be deemed to have  
20 expropriated Glamis's rights in its unpatented mining  
21 claims.

22           We will then turn to examine Glamis's claims

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14:17:59 1 that the United States violated the customary  
2 international law minimum standard of treatment. And  
3 before delving into the specifics of this claim, we  
4 will spend some time elaborating on the meaning of the  
5 minimum standard of treatment and identifying what a  
6 Claimant must prove in order to identify a Rule of  
7 customary international law.

8           We will then show that Glamis has not met its  
9 burden of establishing that the standards that it  
10 proposes to measure the United States's conduct  
11 against have become a part of customary international  
12 law; and, in particular, we will show that Glamis has  
13 not proven that there is any customary international  
14 law requiring transparency. We will do the same with  
15 respect to Glamis's argument that customary  
16 international law prohibits state action that  
17 frustrates an alien's expectations, and we'll explain  
18 that Glamis has not proven that what it describes as  
19 arbitrary conduct is conduct that is prescribed by the  
20 customary international law minimum standard of  
21 treatment.

22           We will then examine each of the California

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14:19:04 1 measures and show that neither of them violated the  
2 international law minimum standard of treatment.

3           We will also show that even if the Tribunal  
4 were to apply the standards that Glamis has  
5 introduced, the California measures pass muster under

6 those standards. Both the SMGB regulation and Senate  
7 Bill 22 were adopted in a transparent manner. Neither  
8 measure could have upset reasonable expectations, and  
9 neither measure is arbitrary because both measures  
10 were rational responses to perceived problems.

11 Finally, we will demonstrate that the Federal  
12 Government did not violate the customary international  
13 law minimum standard of treatment at any time during  
14 the processing of Glamis's Plan of Operations. As an  
15 initial matter, it is important to note that many of  
16 the actions about which Glamis complains in this  
17 regard took place more than three years before it  
18 submitted its claim to arbitration and, therefore, are  
19 time barred. And this is true, for example, of  
20 Solicitor Leschy's 1999 M-Opinion, which Claimant spent  
21 so much time discussing this morning, but  
22 nevertheless, we will show that none of these

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14: 20: 15 1 time-barred actions violated the United States's  
2 customary international law obligations.

3 We will show that Glamis is asking this  
4 Tribunal to second-guess factual determinations and  
5 legal conclusions drawn by agencies at every step of  
6 the process, and we will explain that this is not the  
7 role of an international tribunal. And that even if  
8 this Tribunal were to find mistakes of fact or law  
9 that were made, that such errors do not violate a  
10 State's obligation to provide investment's treatment  
11 in accordance with the customary international law



12 minimum standard of treatment.

13 Now, Glamis has made it clear this morning  
14 that it does not want the Tribunal to scrutinize each  
15 of the actions taken by the Federal Government.  
16 Instead, it repeatedly urges the Tribunal to look at  
17 the totality of the circumstances.

18 It is our contention that Glamis stresses the  
19 totality of the circumstances, because when you do  
20 look carefully at each of the actions that the Federal  
21 Government took, you won't find anything wrongful. If  
22 the actions themselves are not wrongful, considering

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14: 21: 28 1 all of the actions together as part of the totality of  
2 the circumstances gets Glamis nowhere. And we will,  
3 indeed, demonstrate that each of the complaints that  
4 Glamis has made both about the process and about the  
5 substance of the Federal agency's actions and  
6 decisions is without merit.

7 And while we do that, we will also  
8 demonstrate, as we will have done with Glamis's claim  
9 challenging the California measures, that even under  
10 its own standards, Glamis's claim fails because the  
11 Federal Government's actions were transparent, that  
12 any expectations that Glamis had that the Government  
13 would act in a different matter--in a different manner  
14 were not reasonable, and that none of the Government's  
15 actions can be characterized as arbitrary.

16 So, with that, this marks the end of the  
17 United States's opening remarks, and I thank the

18 Tribunal for its attention, and we look forward to  
19 presenting our defense later this week.

20 Thank you.

21 PRESIDENT YOUNG: Thank you very much.

22 Mr. Gourley, we turn back to you to commence.

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14: 22: 43 1 MR. GOURLEY: I will turn it over to

2 Mr. McCrum

3 PRESIDENT YOUNG: We will take a quick  
4 five-minute break.

5 (Brief recess.)

6 PRESIDENT YOUNG: Thank you. We will  
7 commence the hearing again.

8 Mr. McCrum

9 MR. McCRUM Thank you, Mr. President,  
10 Members of the Tribunal.

11 Claimant Glamis Gold, Limited, will now  
12 proceed with the evidentiary phase of this hearing,  
13 presenting its sworn witness testimony addressing  
14 factual issues that have been heavily contested in  
15 this case by the United States since the submission of  
16 the Counter-Memorial as well as the Rejoinder.

17 We have witness binders that we have  
18 presented to each member of the Tribunal and  
19 Ms. Harhay, and we have provided those witness binders  
20 with the--to the counsel for the State Department as  
21 well, and the witnesses will have witness binders to  
22 refers to the exhibits as we move along. Our first

14: 33: 51 1 witness is Mr. Kevin McArthur, the Chief Executive  
2 Officer of Goldcorp, Inc. The exhibits that we will  
3 be reviewing with him are in the binder bearing the  
4 tab Hearing Exhibit for C. Kevin McArthur midway  
5 through the binder.

6 If the--we'd be ready to swear the witness in  
7 at this time, Mr. President.

8 Mr. McArthur, will you read the oath in front  
9 of you.

10 KEVIN MCARTHUR, CLAIMANT'S WITNESS, CALLED

11 THE WITNESS: I solemnly declare upon my  
12 honor and conscience that I shall speak the truth, the  
13 whole truth, and nothing but the truth.

14 MR. McCRUM Thank you.

15 THE WITNESS: Thank you.

16 DIRECT EXAMINATION

17 BY MR. McCRUM

18 Q. Mr. McArthur, can you please state your full  
19 name, title, and address for the Tribunal.

20 A. Charles Kevin McArthur. I'm the President  
21 and CEO of Goldcorp, Inc. My office address is 666  
22 Burrard Street in Vancouver, British Columbia.

14: 34: 50 1 Q. And prior to Goldcorp, what was your position  
2 with Glamis Gold, Limited?

3 A. I was the President and CEO of Glamis Gold,

4 Limited.

5 Q. Do you hold a degree in mining engineering  
6 and did you work as a mining engineer in metallic  
7 mineral mining before you joined Glamis Gold, Limited?

8 A. Yes, I hold a degree in mining engineering  
9 from the University of Nevada Reno MacKay School of  
10 Mines. I've held a variety of positions in metallic  
11 mining since 1980.

12 Q. Can you describe some of your early  
13 experience, Mr. McArthur, in the metallic mining field  
14 after your--after you obtained your mining engineering  
15 degree.

16 A. Yeah. In 1980, January 1980, I started work  
17 with Homestake Mining Company, one of the--at that  
18 time the largest gold mining producer in the world.  
19 That was in 1980. Then, in 1983, I moved to British  
20 Petroleum. I was a mining engineer with Alligator  
21 Ridge Mine, one of the early heap-leach open-pit mines  
22 in Nevada. I was there in a variety of positions as

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14: 36: 02 1 Senior Mining Engineer, Blasting Foreman, General  
2 Foreman. Was transferred to the headquarters in  
3 Denver. Thereafter, moved on as Chief Engineer to  
4 Greens Creek Mine in Alaska, to build that mine.

5 In 1988, I joined Glamis Gold as an engineer  
6 in the Reno office. One of the Projects I was in  
7 charge of was the Imperial Project.

8 1989, I moved down to the Picacho Mine, where  
9 I was the General Manager for seven years, and one of

10 my duties was bringing along the Imperial Project  
11 through exploration, to permitting, to building the  
12 mine. In 1995, I moved to our same company, the Rand  
13 Mining Company. I was the President and General  
14 Manager.

15 1997, I became the Chief Operating Officer.

16 1988, the President and CEO of Glamis.

17 Q. Mr. McArthur, you've referred to several  
18 mining operations, metallic mining operations that you  
19 have been associated with as a mining engineer and  
20 mine manager during your experience at Glamis Gold,  
21 Limited, and prior to that. Were those operations  
22 profitable?

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14:37:16 1 A. Every one of them. Very highly successful  
2 mines and profitable.

3 Q. Now, from concerning the work at the--in the  
4 California Desert Conservation Area, were the Rand and  
5 Picacho Mines open-pit gold mines similar to the  
6 Imperial Project?

7 A. Very similar. Open-pit mines, run of mine  
8 heap leaching, average grade of about .02 ounces of  
9 gold per ton. All of those are very similar mines.

10 Q. In your experience as Manager of the Picacho  
11 Mine, did you gain familiarity with the state  
12 regulatory requirements affecting mining?

13 A. Yes, as a General Manager of that mine for  
14 seven years, I was very--I became very familiar with  
15 all of the regulatory requirements.

16 Q. And that--did that experience include  
17 reclamation plans under the California Surface Mining  
18 and Reclamation Act of 1975?

19 A. Yes. As a matter of fact, our Picacho Mine  
20 was the first mine that acquired a Reclamation Plan  
21 under SMARA. It had the SMARA plan number 001.

22 Q. And did your experience at the RAND and

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14: 38: 38 1 Picacho Mine in the California conservation area give  
2 you familiarity with the Interior Department Bureau of  
3 Land Management regulations affecting hardrock mining?

4 A. Yes.

5 Q. Can you compare the mining techniques at the  
6 Rand and Picacho Mines and ore grades to the proposed  
7 Imperial Project.

8 A. Yes. As I said, same process at both mines,  
9 open-pit mining, big mining equipment, average grades  
10 around 0.2 ounces per ton. We didn't crush the ore.  
11 We just blasted it and put it on the liners and  
12 leached the gold. Same process.

13 Q. Did the Bureau of Land Management or the  
14 California Counties of Imperial and Kern require  
15 complete backfilling as reclamation requirements at  
16 either the Rand or Picacho Mine?

17 A. No.

18 Q. And did you have an understanding about the  
19 role of Imperial and Kern County with regard to the  
20 administration of the California Surface Mining and  
21 Reclamation Act?

22 A. Yeah. I understood how it all worked, yes.

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14:39:50 1 Q. Were the other--were there other operating  
2 open-pit gold mines in the California Desert  
3 Conservation Area during your years of experience  
4 there?

5 A. Yeah, there were a variety of gold mines in  
6 the area and then in a very close-in area at Imperial  
7 Project there were within a 10- or 12-mile radius,  
8 three other operating mines. Our Picacho Mine about  
9 10 miles to the east to--about 10 or 12 miles to the  
10 West was the Mesquite Mine, and a handful of miles  
11 south of us was the American Girl Project, all very  
12 similar in scope and ore grades and processing  
13 techniques.

14 Q. You mentioned the Mesquite Mine, I believe.  
15 Was that larger or smaller than the proposed Imperial  
16 Project?

17 A. Much larger in terms of footprint and number  
18 of tons of material mined.

19 Q. How did those other open-pit gold mines in  
20 the California Desert Conservation Area affect your  
21 expectations and plans for the Imperial Project?

22 A. Well, I mean, we had over 10 years of

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14:41:06 1 operating experience in the area, and we had no

2 expectations that our permits wouldn't go through. We  
3 didn't see anything different in our operation that we  
4 didn't see at any of those other operations.

5 Q. I would like to refer to McArthur Hearing  
6 Exhibit Number 1 and put that up on the screen.

7 This is a BLM document the Government had  
8 produced in this NAFTA proceeding. It is an internal  
9 BLM Director's briefing memo to the National BLM  
10 Director dated January 10, 1995.

11 Mr. McArthur, are you familiar with this  
12 document?

13 A. Yes, I am.

14 Q. And when you saw it, were you surprised to  
15 see in a document dated January 10, 1995, that the  
16 Glamis company, Glamis named predecessor Chemgold  
17 referred to as a good steward of the public land  
18 sharing BLM's responsibilities?

19 A. Well, no, this didn't surprise me at all. We  
20 had been in the desert in Imperial County mining for  
21 15 years. I had been there since 1988, and we knew  
22 that we had been doing a very good job. We enjoyed a

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14: 42: 25 1 very good relationship with all of the agencies, not  
2 only BLM, but the county and the State through the  
3 Water Quality Control Board.

4 Q. The other companies referenced there under  
5 the statement, the secretarial statement DOI position,  
6 can you refer, describe who those operators are, Santa  
7 Fe and American Girl.



8 A. Well, Santa Fe was the company after  
9 Goldfields and then became Hansen and then later  
10 Newmont. That was the Mesquite Gold Mine. American  
11 Girl was, of course, the American Girl Gold Mine.  
12 Chemgold operated the Picacho Mine which I was the  
13 General Manager of for seven years, and also the  
14 Imperial Project just to the west of Picacho Mine.

15 Q. Turning to the highlighted section below  
16 that, there is a reference to Chemgold submitting a  
17 Plan of Operations. What Plan of Operations would  
18 that refer to, Mr. McArthur?

19 A. Well, in 1994, we presented a Plan of  
20 Operations for the Imperial Project to construct and  
21 operate a open-pit heap-leach gold mine very similar  
22 to the mines mentioned above.

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14: 43: 37 1 Q. So, is that reference referring to the  
2 proposed Imperial Project Plan of Operations?

3 A. Yes, it is.

4 Q. And what was your level of involvement with  
5 that proposed Plan of Operations?

6 A. Well, I was the Manager of the Project. I  
7 was very much involved in preparation of the plan of  
8 operations.

9 Q. And the last highlighted section on this  
10 document, position of major constituents, upon seeing  
11 this document in this litigation, were you surprised  
12 to see the statement: "Local Government agencies and  
13 officials support existing and proposed mining

14 operations in Imperial County"?

15 A. No. Like I said, not surprising at all. We  
16 enjoyed very good relationships with all of the  
17 Government agencies. This, I guess, refers to the  
18 county, the Planning Department of the county. We had  
19 worked with them for many years and enjoyed very good  
20 relationship as a responsible mining company.

21 And also the State through the Water Quality  
22 Control Board, who had worked very closely with us,

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14: 44: 37 1 and we enjoyed very good relationships.

2 Q. Other than the Rand and Picacho Mines in the  
3 California Desert Conservation Area, has Glamis  
4 operated and reclaimed other open-pit gold mines in  
5 the United States and have they required complete  
6 backfilling?

7 A. No, they have not required complete  
8 backfilling, and we have reclaimed fully one mine in  
9 California, the Alto Mine. We're in the process of  
10 reclaiming two other mines in Nevada, the Dee Mine and  
11 the Daisy Mine without any issues, and we are also now  
12 in the process of reclaiming our Rand Mine up in Kern  
13 County, California.

14 Q. And do you have any substantial gold open-pit  
15 operations in the United States today?

16 A. Yes, we do. The Marigold Mine in Nevada is a  
17 rather large mine.

18 Q. Is that an open-pit mine?

19 A. Yes, open-pit heap-leaching, very, very

20 similar to Picacho, Rand, what Imperial would have  
21 been.

22 Q. Is the Marigold Mine in Nevada subject to

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14: 45: 48 1 complete backfilling requirements?

2 A. No.

3 Q. Is that mine on lands managed by the Bureau  
4 of Land Management?

5 A. Yes, it is.

6 Q. Has Glamis operated other open-pit gold mines  
7 in Latin America, including Mexico, and are they  
8 subject to complete backfilling requirements?

9 A. Yes, they operate a variety of gold mines in  
10 those areas, and, no, they are not.

11 Q. Roughly how many jobs are provided by your  
12 company's Latin American and Nevada open-pit gold  
13 mining operations today, Mr. McArthur?

14 A. Well, the company employs roughly 9,000  
15 people. 2,500 of them are in Canada, roughly 400 in  
16 the U.S., and the remainder in Latin America.

17 Q. Between--turning back to the Imperial Project  
18 in the California Desert, between 1997 and  
19 December 1994, what types of companies--what type of  
20 activities was the company pursuing in the Imperial  
21 Project area and what approximate expenditures were  
22 involved?

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14: 46: 49 1 A. Yeah. That was mainly exploration plus  
2 feasibility studies, all the geotechnical  
3 investigations, all those things required to get the  
4 Project to a feasibility level.

5 Also, all of our baseline studies work and  
6 our permitting work, and by '94, a little over \$4  
7 million.

8 Q. During that time, was the--were the  
9 exploration projects reviewed and approved by the  
10 Bureau of Land Management?

11 A. Yes, they were in conjunction with the county  
12 Planning Department.

13 Q. And were any of these BLM approvals for  
14 exploration challenged or appealed by the Quechan  
15 Tribe in the late 1980s or through the mid-1990s?

16 A. No, no.

17 Q. During this time, did the Quechan Tribal  
18 historian have any role in cultural resource reviews  
19 being carried out in the Imperial Project area under  
20 the supervision of the Bureau of Land Management?

21 A. Yes, a fellow by the name of Lorey Cachora.  
22 He was the Tribal historian. He was involved in the

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14: 48: 02 1 early cultural studies and worked with our  
2 consultants, and that gave me a pretty good comfort  
3 that we weren't having any problems there in the area.

4 Q. During your years of responsibility for the  
5 Picacho Mine, did the Quechan Tribe express opposition

6 to it?

7 A. Never.

8 Q. Did you ever meet with Quechan Tribal leaders  
9 when they may have had the opportunity to express any  
10 opposition regarding the Picacho Mine or your early  
11 ongoing mineral exploration activities at the Imperial  
12 Project Site?

13 A. Yeah, I only had one formal meeting with the  
14 Quechan Tribe. They were building a new housing  
15 development to the north of the All-American Canal,  
16 and they had asked us to participate by spending a  
17 million dollars to build them a new bridge, and we, of  
18 course--we couldn't afford that, especially the way  
19 our company was at that time, and we did not  
20 participate in that, but there was no discussion or  
21 any indication that they were opposed to any of our  
22 mining operations at Picacho nor our Imperial Project

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14:49:13 1 at that time.

2 Q. Was that, the meeting that you referred to  
3 with the Quechan Tribe leaders, was that facilitated  
4 in any way by the Federal Government?

5 A. Yes. The Bureau of Indian Affairs sponsored  
6 the meeting.

7 Q. And were those discussions cordial or were  
8 they contentious?

9 A. They were cordial. There were no issues  
10 there.

11 Q. By the time you had submitted the

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12 December 1994 Plan of Operations for the Imperial  
13 Project and during your work at the Picacho Mine, had  
14 you ever heard of any feature in the California Desert  
15 sometimes referred to as a Trail of Dreams in  
16 connection with the Imperial Project area or anywhere  
17 else in the California Desert?

18 A. No. I mean, I was aware of certain trails  
19 all over the desert and on our project site, but had  
20 never heard of it referred to as the Trail of Dreams.

21 Q. Shortly before you submitted the Plan of  
22 Operations for the Imperial Project in December 1994,

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14: 50: 23 1 did you become aware of the enactment of the  
2 California Desert Protection Act of 1994?

3 A. Yes, I did.

4 Q. And was the Imperial Project placed into any  
5 designated wilderness area or national park for  
6 permanent protection by the 1994 Act?

7 A. No. In fact, I worked very hard to make sure  
8 that--I wanted to field check the boundaries and to  
9 make sure that we were well outside of that bound--of  
10 the boundaries of the withdrawal areas.

11 Q. Were the congressional designations of those  
12 protected areas based on recommendations from the  
13 Bureau of Land Management, to your knowledge?

14 A. To my knowledge, yes.

15 Q. Was the Imperial Project ever in any  
16 recommended areas recommended by the BLM to Congress  
17 for designation as wilderness area?

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18 A. No.

19 Q. And are there wilderness areas that are in  
20 vicinity, in the general vicinity of the Imperial  
21 Project area?

22 A. Yes, two of them. The Indian Pass Wilderness

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14:51:40 1 Area up to the north of the project, a couple of miles  
2 north, and also to the northwest of the Picacho Peak  
3 Wilderness Areas. These are areas set aside for a  
4 variety of reasons, including Native American cultural  
5 reasons.

6 Q. Did you play a role in monitoring that  
7 legislation to see how it might affect Glamis's  
8 interest in the Imperial Project mining claims?

9 A. Yes. Yes, absolutely. I worked closely with  
10 a person by the name of Kathy Lacy and Senator  
11 Feinstein's office here in D.C. to assure that our  
12 interests were--were heard.

13 Q. How did the passage of the 1994 Act in  
14 October of 1994 influence your plans regarding the  
15 Imperial Project?

16 A. Well, they gave us comfort that the Imperial  
17 Project was clear and that those lands would remain  
18 open for a multiple use. And I was very particularly  
19 concerned to make sure that the final legislation  
20 remained as it was then in the draft, that there were  
21 no buffer zones around these wilderness areas that  
22 would affect our operation.

14: 53: 02 1 Q. And did the language regarding no buffer  
2 zones, was that part of the final act, as you  
3 understand it?

4 A. Yes, it was.

5 Q. By 1997, as the Imperial Project Plan of  
6 Operations was pending at the Bureau of Land  
7 Management and the Imperial County, did you make any  
8 particular large purchases for mining equipment in  
9 anticipation of action on the Plan of Operations?

10 A. Oh, yeah, we were moving forward. We did a  
11 variety of things. We put in our first water well  
12 that cost about \$500,000. We purchased a royalty on  
13 the property for another \$500,000. We bought a shovel  
14 for \$7 million, if that's what you're referring to.

15 Q. Did you say \$7 million for one shovel?

16 A. \$7 million for the electric shovel for the  
17 project.

18 Q. By 1998, did you have a face-to-face meeting  
19 with the BLM California State Director Ed Hastey?

20 A. Yes.

21 Q. Did you form any expectations regarding the  
22 Imperial Project in that, as a result of that meeting?

14: 54: 12 1 A. Well, I retained the same impression that I  
2 had all along, that there were no problems with the  
3 Project, and it would eventually get permitted, but Ed



4 Hastey took me aside and looked me in the eye and told  
5 me just give it a little time. You are going to get  
6 your permits for this project.

7 Q. By 1999, what was going on with the Project?

8 A. Well, we were experiencing some delays with  
9 the Project and just trying to figure out where we  
10 were going with the Project at that time.

11 Q. By 1999, nearly four years after the  
12 submission of the Plan of Operations, what did you do  
13 with the 7.2 million dollar mine shovel?

14 A. Yeah, at that time we were holding that  
15 shovel. It was costing us about \$30,000 per month to  
16 store the shovel. We had other capital needs, and so  
17 we decided to sell that shovel and then to purchase a  
18 new one when we acquired our permits.

19 Q. After Interior Secretary Bruce Babbitt denied  
20 the Imperial Project on January 17, 2001, three days  
21 before leaving office, what accounting decisions did  
22 you make regarding Glamis's cash investment in the

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14: 55: 31 1 Imperial Project, which at that time was over  
2 \$14 million?

3 A. We decided to write the Project off and to  
4 take a loss on our year-end statements.

5 Q. Turning to the California mandatory complete  
6 backfilling regulations adopted between December 2002  
7 and April of 2003, what impact have those requirements  
8 had upon the value of the Imperial Project?

9 A. Well, they had a stunning, devastating effect

10 on our company and on the Imperial Project's value. I  
11 mean, it rendered the Imperial Project worthless.

12 Q. Is your conclusion on that consistent with or  
13 contradicted by the preliminary assessments of  
14 economic impact of backfilling carried out by your  
15 company in January 2003, which Mr. Clodfelter referred  
16 to this morning on behalf of the Respondent?

17 A. No, that does not contradict our findings.  
18 If you are referring to Jim Voorhees's memo, we asked  
19 Jim, our Chief Operating Officer, to provide an  
20 analysis of the impact of the consequences of  
21 backfilling, what was referred to as back of the  
22 envelope, which basically was what it was. We asked

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14:57:05 1 Jim to provide us a view as to where the Project was  
2 headed.

3 And, by the way, we did not include increased  
4 costs. We didn't include additional capital costs to  
5 the Project because we were going to have to use the  
6 equipment more, which means getting new equipment or  
7 rebuilding the equipment we had got.

8 We didn't look at the delays to the Project  
9 that would be included and were not included in our  
10 economic analysis. We didn't look at the additional  
11 financial assurances we would have to put up for the  
12 Project.

13 And even so, with a very conservative view,  
14 the Project came up with a negative net present value.

15 Q. Mr. McArthur, did you hear Mr. Clodfelter say

16 it had a 9 million-dollar net present value this  
17 morning? Is that correct, according to that analysis?  
18 A. No, that's not correct. That--I think he was  
19 referring to some of the upside gold values that were  
20 used in that analysis. At that time, our company was  
21 using \$300 for its reserves calculations, \$300 per  
22 ounce of gold, and our valuations of new projects also

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14: 58: 25 1 utilized \$300. And in that case, it was a negative  
2 net present value.

3 But furthermore, we are a business. We just  
4 don't crank out numbers. We look at things in a  
5 variety of ways, and given the Governor's express  
6 intent to stop our project, it didn't make any  
7 business sense to move forward at that time. It would  
8 have been reckless. It wouldn't have been rational  
9 for us to continue with the Project.

10 Q. The supplemental report filed by Navigant  
11 five days ago and Mr. Clodfelter's statement this  
12 morning makes a reference to the Cerro Blanco project  
13 where Glams Gold wrote off an 8 million-dollar  
14 investment. Is that situation in any way comparable  
15 to the Imperial Project, in your view?

16 A. Well, the only direct comparison is that we  
17 wrote the Cerro Blanco off, I believe, at the same  
18 time as the Imperial Project, but those are two very  
19 different projects. The Cerro Blanco project is an  
20 operation--sorry, a project that we have in Guatemala.  
21 When we wrote that project off, we were looking at it

22 as a big open-pit operation, and it just wasn't making

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14:59:50 1 the--the economics just didn't look right.

2           We had two companies come to us and make very  
3 meaningful approaches to us to buy the Project. We  
4 rejected that and decided to invest more money into  
5 exploration. We have done that since. We discovered  
6 a very high grade vein at depth. We have now relooked  
7 at the mine as an underground mine. We're in the  
8 middle of feasibility on that project right now. It  
9 looks actually quite good.

10           So, it's a--very much different from the  
11 Imperial Project. The Imperial Project has no  
12 underground mining vein. It's just a big homogenous  
13 ore body that you couldn't possibly underground mine  
14 economically.

15           But moreover, the biggest factor is that we  
16 don't have an Executive Officer of the country of  
17 Guatemala telling us that there is absolutely no way  
18 that we want you to mine this mine. So, there are all  
19 the differences I can think of offhand.

20       Q.   Over the past few years in the precious  
21 metals mining industry, how would you characterize the  
22 level of investment by operating and developing

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15:01:00 1 companies with regard to the acquisition of known gold

2 deposits?

3 A. Well, it's a very competitive environment.  
4 Gold is very scarce. That's why it's so valuable.  
5 And where there are deposits, there is a great deal of  
6 interest in acquisition of those deposits.

7 Q. Is the Glamis Imperial Project a known  
8 reported gold mineral resource?

9 A. Yeah. It's well-known in our industry as a  
10 plus million ounce deposit that has not been mined.

11 Q. Has Glamis Gold, Limited, or Goldcorp  
12 received a single offer from any entity regarding a  
13 prospective purchase of the Glamis Imperial Project,  
14 Project properties to the present date?

15 A. No, no. No offers at all. In fact, I think  
16 I heard the word earlier today the Project has really  
17 been stigmatized by the way that its--the Government  
18 has treated us.

19 Q. What does that market experience tell you  
20 about the value of the Glamis Imperial Project today?

21 A. Well, the same as our conclusions back when  
22 we analyzed the Project that we referred to earlier,

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15:02:15 1 that it has zero value.

2 Q. From your experience in the California  
3 Desert, what was your understanding of the  
4 significance of Pilot Knob to the Quechan Tribe?

5 A. Well, the Pilot Knob was an area of high  
6 cultural significance to the Quechan Tribe, and my  
7 understanding is there are some deep religious values

8 associated with it.

9 Q. According to the Quechan Tribe assertions, as  
10 you have understood them, where did the Trail of  
11 Dreams lead to heading south from the Imperial Project  
12 vicinity?

13 A. I'm not sure I'm allowed to speak of that in  
14 a public forum.

15 MR. McCRUM: Well, we are approaching an  
16 area, Mr. President, that we may be getting into some  
17 confidential resource implication, so we may need to  
18 turn off the public viewing for several minutes.

19 PRESIDENT YOUNG: Fine. We will turn off the  
20 public viewing at this point.

21 (Confidential portion begins.)

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11 (End of confidential portion.)

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15: 13: 33 1           PRESIDENT YOUNG:  Mr. Clodfelter,  
2 Ms. Menaker?

3           MR. CLODFELTER:  Mr. President, could we  
4 indulge you for a few minutes to confer on  
5 cross-examination?  It would--that time would be out  
6 of our time as well.

7           PRESIDENT YOUNG:  Well, we are close to our  
8 scheduled break, so I'm prepared to accelerate the  
9 break by 15 minutes, and we will commence the hearing  
10 again.  It is 3:17.  We will ask everyone to be back  
11 here at 3:47.  Thank you.

12           I would like to remind counsel that not to  
13 talk with the witness during the breaks.  Thank you.

14           May we turn the camera back on?  Are we  
15 prepared, or will you be asking questions that would  
16 relate, or would you like the camera to be left off?

17           MR. CLODFELTER:  I don't think any of the  
18 questions we would pose would raise any  
19 confidentiality issues.  Is that what you mean,  
20 Mr. President?

21           PRESIDENT YOUNG:  Yes, that's exactly it.  
22 Okay.  So, we will be prepared to turn the camera back

15: 14: 35 1 on after the break.

2           Could we communicate to the room that we will  
3 reconvene at 3:47, and the camera will be on at that

4 point.

5 Thank you.

6 (Brief recess.)

7 PRESIDENT YOUNG: Okay. It's 3:47. It's  
8 time start again.

9 I will turn the time over to Ms. Menaker and  
10 Mr. Clodfelter, the time over to you.

11 MR. CLODFELTER: Mr. President, we don't have  
12 any questions for Mr. McArthur, but I would like to  
13 make two comments.

14 One, at least twice he presented hearsay  
15 testimony. We did not object because there are no  
16 strict rules of evidence before you, but we would  
17 suggest--we will remind you at the appropriate time  
18 when the testimony is not based upon personal  
19 knowledge, the truth of the assertion and the  
20 testimony is not based on personal knowledge but is  
21 based strictly on hearsay.

22 And, secondly, on at least one occasion

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15:44:29 1 testimony was new--it did not appear in the statements  
2 presented in writing--and we would ask Claimant to  
3 indicate, as they call their witnesses, if they  
4 intend, in fact, to elicit new testimony so that it  
5 can be debated under the standard set in your last  
6 Order that is exceptional.

7 PRESIDENT YOUNG: Thank you very much.

8 Do you want to specify the instances of  
9 hearsay and instances of new testimony for us?

10 MR. McCRUM I would appreciate that,  
11 Mr. President.  
12 MR. CLODFELTER: We could do that.  
13 PRESIDENT YOUNG: Thank you very much.  
14 Otherwise, you have no questions, but you  
15 will be able to submit that to us?  
16 MR. CLODFELTER: Yes.  
17 PRESIDENT YOUNG: Okay, thank you.  
18 Mr. McArthur, thank you for your testimony  
19 and your participation, and you are currently excused.  
20 (Witness steps down.)  
21 PRESIDENT YOUNG: We turn to you for your  
22 next witness, Mr. McCrum

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15:45:20 1 MR. McCRUM Mr. President, I would request  
2 Mr. Clodfelter to specify the areas that he believes  
3 exceeded the scope of the witness's statement now.  
4 MR. CLODFELTER: Ms. Menaker can describe  
5 that testimony.  
6 PRESIDENT YOUNG: Thank you.  
7 MS. MENAKER: I don't have the LiveNote right  
8 in front of me, but at one point Mr. McArthur said  
9 that he had approached officials in the new  
10 administration who had said something about whether or  
11 not they would consider changing the prior  
12 administration's rules or regulations, and there is  
13 nothing about that in the evidence.  
14 MR. McCRUM Thank you.  
15 PRESIDENT YOUNG: And Mr. McCrum, should you

16 choose to talk about that, you are perfectly welcome

17 to do that during your closing statement.

18 MR. McCRUM Thank you.

19 Claimant Glamis Gold will now call its second

20 sworn witness to address contested facts that the

21 United States has put in issue in its counter memorial

22 and Rejoinder filings in this case. Our second

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15: 46: 30 1 witness is Mr. Charles Jeannes.

2 CHARLES JEANNES, CLAIMANT'S WITNESS, CALLED

3 PRESIDENT YOUNG: Mr. Jeannes, you have a

4 witness oath there.

5 THE WITNESS: Yes, I do.

6 PRESIDENT YOUNG: If you would read that,

7 please, or state that, please.

8 THE WITNESS: I solemnly declare upon my  
9 honor and conscience that I shall speak the truth, the  
10 whole truth, and nothing but the truth.

11 PRESIDENT YOUNG: Thank you very much.

12 Mr. McCrum

13 MR. McCRUM Yes, thank you.

14 DIRECT EXAMINATION

15 BY MR. McCRUM

16 Q. Mr. Jeannes, could you please state your full  
17 name, current title, and business address.

18 A. My name is Charles Jeannes. I'm the  
19 Executive Vice President of Corporate Development for  
20 Goldcorp. Our address is 666 Burrard Street,  
21 Vancouver, British Columbia.



22 Q. And prior to being with Goldcorp, what were

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15:47:20 1 your positions with Glamis Gold, Limited?

2 A. Most recently, I was Executive Vice  
3 President-Administration and General Counsel.  
4 Previous to that, Senior Vice President. And at one  
5 point a while back I was Chief Financial Officer, as  
6 well.

7 Q. Mr. Jeannes, Glamis submitted the Imperial  
8 Project Plan of Operations to the Bureau of Land  
9 Management and Imperial County in December 1994; is  
10 that correct?

11 A. That's correct.

12 Q. Based on your understanding, how would you  
13 characterize the first few years of BLM's review of  
14 that Plan of Operations based on the--based on the  
15 facts that you're aware of?

16 A. It seemed to go fairly normally. By  
17 December 2006, there was a Draft Environmental Impact  
18 Statement issued, and then some additional issues  
19 regarding cultural resources were--arose during the  
20 comment period, and so a second Draft EIS, which is a  
21 little unusual, was issued in late 1997.

22 Q. In the Draft 1996 EIS, Environmental Impact

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15:48:41 1 Statement, Environmental Impact Report, was there a

2 preferred alternative identified, and what was it?

3 A. Yes. In both the '96 Draft and the '97  
4 Draft, the proposed Plan of Operation submitted by  
5 Glamis was designated as the Government's preferred  
6 alternative.

7 Q. And I'm going to now refer you to Jeannes  
8 Hearing Exhibit 1. This is a document obtained in  
9 discovery in this case from the Government. It is a  
10 BLM internal schedule of the Imperial Project as of  
11 July 27, 1998. Let's turn to that in the witness  
12 binder as Jeannes Exhibit 1 because, on the screen,  
13 it's not too clear.

14 But what is that document, Mr. Jeannes? What  
15 does that document describe, as you understand it?

16 A. Well, as I understand it, it is an internal  
17 schedule that the BLM prepared, identifying when they  
18 expected to have the Final EIS completed, and that  
19 would have been September of 1998.

20 Q. And does this internal schedule provide a  
21 date for the Projected Record of Decision on the  
22 Imperial Project?

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15:50:00 1 A. Yes. Thirty days later, in October 1998.

2 Q. There you go. The schedule is much more  
3 visible now.

4 So, what is the Projected date for the BLM to  
5 issue the Record of Decision on the Imperial Project?

6 A. To actually complete it would be October 18,  
7 1998.

8 Q. And was the Imperial Project Record of  
9 Decision issued in 1998?

10 A. No, it wasn't. It was issued quite a bit  
11 later in September--well, the Record of Decision would  
12 have been January 2001.

13 Q. And, by 1999, what was the status of the  
14 Imperial Project?

15 A. Well, it had become apparent that it had  
16 become delayed.

17 I joined the company in early 1999, and one  
18 of my tasks was to try to help move it along, and I  
19 met with the BLM in Sacramento and was told that all  
20 decisions on this project were now being made in  
21 Washington at the highest levels.

22 Q. Mr. Jeannes, prior to your joining Glamis

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15: 51: 17 1 Gold, Limited, did you have experience with other gold  
2 mining companies?

3 A. Yes. I worked for Placer Dome from 1994  
4 through 1999. And, prior to that, I was a mining  
5 lawyer in private practice in Reno, Nevada.

6 And one of my clients prior to joining Placer  
7 Dome was Glamis, so I had involvement with the  
8 Imperial Project from the very beginning.

9 Q. Was Placer Dome a small startup company?

10 A. No, it was one of the world's larger gold  
11 mining companies until it was taken over just recently  
12 by Barrick Gold Corporation.

13 Q. And, by 1999, when you were at Glamis Gold,

14 Limited, were the--did the delays appear to be usual,  
15 in your experience?

16 A. No. At this point, as I said, we--nothing  
17 was moving, and we weren't getting any information as  
18 to why that was the case, and so we had the meeting in  
19 Sacramento and were told that decisions were being  
20 made in Washington.

21 Q. And was there any particular individual you  
22 understood was the source of delays on the Imperial

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15: 52: 28 1 Project?

2 A. It was suggested that I meet with Solicitor  
3 Lesly, which I did in July of 1999.

4 Q. And, in your meeting with Solicitor Lesly in  
5 the Interior Department headquarters, what did he tell  
6 you about his role regarding the Imperial Project?

7 A. He said that they--that his office was  
8 conducting legal review of a variety of issues  
9 involved in the Project, and that nothing was going to  
10 happen until that legal review was completed.

11 Q. When Secretary Babbitt denied the Imperial  
12 Project on January 17, 2001, what did he rely on for a  
13 legal authority?

14 A. Largely the Solicitor's Opinion issued by  
15 Solicitor Lesly about a year earlier in January of  
16 2000.

17 Q. And what's the status of Solicitor Lesly's  
18 Solicitor's Opinion today?

19 A. It's been revoked today. At the time, he

20 came up with the new undue impairment standard that we  
21 heard about earlier; and, when Solicitor Myers took a  
22 look at that in the new administration, he found it to

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15: 53: 47 1 be not in accordance with the law, and that  
2 Solicitor's Opinion was revoked.

3 Q. I would like to refer to Jeannes Hearing  
4 Exhibit Number 2. This is a memorandum from Interior  
5 Solicitor John Lesly to BLM California State Director  
6 Ed Hastey on October 30, 1998.

7 Is this a document that you are familiar  
8 with, Mr. Jeannes?

9 A. Yes. It was produced in this litigation.

10 Q. Had you seen it prior to its production in  
11 this NAFTA proceeding?

12 A. No, I hadn't.

13 Q. Is this document consistent with the  
14 impressions you formed in 1999 regarding the delays on  
15 the Imperial Project?

16 A. Well, yes. As I said, it was obvious that  
17 things were being delayed. This certainly confirmed  
18 what we came to understand the Solicitor's Office had  
19 put the stops on the Project.

20 Q. Turning to the last paragraph in this  
21 memorandum, what does Solicitor Lesly say that BLM  
22 State Director Ed Hastey should do with regard to the

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15:55:01 1 validity of the examination for the Imperial Project  
2 and the Final Environmental Impact Statement?

3 A. Well, it says: "In the meantime, your folks  
4 should delay completion of the validity examination  
5 and the Final EIS."

6 Q. After the Interior Department's January 17,  
7 2001, denial of the Imperial Project, what actions did  
8 Glamis Gold, Limited take as a publicly traded  
9 corporation with regard to the reported mineral  
10 reserves at the Imperial Project?

11 A. Well, we each year have to re-examine our  
12 reserves and resources, and we had to recharacterize  
13 the proven and probable reserves for the Imperial  
14 Project down to the lesser category of mineral  
15 resource for our year-end statement because the SEC  
16 and Canadian rules required that there be some  
17 reasonable expectation of having the legal right to  
18 mine and remove those minerals in order to call them  
19 reserves. And once our permit was denied by Secretary  
20 Babbitt, we took that action to recharacterize the  
21 reserves to resources.

22 Q. Does Glamis Gold, Limited face any

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15:56:20 1 consequences in the marketplace for downgrading  
2 reserves to resources?

3 A. Absolutely. We are valued based on our  
4 reserves. There is a lot of metrics that are used by  
5 investors in our sector, and one of them is the number

6 of proven and probable reserves per share of stock  
7 that you have of a public company. And when  
8 determining relative values between different mining  
9 companies, that's one of the many metrics that they  
10 look at, and so it hurt to take those reserves out of  
11 our statement.

12 Q. In the United States Rejoinder at page 62,  
13 the Government has asserted that Glamis wrote off its  
14 investment in the Imperial Project as a function of  
15 its litigation plans. Do you have a response to that,  
16 Mr. Jeannes?

17 A. That is absolutely wrong. We are governed by  
18 generally accepted accounting principles in Canada and  
19 the U.S. as well because we do a reconciliation note,  
20 and those principles require that, if you don't have a  
21 reasonable expectation of recovering an investment  
22 that you are carrying on your balance sheet as an

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15:57:29 1 asset, then you have to look at that asset as impaired  
2 and write it down, and that's exactly what we did, not  
3 happily because, as Kevin McArthur mentioned earlier,  
4 it put us into a net-loss situation for the year.

5 Q. I'm going to refer to Jeannes Hearing  
6 Exhibit 3, which is an Interior Department briefing  
7 document to the National BLM Director dated  
8 April 2003.

9 And does this document refer to the  
10 rescission of the Solicitor Leschy's legal opinion that  
11 you were referring to?

12 A. Yes, it does. It states that that opinion  
13 was legally in error, which certainly was consistent  
14 with our belief.

15 Q. And does this document describe the actions  
16 that Secretary Norton took with regard to the denial  
17 of the Imperial Project by Secretary Babbitt?

18 A. Yes. Shortly after the Solicitor's Opinion  
19 was issued, Secretary Norton rescinded the Record of  
20 Decision that denied the Project in January 2001.

21 Q. Turning to the last highlighted statement on  
22 that particular document, there is a characterization

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15: 58: 59 1 to the prior processes that the Glami s Imperial  
2 Project was subjected to. How does that statement  
3 compare with your impressions about the Glami s  
4 Imperial Project in the latter 1990s under Solicitor  
5 Leshy?

6 A. Well, it certainly agrees--or my  
7 understanding would agree with that statement. It was  
8 unusual the way in which the Interior office in  
9 Washington, D. C. , took ahold of this project and took  
10 such an interest in it. And the delay was certainly  
11 unusual.

12 Q. Were any other mine proposals denied by the  
13 Federal Government on the basis of the now-rescinded  
14 Interior Solicitor's Opinion by John Leshy?

15 A. No.

16 Q. Did BLM ultimately finish the Glami s Imperial  
17 Project mineral examination that Solicitor Leshy



18 halted in 1998?

19 A. Yes, eventually about four years later--it  
20 would have been September of 2002--the Mineral Report  
21 was issued.

22 Q. Was that Mineral Report approved by a mere

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16:00:21 1 low-level BLM official?

2 A. No. As you can see on the screen, there  
3 were--I think I counted 11 BLM officials who signed  
4 that report, including the State Director in  
5 California, Mike Poole.

6 Q. And turning to the findings of the Federal  
7 Government in the Bureau of Land Management Mineral  
8 Report, what did the Federal Government conclude?

9 A. Well, they concluded that the Project was a  
10 valuable discovery of minerals, and that the  
11 possibility of backfilling was not economically  
12 feasible.

13 Q. One particular part of the highlighted  
14 section of that report states that Glamis has found  
15 minerals within the boundaries of the 187 load mining  
16 claims and evidence of such a character that a person  
17 of ordinary prudence would be justified in the further  
18 expenditure of labor and means with a reasonable  
19 prospect of success in developing a valuable mine.

20 What did this Federal finding indicate to  
21 you, Mr. Jeannes?

22 A. Well, it confirmed what we believed all

16: 01: 31 1 along, that we had properly staked and maintained the  
2 mining claims and that they contained mineralization  
3 that was economic and could be mined at a profit, and  
4 that our expectations in that regard were reasonable.

5 Q. By 2002, had the assertions about a Trail of  
6 Dreams being in the Imperial Project been made and  
7 reported?

8 A. Yes.

9 Q. Has this finding of the Federal Government  
10 about the prudence and reasonable prospect of success  
11 concerning the Imperial Project made in September 2002  
12 been rescinded to the present date?

13 A. No, it's my understanding that it's still a  
14 valid Mineral Report.

15 Q. Now, after September 27, 2002, when the BLM  
16 Mineral Report was issued, what happened next within a  
17 matter of days?

18 A. Our excitement over receiving that report  
19 lasted three days, and then Governor Davis announced  
20 publicly his opposition to the project and his  
21 direction to his staff to take all available means to  
22 stop it.

16: 03: 04 1 Q. And let's take a look at the Jeannes Hearing  
2 Exhibit 5. Is this a document that you're familiar  
3 with?

4 A. Yes.

5 Q. This is a statement by Governor Gray Davis on  
6 September 30, 2002, and I will refer you to the first  
7 highlighted portion which is actually the last  
8 conclusion--the last paragraph of that document.

9 Does that statement by Governor Gray Davis  
10 refer to any other mine, other than the Glamis  
11 Imperial Project?

12 A. No, it doesn't. This is what I just  
13 mentioned, that he made a statement that he was  
14 directing his Secretary of Resources to pursue all  
15 available legal and administrative remedies to  
16 stop--assist in the--stopping the development of that  
17 mine.

18 Q. And what was the context of Governor Gray  
19 Davis's public statement on September 30, 2002,  
20 Mr. Jeannes?

21 A. Well, this was his veto message to the  
22 Senate. I had been active on this bill S.B. 1828 that

16: 04: 14 1 had been working its way through the California  
2 legislature, and he--the bill generally would have  
3 given Native American Tribes in California a very  
4 broad veto power to stop all kinds of development if  
5 they were found to interfere with sacred sites, not  
6 just mining, and so it was quite broad.

7 So, Governor Davis vetoed the bill and, as  
8 you can see on the screen, he's concerned that, as the  
9 bill is written, someone might invest large sums of

10 money in a project before learning the development  
11 implicates a sacred site.

12 Q. So, as you understood it, the Governor was  
13 concerned about that circumstance as it would apply to  
14 other projects around the State that were beyond the  
15 mining industry?

16 A. Yeah. I mean, it's very--it's bothersome  
17 because he was obviously concerned about other  
18 projects, but he directed him to try to stop ours.

19 Q. Did S.B. 1828 have implications for projects  
20 that the State Government itself might be associated  
21 with?

22 A. Oh, yeah, S.B. 1828 was very broad, and it

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16:05:33 1 didn't matter who was the sponsor, whether it was a  
2 public or private project, and actually was so broad  
3 as to include private and public land, as well.

4 Q. Now, the Governor's directive to the  
5 Secretary of Resources to pursue all possible legal  
6 and administrative remedies that will assist in  
7 stopping the development of the Glamis Imperial Mine,  
8 what did that lead to, Mr. Jeannes?

9 A. A few months later, in December of 2002, the  
10 California Mining and Geology Board issued emergency  
11 temporary regulations that we have heard about today.  
12 Those required that all metallic mines--new metallic  
13 mines be backfilled and recontoured to a height of no  
14 more than 25 feet on the property.

15 Q. Referring to Jeannes Hearing Exhibit 7, which

16 is on the screen, this is a report of the State Mining  
17 and Geology Board Executive Officer's report  
18 associated with the December 12, 2002, Emergency  
19 Rulemaking.

20 Mr. Jeannes, what did SMGB, the State Mining  
21 and Geology Board, identify as the reason for the  
22 emergency?

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16:06:59 1 A. The sole reason cited for the emergency is  
2 our project, the Glamis Imperial Project.

3 Q. Are you aware of any other metallic mine  
4 projects statewide that had gone through the costly  
5 multi-year Environmental Impact Statement,  
6 Environmental Impact Report process that was pending  
7 statewide at that time?

8 A. No, I'm not.

9 Q. Mr. Jeannes, did the State of California  
10 Mining and Geology Board identify any scientific or  
11 technical studies as part of the issuance of the  
12 mandatory backfilling requirements in the regulations?

13 A. No. In fact, they specifically said that  
14 they weren't relying on any technical or scientific  
15 studies. I was at one of the two hearings, and people  
16 tried to submit evidence that backfilling and open pit  
17 is not always the most environmentally appropriate  
18 thing to do, and the Board didn't want to hear that  
19 evidence.

20 Q. We are referring now to Jeannes Hearing  
21 Exhibit 8, which is the final statement of reasons of

16:08:14 1           And, Mr. Jeannes, is this the affirmative  
2 finding you were referring to regarding the lack of  
3 technical or empirical studies or reports or documents  
4 relied on by the SMGB?

5       A.    Yes, that's correct.

6       Q.    Mr. Jeannes, are you aware of any similar  
7 mandatory complete backfilling regulatory requirements  
8 for metallic mines in the United States?

9       A.    No, not in the United States.

10           We also operate in Canada and in numerous  
11 countries in Latin America, and I'm not aware of any  
12 complete backfilling requirements anywhere.

13       Q.    In addition to creating the new complete  
14 backfilling and site regrading requirements for  
15 metallic mines, did the new California requirements  
16 impose obligations regarding financial assurances for  
17 such projects?

18       A.    Yes. They provided that the additional work  
19 required at the end of the mine life to rehandle the  
20 material and backfill the pit and recontour the site  
21 had to have financial assurances.

22       Q.    What type of new economic burden did these

16:09:37 1 financial assurance requirements place on the Glamis

2 Imperial Project as of the adoption of these  
3 regulations?

4 A. Well, it was substantial because you're being  
5 required to put up security in the form of a bond or  
6 cash, Letter of Credit or whatever it may be, for  
7 something that's not going to happen until the very  
8 end of the mine life, which, in this case, would have  
9 added four or five years to the Imperial Project. And  
10 it's a substantial cost at a time when you have got no  
11 revenue coming in.

12 Q. Mr. Jeannes, did Glamis Gold, Limited post  
13 financial assurances for other gold mine projects in  
14 the United States around this time frame of 2002-2003?

15 A. Well, certainly. It was standard procedure  
16 for us to bond or otherwise put up financial  
17 assurances for our obligations to reclaim a property  
18 when we were done mining, and we did that.

19 By this time, after 9/11, we were no longer  
20 able to get traditional surety bonds. That market had  
21 dried up, and so Glamis was posting Letters of Credit  
22 through U.S. bank, but those Letters of Credit were

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16:10:55 1 100 percent cash-collateralized.

2 Q. What do you mean by cash-collateralized  
3 Letters of Credit, to those of us that don't have a  
4 financial background?

5 A. Sorry. We would have a deposit at U.S. bank  
6 either in the form of cash money market or CD usually,  
7 because it was long-term, equal to the amount of the

8 obligation in the Letter of Credit that was then  
9 delivered to the BLM or other regulatory agencies.

10 Q. At Glamis Gold, Limited, did you have  
11 responsibility for coordinating such financial  
12 assurances?

13 A. My department, yes.

14 Q. And the experience you described at Glamis  
15 Gold, Limited was in terms of collateralizing the  
16 Letters of Credit? Was that your typical experience?

17 A. Well, that's the only way we could do it  
18 after the surety market dried up.

19 I mean, this was a big crisis in the mining  
20 industry, starting in late 2001-2002. There was  
21 congressional hearings on it I testified at. The  
22 traditional way of getting a surety bond from an

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16: 12: 14 1 insurance company just went away, so all of our new  
2 financial assurances, as those surety bonds rolled  
3 over, became a hundred percent cash-backed Letters of  
4 Credit.

5 Q. During this period, did Glamis Gold, Limited  
6 have economic incentives to obtain financial  
7 assurances in the most cost-effective manner?

8 A. Absolutely. If we could have done it in a  
9 way that conserved our capital or was less expensive,  
10 we certainly would have done it.

11 Q. Based on your experience, could Glamis Gold,  
12 Limited have obtained a Letter of Credit without cash  
13 on the order of 50 to \$60 million?



14 A. No.

15 Q. In response to the Governor's directive in  
16 September 2002, the State resources agency also began  
17 working with the California legislature to pass  
18 legislation. Did you have familiarity with that  
19 legislation that turned into S.B. 22?

20 A. Yes. It was all intertwined with and going  
21 on at the same time as the State Mining and Geology  
22 Board regulations were being considered.

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16:13:22 1 Q. Let's take a look at Jeannes Hearing Exhibit  
2 9. This is a California Senate Natural Resources and  
3 Wildlife Committee report on S.B. 22, and we are  
4 looking at the highlighted statement here which says:  
5 "Changes to the statute are urgently needed to stop  
6 the Glamis Imperial Mining Project in Imperial County  
7 proposed by Glamis Gold, Limited, a Canadian-based  
8 company."

9 Mr. Jeannes, were any other mining companies  
10 referred to in this particular Senate report?

11 A. No, the same as the temporary emergency  
12 regulations that the Mining and Geology Board adopted,  
13 they used our project as the basis for the emergency  
14 adoption. And then--it's kind of interesting--the  
15 legislature then used the fact that those temporary  
16 regulations were about to expire as the basis for the  
17 emergency to short-circuit the legislative process and  
18 rush S.B. 22 through. A couple of days later, they  
19 made the regulations permanent anyway.

20 So, it was an interesting process at the  
21 time.

22 Q. The finding in the Senate report in Jeannes

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16:14:58 1 Hearing Exhibit 9 makes a particular finding about the  
2 feasibility of Glamis complying with these  
3 requirements.

4 Is the statement that the backfilling  
5 requirements make the Glamis Imperial Project  
6 infeasible consistent with the determinations made by  
7 Glamis Gold?

8 A. Yes. The author's understanding is the same  
9 as ours.

10 Q. Let's take a look at Jeannes Hearing  
11 Exhibit 10, which is a confidential Enrolled Bill  
12 Report to the California Governor, dated March 25,  
13 2003, from the Governor's Office of Planning and  
14 Research.

15 What does this indicate was the intent of  
16 S.B. 22 as it related to the Glamis Imperial Project,  
17 Mr. Jeannes?

18 A. It says it's intended to provide a permanent  
19 prohibition to the approval of the Glamis Gold Mine  
20 project in--it says San Diego, but it was Imperial  
21 County.

22 Q. Let's take a look at the highlighted phrase

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16:16:01 1 here, the highlighted sections of that report,  
2 Mr. Jeannes.

3 Does it indicate that any one particular  
4 project is targeted?

5 A. Again, only our project is mentioned. It was  
6 the only one pending at the time.

7 Q. Let's take a look at another section of that  
8 particular exhibit, Jeannes Hearing Exhibit 10, back  
9 on the prior page. In the second-to-last paragraph,  
10 does this confidential Enrolled Bill Report to the  
11 California Governor on S.B. 22 indicate a coordination  
12 of the legislation with the pending State Mining and  
13 Geology Board regulatory process?

14 A. Yes. This is what I was making reference to  
15 earlier. They used the fact that the emergency  
16 regulation was only temporary as the basis for the  
17 urgency to get S.B. 22 through without going through  
18 the normal legislative process. And then shortly  
19 after, I believe, S.B. 22 was passed and signed by the  
20 Governor, they made permanent the emergency  
21 regulations at the State Mining and Geology Board.

22 Q. Mr. Jeannes, how did this experience and

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16:17:31 1 treatment by the California Government compare with  
2 Glamis's prior experience in California?

3 A. Well, we had a very good-- as Mr. McArthur  
4 mentioned, a very good, long-standing relationship  
5 with the State. We had been commended for our

6 reclamation activities at Picacho, a lot of dealings  
7 with the State through primarily the Water Quality  
8 Control Board at both Rand and Picacho.

9 Kevin used to say in his investor tours that  
10 California is a great place to do business, but things  
11 changed.

12 Q. I refer you to Jeannes Hearing Exhibit 11,  
13 which is the press statement of Governor Gray Davis on  
14 April 7, 2003, upon signing S.B. 22 into law.

15 Does this press statement refer to any other  
16 mine other than the Glamis Imperial Project?

17 A. No. Again, it is our mine that he talked  
18 about stopping.

19 Q. Referring to the first highlighted sentence,  
20 does this indicate whether the Government envisioned  
21 the Project proceeding in a particular way, or does it  
22 indicate an intent to stop the Project, to you?

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16:19:05 1 A. No. It was their intent and understanding  
2 that, if they imposed this backfilling requirement, it  
3 would stop the Project, and it did.

4 Q. Turning to the next highlighted sentence,  
5 "This measure sends a message that California's sacred  
6 sites are more precious than gold," was that message  
7 received by Glamis Gold, Limited?

8 A. Yes, certainly. And, I would say, the rest  
9 of the mining community.

10 Q. Turning to the final highlighted sentence,  
11 the statement that the reclamation and backfilling

12 requirements of this legislation would make operating  
13 the Glamis Gold Mine cost-prohibitive, is that  
14 statement consistent with the determinations of Glamis  
15 Gold, Limited?

16 A. Yes, it is.

17 Q. Mr. Jeannes, are you needing to speculate  
18 about what the California Governor intended in  
19 answering these questions?

20 A. No. He made it very clear in his various  
21 statements, as did the legislature and the State  
22 Mining and Geology Board.

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16:20:09 1 Q. Mr. Jeannes, have these findings of the  
2 California Governor been rescinded, to your knowledge?

3 A. No, they haven't.

4 Q. Mr. Jeannes, have you become aware of the new  
5 proposed Quechan casino and resort at the base of  
6 Pilot Knob?

7 A. Yes. I had a newspaper reporter contact me  
8 several weeks ago. That was the first time I had  
9 heard about it.

10 Q. Have you reviewed an amendment to the  
11 California Tribal-State Compact between the State of  
12 California and the Quechan Tribe approved by the  
13 Governor Schwarzenegger and the Quechan Tribe as of  
14 June 26, 2006?

15 A. Yes, I have looked at it.

16 Q. Does this agreement approved by the  
17 California Governor pertain to the site of the new

18 Quechan casino at the base of Pilot Knob?

19 A. Yeah, the agreement authorizes the casino to  
20 be constructed at that site.

21 Q. Has the U. S. Interior Department approved the  
22 Tribal/State Gaming Compact between the State of

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16:21:13 1 California and the Quechan Tribe in 2007?

2 A. Yes, it was approved by Notice in the Federal  
3 Register a few months later.

4 Q. Is that Federal Register Notice and the  
5 Governor's agreement contained in your last rebuttal  
6 statement filed in this case?

7 A. Yes, they're exhibits.

8 Q. Mr. Jeannes, has Glami s Gold, Limited, or  
9 Goldcorp received any offers to purchase the Imperial  
10 Project mining claims from other mining companies or  
11 mining investment interests in the last five years?

12 A. Not just the last five years. We never have.

13 Q. Mr. Jeannes, the Government asserted in its  
14 Rejoinder that one's home does not lack value merely  
15 because buyers do not appear at one's doorstep with  
16 offers to buy it. Is that analogy applicable to the  
17 Imperial Project, based on your experience?

18 A. No, not at all. It reflects someone who  
19 doesn't really understand our business.

20 The gold sector is a very small part of the  
21 overall mining industry, and there is just not that  
22 many gold deposits. I'm in charge of business

16: 22: 27 1 development for Goldcorp, and I would say I know of or  
2 have a file on every mineral deposit in the western  
3 hemisphere, gold deposit of over a million ounces.  
4 And my counterparts at the other companies do, too.  
5 There's just not that many of them.

6           And we also have it seems like an abundance  
7 of investment bankers in our business who act as  
8 brokers trying to look at assets that may be noncore  
9 to one company and interest another company and buying  
10 them or selling them, and that's how they generate  
11 fees, and I have never had any interest expressed by  
12 any investment banker to try to help sell or run a  
13 process for Imperial because the industry knows it has  
14 no value. It can't be built.

15       Q.    Are the mineral resources, the gold mineral  
16 resources, at the Imperial Project, do they continue  
17 to be reported annually by Goldcorp and its  
18 predecessor Glamis Gold, Limited?

19       A.    Yeah, it's still a mineral resource. It  
20 doesn't have an economic value, and that's why we  
21 can't report it and don't report it as a reserve, but  
22 it's a finite, you know, bit of mineralization that we

16: 23: 42 1 have to report as a resource, and we do. So--and  
2 that's been in our Annual Report every year.

3       Q.    Has Goldcorp changed its treatment of the

4 reporting of the mineral resource as compared to the  
5 way Glamis Gold, Limited reported the resource?

6 A. No. I'm pretty sure it's still in there as a  
7 mineral resource.

8 Q. Why do you think that no entity has come  
9 forward with an offer to purchase the Imperial Project  
10 mining claims, particularly given the assertion by the  
11 United States in this proceeding that it has a market  
12 value of \$159 million at least?

13 A. Well, I don't think anyone else in the  
14 business believes that, or else I would have received  
15 numerous inquiries.

16 You know, everything that we went through at  
17 Imperial was very high profile in our business. There  
18 was a lot of media, there was a lot of discussion  
19 about it within our sector, and people know what  
20 happened. They know the position of the State of  
21 California with respect to open-pit mines, or at least  
22 the one of that Imperial Project, and I don't think

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16:24:51 1 anybody believes there is any value there, as do we.

2 Q. Thank you, Mr. Jeannes.

3 MR. McCURUM That will conclude our direct  
4 testimony.

5 THE WITNESS: Thank you.

6 PRESIDENT YOUNG: Thank you very much.

7 Ms. Menaker or Mr. Clodfelter?

8 CROSS- EXAMINATION

9 BY MS. MENAKER:



10 Q. Good afternoon, Mr. Jeannes.  
11 A. Good afternoon.  
12 Q. In paragraph seven of your rebuttal  
13 statement, you state: "There was recently a single  
14 inquiry made by a mining company for information  
15 regarding the Imperial Project, but there has been no  
16 subsequent offer to purchase"; is that correct?  
17 A. That's correct.  
18 Q. And what company made this inquiry?  
19 A. I have signed a confidentiality agreement,  
20 and I'm not supposed to say.  
21 I don't know how to handle that. The  
22 confidentiality agreement says that you don't identify

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16:25:48 1 the fact of the discussions. Should we shut off the  
2 cameras? I don't know how to handle that.  
3 I could give you a lot of details about it  
4 without identifying it. It's a small gold--or a  
5 company that's not operating anything but developing  
6 gold projects, and they wanted to learn more about the  
7 Imperial Project. I gave them full access to our  
8 Feasibility Study, gave them the block model and the  
9 resource model electronically so that they could  
10 manipulate it themselves. And I gave them Web site  
11 for this proceeding and said, "Go. You will have  
12 everything you need there to understand what has been  
13 the history of the Project from a permitting and legal  
14 standpoint."  
15 Q. How was this inquiry first made?

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16 A. I got a phone call from one of our guys in  
17 Toronto who had a friend who called him and said, "Who  
18 should I talk to?"

19 Q. And then--so, you obviously talked to them by  
20 phone.

21 A. Umm-hmm.

22 Q. Did you consequently meet?

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16:27:05 1 A. Yes.

2 Q. And how many times did you meet?

3 A. Once.

4 Q. And did this inquirer ask whether the mining  
5 claims, whether Goldcorp would be interested in  
6 selling the mining claims?

7 A. Yes.

8 Q. And how did you respond?

9 A. I told him everything was for sale, "Go look  
10 at the data;" and, if they wanted to make us an offer,  
11 we would listen to it.

12 Q. And did they indicate any amount that they  
13 were thinking about offering?

14 A. No.

15 Q. And did you tell them what price you would  
16 accept?

17 A. No.

18 Q. So, there was no discussion at all about any  
19 price?

20 A. No.

21 Q. And how many meetings did you have with this

22 individual?

230

16: 27: 51 1 A. One.

2 Q. And how many phone calls did you have?

3 A. I probably had, I think, only one other phone  
4 call. I think we exchanged messages once and maybe an  
5 E-mail. No, I don't think we ever e-mailed. Just  
6 phone messages and one live call.

7 Q. And did this person travel to meet you?

8 A. Yes.

9 Q. And from about how far away?

10 A. I have no idea where he was before he came to  
11 Vancouver.

12 Q. And did you give this person the information  
13 that you were just referring to, the link to the Web  
14 site and some of the other information by telephone,  
15 before he or she came to meet with you?

16 A. Yeah. I asked--once the inquiry came in, I  
17 had someone in our group hook up with them, a guy who  
18 works for me, and I said make available the block  
19 model and Feasibility Study and anything else they  
20 asked for.

21 Q. And about how long ago was your last contact  
22 with this person?

231

16: 28: 59 1 A. I would have to look at my calendar, but I'm

2 guessing three weeks.

3 Q. And did this individual ask about Glamis's  
4 claim in this arbitration?

5 A. Yeah, yeah. Like I said, I made reference to  
6 it and gave him the Web site so he could go see  
7 everything he needed to know about it.

8 Q. During your testimony today, you read from  
9 the 2002 BLM Mineral Report, which stated that  
10 complete backfilling was economically infeasible; is  
11 that correct?

12 A. Correct.

13 Q. And are you aware that BLM used a gold price  
14 of \$296 per ounce in making that determination?

15 A. I didn't recall, but it is what it is. It's  
16 in the report.

17 Q. Was it your desire--and by "your," I mean  
18 Glamis's and Goldcorp's desire--that DOI continued to  
19 process Glamis's Plan of Operations even after Glamis  
20 submitted its claim to arbitration and wrote to DOI  
21 that it was going to pursue other avenues?

22 A. Well, as you know, at one point, very

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16:30:15 1 briefly, we were trying to resolve this matter by  
2 negotiation with the Government; and, during that  
3 period, I asked the BLM State Office in California to  
4 stop work because I didn't want new things to happen  
5 that would upset the discussions, but that ended very  
6 quickly when the emergency regulations were issued,  
7 and so I wrote them shortly after that and said

8 "please proceed. "

9 Q. When you were referring to your letter of, I  
10 believe it was, March 2003, where Glamis said that it  
11 cannot renew its request, so basically hold DOI  
12 harmless by any delay by reaffirming its request that  
13 it stop processing; is that correct?

14 A. I wasn't renewing anything. They asked me  
15 and said, "If you want us to stop, you have to hold  
16 the Government harmless for any damage," and I said  
17 no. And so, then, when I wrote the letter back in  
18 March, I said, "Please forget that I asked you to stop  
19 and carry on. "

20 Q. Right. And when you originally asked them to  
21 stop, that was pursuant to a request that you made  
22 back in December; is that correct?

233

16: 31: 35 1 A. Yeah. So, there was about a three- or  
2 four-month period there.

3 Q. So, this letter that you're referring to was  
4 in March, but then it was a few months after that, in  
5 July, when the Glamis decided to pursue arbitration  
6 and then wrote to the DOI saying that it was going to  
7 pursue other avenues; isn't that correct?

8 A. I don't recall writing after this was  
9 submitted. If I did, I need my recollection  
10 refreshed.

11 Q. Okay. So, you don't recall Mr. McCrum  
12 sending a letter on behalf of Glamis to DOI, informing  
13 them that Glamis Gold had decided to pursue

14 arbitration, thanking DOI for its past attention to  
15 this matter, but saying now that the issue has become  
16 so intractable that Glamis has decided to pursue other  
17 avenues. Are you aware of that letter?

18 A. Yeah, I recall there was something like that.  
19 We certainly didn't ask them to stop work on the  
20 Project, though.

21 Q. Did you at any time, after that letter was  
22 sent, contact DOI or BLM officials about your Plan of

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16:32:39 1 Operations?

2 A. Well, we had ongoing discussions throughout  
3 the 10-year period.

4 At that point, I don't recall any further--I  
5 could be wrong, but I don't recall any further  
6 discussions, no.

7 Q. Thank you.

8 You testified earlier that people tried to  
9 submit evidence against backfilling. This is before  
10 the SMGB Board.

11 A. Um-hmm.

12 Q. But the board didn't want to hear that  
13 evidence.

14 A. Umm-hmm.

15 Q. Is that correct?

16 A. That's correct.

17 Q. You attended a board hearing, didn't you?

18 A. Yes.

19 Q. And is it also the case that you testified

20 before the board?

21 A. I couldn't recall. I know I testified  
22 several times, and I couldn't recall whether it was

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16: 33: 27 1 always in relation to the legislative efforts or  
2 whether I also did at the board. To this day, I can't  
3 recall. I know Jim Voorhees did, and I was with him.  
4 I don't recall testifying, myself.

5 Q. Okay. But you seemed to recollect another  
6 Glamis officer testifying before the board?

7 A. Yes.

8 Q. At any time, did the SMGB tell you that you  
9 were prohibited from submitting evidence?

10 A. No.

11 And it wasn't one of us who was proffering  
12 this evidence. It was another person whose name I  
13 don't know who was making reference to a study about  
14 the fact, as I said, that it is not always the most  
15 environmentally appropriate alternative to backfill an  
16 open pit, particularly given certain water issues.  
17 And I can't recall exact words that were said, but my  
18 recollection is that he was told, "Thank you very  
19 much, but we are going on," and they didn't want  
20 to--or didn't allow him to elaborate on this study.

21 Q. So, was he prohibited from testifying  
22 further?

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16: 34: 43 1 A. I don't recall. There may have been a time  
2 limit on all of us. I don't recall.

3 Q. So, is what you're saying that the board  
4 disagreed with--is it fair to say that the board  
5 disagreed with some of the views that were expressed  
6 by some of the individuals regarding backfilling that  
7 may also have been shared by Glamis?

8 A. Yeah, I assume they disagreed or they  
9 wouldn't have adopted it, but they also said in their  
10 records that they weren't relying on any technical  
11 reports, period.

12 Q. But, as far as you're aware, they did not  
13 refuse to receive any technical reports; is that  
14 correct?

15 A. My recollection is that they didn't want to  
16 hear about that topic. And whether the guy physically  
17 tried to hand them a report, I don't know.

18 Q. But everybody who wanted to testify--are you  
19 aware that they ever prevented or prohibited anybody  
20 who wanted to testify from testifying at these  
21 hearings?

22 A. No, no, I'm not.

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16: 36: 00 1 Q. I just to want return to an earlier question,  
2 I apologize, but when I started asking you about  
3 Glamis's intentions regarding DOI's processing of the  
4 Plan of Operations, my original question was: After  
5 July 2003, did Glamis want BLM to continue to process



6 its Plan of Operations?

7 A. I don't recall that we took a position one  
8 way or the other. I mean, we were in this litigation  
9 process, and I'm not sure what that meant, but we  
10 always took the position that, if we could have gotten  
11 a permit to operate this mine, we wanted to operate  
12 it. That's why we stayed at it for 12 years.

13 I don't recall having a position at that time  
14 when we filed it. I just don't recall.

15 Q. Thank you.

16 PRESIDENT YOUNG: No further questions.

17 MS. MENAKER: No, thanks.

18 PRESIDENT YOUNG: Thank you.

19 Mr. McCrum?

20 MR. McCRUM: No redirect here.

21 PRESIDENT YOUNG: Thank you.

22 Mr. Jeannes, thank you very much. You are

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16:37:08 1 excused.

2 (Witness steps down.)

3 PRESIDENT YOUNG: Mr. McCrum, do you want to  
4 call your next witness?

5 MR. McCRUM: Yes, we are prepared-- our next  
6 witness is Daniel Purvance, and he is here, and we are  
7 fully prepared to proceed with him. I would ask for  
8 the Tribunal's indulgence. We wasn't scheduled for  
9 today. We don't have a witness binder prepared for  
10 him today. We have exhibits ready to show on the  
11 screen which have been submitted in the record of this

12 case, and I think we could proceed efficiently with  
13 that and provide the binder first day tomorrow morning  
14 with the day two schedule, if that's allowed.

15 PRESIDENT YOUNG: That's acceptable. Thank  
16 you.

17 MS. MENAKER: Mr. President, would it be okay  
18 to take a five-minute break, or even less?

19 PRESIDENT YOUNG: We will take a break until  
20 quarter to 5:00, if that's all right.

21 (Brief recess.)

22 PRESIDENT YOUNG: We would request you to

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16:46:51 1 read the witness statement.

2 DANIEL PURVANCE, CLAIMANT'S WITNESS, CALLED

3 THE WITNESS: I solemnly declare upon my  
4 honor and conscience that I shall speak the truth, the  
5 whole truth, and nothing but the truth.

6 PRESIDENT YOUNG: Now, Mr. Purvance, as I  
7 understand, part of your testimony will relate to  
8 locations of coordinates for certain kinds of  
9 information that we desire to keep confidential. So,  
10 Mr. McCrum, if you could give us adequate warning  
11 before you venture into those areas, we will have to  
12 curtail the public part of the hearing during the  
13 brief parts of the testimony relevant to that.

14 MR. McCRUM: Yes, Mr. President. We'll try  
15 to have that confined to the latter part of  
16 Mr. Purvance's testimony.

17 PRESIDENT YOUNG: Thank you.

18 Proceed.

19 DIRECT EXAMINATION

20 BY MR. McCRUM

21 Q. Mr. Purvance, can you please state your full  
22 name, title, and business address.

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16: 47: 46 1 A. Dan Purvance. I'm Director of Environment  
2 for Goldcorp. My address is 10 Caterpillar Court,  
3 Sparks, Nevada.

4 Q. And what is your position with Goldcorp,  
5 Inc.?

6 A. I'm currently the Director of Environment  
7 with Goldcorp.

8 MR. McCRUM Are you able to hear the  
9 witness, Mr. President? Okay.

10 BY MR. McCRUM

11 Q. And what's your current title? I didn't  
12 quite get that.

13 A. My current title is Director of Environment  
14 for Goldcorp, Inc.

15 Q. Are you a geologist; and, if so, where did  
16 you get your degree?

17 A. Yes, I am a geologist. I received my degree  
18 from the University of Utah in 1975.

19 Q. And have you worked as a geologist in the  
20 metallic mining industry since getting your degree?

21 A. Yes, I have both metallic--I started my  
22 career in the uranium industry early on. I worked for

16: 48: 43 1 Real Algom and Home State Mining Company, two large  
2 international mining companies in southern Utah,  
3 Colorado, Arizona. I joined Glamis in 1992 at the  
4 Picacho Mine.

5 Q. And at the Picacho Mine, what was your--what  
6 was your--Mr. Purvance, what was your role at the  
7 Picacho Mine?

8 A. I was the mine geologist and project  
9 geologist for the site.

10 Q. And, after 1994, did you--well, I'm sorry.  
11 In the early 1990s, did you become involved with the  
12 Imperial Project?

13 A. Yes, yes. In 1994, approximately 1994, I  
14 became the Project geologist for the Imperial Project  
15 which was responsible for all the exploration,  
16 exploration permitting activities, all the field  
17 studies that were going on at that time.

18 Q. And prior to your work for Glamis Gold  
19 Limited in the California Desert, had you worked at  
20 any other open-pit gold mine operations in the  
21 California Desert conservation area?

22 A. Yes. Prior to being employed by Glamis, I

16: 50: 09 1 was employed by American Girl Mine, a mining company  
2 at the American Girl Mine; also, of course, at the  
3 Picacho Mine which is nearby. And I'm also the

4 Project Manager for the Rand Mine, which is located in  
5 the north end of the CDCA.

6 Q. Is the Rand Mine in the California Desert  
7 Conservation Area?

8 A. Yes, it is.

9 Q. Now, Mr. Purvance, during your years of work  
10 at the American Girl Mine and the operation of the  
11 Picacho Mine when you worked there, do you recall any  
12 Native American objections to the operation of those  
13 open-pit gold mines?

14 A. No, at no time did I witness any kind of  
15 demonstration or see any kind of demonstration or  
16 appeal or anything.

17 Q. By the early 1990s, when you became  
18 responsible for coordinating the cultural resource  
19 reviews for the Glamis Imperial Project, did you  
20 become aware of the participation of Lorey Cachora,  
21 the Quechan Tribal historian, in the cultural resource  
22 reviews for the Imperial Project?

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16: 51: 14 1 A. Yes. I was--as the Project geologist for  
2 Imperial, I was in charge of all the cultural  
3 studies--all the permits that are required to drill,  
4 you have to have, of course, clearance from the BLM,  
5 so I was familiar with all the cultural studies that  
6 had been done on the Project area.

7 Q. And these cultural studies you're referring  
8 to, did they involve Mr. Cachora, and was that in the  
9 Imperial Project area?

10 A. Yes, they were for the Imperial Project,  
11 especially for the Imperial Project area; and, yes, I  
12 was aware that Mr. Cachora was involved in those  
13 studies.

14 Q. Did you personally meet with Mr. Cachora, the  
15 Quechan Tribal historian, as part of those cultural  
16 resource reviews in the early 1990s?

17 A. Yes. Again, I was responsible for the field  
18 activities at the project site. So, as the  
19 archaeology crews would come and go to the field and  
20 to the site, I would meet with them and acknowledge  
21 where they are at.

22 Q. Was Mr. Cachora on-site in the Imperial

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16:52:18 1 Project area for a matter of a few days or longer  
2 periods?

3 A. No, he was--typical, they were there for  
4 several weeks or months doing field surveys, and he  
5 was active daily in those surveys.

6 Q. Between 1992 and 1995, what types of  
7 activities was Glamis Gold carrying out in the  
8 Imperial Project project area?

9 A. We were actively developing the Project by  
10 drilling. I was in charge of drilling programs, and  
11 so we were permitting drilling programs to the BLM  
12 And then, also we were developing a water source for  
13 the Project, so we were drilling water wells and  
14 investigations to secure water for the site.

15 Q. In the early 1990s, were any of those

16 BLM approved activities the subject of administrative  
17 appeals or judicial challenges by the Quechan Tribe?

18 A. No, not at all.

19 Q. By 1995 to 1996, roughly how many mineral  
20 exploration drill holes had been drilled in the  
21 Project area, the Imperial Project area, and the  
22 surrounding immediate vicinity?

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16: 53: 31 1 A. There was over 400 drill holes that had been  
2 drilled into the deposit and into the area for  
3 investigation of groundwater.

4 Q. Did those 400 drill holes primarily  
5 investigate the ore reserves or groundwater resources?

6 A. Primarily the ore reserves. There are  
7 approximately a dozen holes that were used to seek  
8 water remaining or for specifically to define and  
9 develop the ore body.

10 Q. And what kind of expenditures roughly are we  
11 talking about for the exploratory drilling and related  
12 activities during the early-mid 1990s?

13 A. We had expended several million dollars'  
14 worth of funds towards drilling.

15 Q. Mr. Purvance, are you familiar with the  
16 Running Man feature and its proximity to the Imperial  
17 Project site?

18 A. Yes, I am. It's a rock feature that's  
19 approximately a mile and a quarter away from the  
20 southern end of the project area.

21 Q. Let's take a look at Purvance Hearing Exhibit

22 Number 2.

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16:54:47 1 I'm going to show you a paragraph,

2 Mr. Purvance. A photograph. And can you describe  
3 this photograph that is Purvance Hearing Exhibit  
4 Number 2?

5 A. Yes. That's me standing in the background.  
6 The Running Man geoglyph is a collection of rocks that  
7 you can see in front of me there. The background is  
8 the typical desert landscape that's around the Project  
9 area.

10 Q. Now, roughly how far is the Running Man  
11 feature from the Imperial Project mine-pit area?

12 A. It's a mile-and-a-half, approximately a  
13 mile-and-a-half from the open pit itself.

14 Q. And would the proposed Imperial Project have  
15 had any direct physical disturbance to the Running Man  
16 site?

17 A. No, not at all.

18 Q. Let's turn to the Hearing Exhibit Number 1.

19 Did the Running Man feature assume  
20 significance when Interior Secretary Babbitt denied  
21 the Imperial project on January 17, 2001?

22 A. Yes, it did. This is from the Record of

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16:56:04 1 Decision; and, as you can see, in the left-hand side



2 of the map is the Running Man geoglyph. Off to the  
3 right near the legend is Picacho Peak, and then to the  
4 north is the Indian Pass and the Indian Pass ACEC.  
5 The project area is the black area in the center of  
6 it.

7 Q. And is this figure that we are looking at the  
8 actual figure from the Secretary's decision, except  
9 for the color highlighting that has just been added on  
10 the screen?

11 A. Yes, it is.

12 Q. And what is the black area in the center?

13 A. The black area in the center represents the  
14 Imperial Project Site.

15 Q. And what are those shaded gray areas to the  
16 north?

17 A. The shaded gray areas to the north, there are  
18 two, as Mr. McArthur spoke of, the Indian Pass  
19 Withdrawal Area and the Picacho Peak Wilderness Area.

20 Q. Were those the areas that were closed to  
21 mineral entry and mineral development by the 1994  
22 California Desert Conservation Act?

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16:57:07 1 A. Yes, they are.

2 Q. And what is that rectangle to the north that  
3 says Indian Pass?

4 A. That's the Indian Pass ACEC.

5 Q. And what does ACEC stand for?

6 A. It's an area of environmental critical  
7 concern, I believe.

8 Q. And was the Imperial Project within the  
9 designated wilderness areas or the area of Critical  
10 Environmental Concern as designated?

11 A. No. As clearly shown, the Imperial Project  
12 is about a mile, two miles south of the ACEC and the  
13 Picacho Wilderness--Picacho Peak Wilderness Area.

14 Q. What does the dotted line that surrounds the  
15 Imperial Project, what does that reflect?

16 A. That's the boundary of the ATCC, area of  
17 traditional cultural concern that was assigned to the  
18 Project.

19 Q. And was that area designated before or after  
20 the Imperial Project Plan of Operations was submitted?

21 A. It was after.

22 Q. Now, Mr. Purvance, one of the other features

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16: 58: 22 1 depicted in Secretary Babbitt's denial decision is to  
2 the right, Picacho Peak.

3 Where would the Picacho Mine be in  
4 relationship to Picacho Peak?

5 A. Picacho Peak is about seven miles east of  
6 Imperial Project. The Picacho Mine is located at the  
7 base of Picacho Peak.

8 Q. Mr. Purvance, was there a--there was a field  
9 hearing of the Advisory Council on Historic  
10 Preservation in March of 1999. Did you attend that?

11 A. Yes, I did.

12 Q. I'm sorry, let me strike that. I will come  
13 back to that topic. I passed over an area I wanted to

14 bring up with the witness.

15           Mr. Purvance, in 1997 did you have an  
16 encounter with the Quechan Tribal Historian Lorey  
17 Cachora?

18       A.    Yes, I did in--I believe it was February of  
19 1997 I encountered Mr. Cachora and two people that  
20 were leaving the Project site. They were on the  
21 project site driving along Indian Pass Road.

22       Q.    And would that encounter have been in '97,

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16:59:40 1 would that have been after the cultural resource  
2 studies that Mr. Cachora had been involved in in the  
3 Imperial Project area?

4       A.    Yes, it was.

5       Q.    And why is it that you recall that particular  
6 encounter with Mr. Cachora in early 1997?

7       A.    I approached Mr. Cachora, and we talked, and  
8 he explained to me what the two people were doing on  
9 our project site, and explained that they were a  
10 journalist and a photographer from the Imperial Valley  
11 press, and he was showing them the cultural features  
12 that were in the area. And at that time, Mr. Cachora  
13 asked me about Running Man, asked me where Running Man  
14 was located or where to stop his car along Indian Pass  
15 Road so he could go visit Running Man.

16       Q.    And did that strike--how did that encounter  
17 strike you at that time?

18       A.    That struck me very strange and odd  
19 considering that he was the Tribal historian and

20 obviously had participated in several field studies in  
21 the area that he would be asking me for directions on  
22 how to find it.

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17: 00: 43 1 Q. Did you make a notation in your field log at  
2 the time of that encounter?

3 A. Yes, I did.

4 Q. And has that been submitted with a--one of  
5 your witness statements in this case?

6 A. Yes, it has.

7 Q. Now, turning to the Advisory Council field  
8 hearing in March of 1999, did you attend that?

9 A. Yes, I did.

10 Q. And was Mr. Cachora there on behalf of the  
11 Quechan Tribe, as you understood it?

12 A. Yes, Mr. Cachora and several other  
13 individuals were on that tour.

14 Q. Let's look at Purvance hearing Exhibit  
15 Number 3.

16 Can you tell us what this map depicts.

17 A. This is a map that I prepared that showed the  
18 ACHP tour stops after the tour occurred. As you can  
19 see, the--in black there, there are four stops. They  
20 made Running Man, trail, another trail segment north  
21 of the Project area, and then they proceeded to the  
22 petroglyphs and the Indian Pass ACEC.

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17: 01: 48 1 Q. And what reaction did you have when the  
2 Advisory Council on Historic Preservation field tour  
3 visited these particular sites?

4 A. Well, as you can see, the trail that's on the  
5 southwest corner on the Project area was the only spot  
6 or the only stop on the ACHP tour, and I was shocked.  
7 I thought the whole intent of the tour was to tour the  
8 Project area and look at the cultural resources and  
9 cultural features that were contained within the  
10 Project area.

11 And obviously they visited one small trail  
12 segment that had been isolated outside of any  
13 disturbance area, so it was not going to be disturbed.  
14 It had been--in fact, that trail segment had been  
15 presented in mitigation to be completely outside of  
16 our project or outside of our disturbance area.

17 And then we looked at that trail segment and  
18 proceeded to the north of the Project area to the  
19 second trail marking that's shown on the map.

20 Q. The dotted line that runs along that area,  
21 what does that depict?

22 A. The dotted golden line is the Indian Pass

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17: 03: 05 1 Road. That's the access through the area that we  
2 used.

3 Q. Is that an access road that vehicles are  
4 allowed to travel on?

5 A. Definitely, yes.

6 Q. Did you prepare a photographic map of the  
7 Advisory Council on Historic Preservation tour sites?

8 A. Yes, I did.

9 Q. Let's take a look at the Purvance hearing  
10 Exhibit 4.

11 And what does this map depict?

12 A. This is an aerial photo. It's similar to the  
13 first map except, like I say, it's an aerial photo  
14 that shows the terrain and the project outline. It's  
15 a little bit of a closer up view of it.

16 But again, in yellow you can see Running Man,  
17 the ACHP stops that were down along Indian Pass Road.  
18 You can actually see Indian Pass Road there. And then  
19 the ACHP stopped to the north. On the far left of the  
20 photograph is the Indian Pass.

21 And again, you can see this photograph shows  
22 especially in the ACHP stop on the Southwest corner of

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17:04:08 1 the Project area, that's where we viewed a trail  
2 segment that had been removed from our disturbance  
3 area.

4 No, it's the one below that. Yeah, that one.

5 Q. The map showing the ACHP stops that this is  
6 based on, was that a map you prepared back in 1999, or  
7 for this litigation?

8 A. No, it was back in 1999.

9 Q. Mr. Purvance, during the 1990s when you were  
10 a geologist working in the California Desert, did you  
11 become aware of the fact that the Quechan Tribe

12 authorized mineral exploration and drilling activities  
13 for gold on the Fort Yuma Indian Reservation?

14 A. Yes, I did through my employment at American  
15 Girl, and then later on I learned that the Tribe was  
16 actively looking for gold deposits on the Reservation.

17 Q. And have you become familiar with documents  
18 obtained from the Government through a Freedom of  
19 Information Act request indicating that the Quechan  
20 Tribe sought and obtained Government funding from the  
21 U. S. Interior Department's Bureau of Indian Affairs  
22 for gold mineral exploration between 1988 and 1992?

255

17: 05: 19 1 A. Yes, I am familiar with those documents.

2 Q. Let's look at Purvance hearing Exhibit  
3 Number 5.

4 Do we have the prior page on this exhibit?

5 Okay.

6 This is--is this exhibit part of the 1988  
7 drilling application as you understand it,  
8 Mr. Purvance?

9 A. Yes. It's the appendix for the location of  
10 neighboring gold mine deposits that are in the area.

11 Q. Okay. Let's look at the next map attached to  
12 this.

13 A. It's the previous one.

14 Q. Oh, you found it. Okay. This is Purvance  
15 hearing Exhibit Number 6, and this is the Quechan  
16 Tribe application to the Interior Department Bureau of  
17 Indian Affairs dated February 18, 1988.

18 Mr. Purvance, are you familiar with this  
19 document?

20 A. Yes, I am.

21 Q. And does this--how does this application  
22 characterize the Tribe's level of interest in gold

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17:06:33 1 mining, gold development?

2 A. Characterizes it as they were excited to be  
3 able to provide jobs for the residential--Reservation  
4 residents, travel revenue from leases, royalties, and  
5 whatnot, source of funds for reinvestment of other  
6 areas of economic.

7 Q. And now let's look back at the part of this  
8 application that includes a map.

9 And is this map that's on the screen now part  
10 of the 1988--February 1988 application to the Bureau  
11 of Indian Affairs, Mr. Purvance?

12 A. Yes, that is the map.

13 Q. And what is it showing there, Mr. Purvance?

14 A. The yellow highlighted areas are approximate  
15 locations of gold deposits. As you can see, Mesquite  
16 has been truncated a bit, but Mesquite Mine was at the  
17 time being developed, was a very large project.  
18 Indian Pass Project had also been discovered by the  
19 Goldfields people as an exploration and was being  
20 developed.

21 Picacho is just below Indian Pass. You can't  
22 read the text because of what it is, but that's



17:07:47 1 Picacho Mine had been in operation for a few years.

2 And then in the center of the photograph is  
3 the American Girl Mine and the ore cruise, the Cargo  
4 Muchacho deposits that were being developed and had  
5 been discovered at the time.

6 Q. And had there been a recent discovery of gold  
7 mineralization in the Indian Pass area by 1988?

8 A. Yes, as I mentioned, the Goldfields had  
9 originally discovered and had conducted exploration  
10 drilling on Indian Pass.

11 Q. And in the 1988 application for Federal  
12 funding to carry out gold mineral exploration on the  
13 Reservation that you have reviewed, Mr. Purvance, did  
14 the Tribe express any concern or objection to the  
15 Bureau of Indian Affairs about potential gold  
16 development in the Indian Pass area?

17 A. No, not at all. I think the Tribe noted that  
18 there was a lot of development going on around their  
19 Reservation. The same rock units, the same structural  
20 features go into the Reservation, so I can see they  
21 would obviously be looking for similar-type deposits  
22 on their Reservation.

17:08:58 1 Q. And the other mines that are depicted here,  
2 the other gold deposits, Picacho, Mesquite, and  
3 American Girl, were they open-pit gold mine projects?

4 A. Yes, they are.

5 Q. And were they as of the late 1980s?

6 A. Yes, they were being developed and mined at  
7 that time.

8 Q. Mr. Purvance, the counsel for the United  
9 States asserted in their opening brief in this case,  
10 their Counter-Memorial, at page 238, and I will quote,  
11 "While it is true that the Quechan commissioned a  
12 limited survey for the potential for bulk gold  
13 mineralization on their Reservation in the late 1980s,  
14 the only exploratory drilling involved in this area  
15 was on the stone face prospect, an area in the  
16 northwest corner of the Reservation that had already  
17 been mined extensively."

18 Did you offer a response to that assertion in  
19 your second statement filed in this case, and if so,  
20 what was it?

21 A. Yes, I did offer a response that simply that  
22 was not the case. There has not been any scale mining

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17:10:13 1 in that area of the stone face prospect.

2 Q. And had--by that time of your second  
3 statement, did you submit photographs showing the  
4 mineral exploration drilling that had been carried out  
5 by the Quechan Tribe with Federal Government funding  
6 at that time?

7 A. Yes, that's--the whole purpose of the  
8 statement was--is that the mineral exploration that  
9 had been conducted by Quechan Tribe was at the stone

10 face prospect, and I have visited the site several  
11 times.

12 Q. Mr. Purvance, after you filed your second  
13 statement in this case, the United States then  
14 repeated the assertion in the Rejoinder at page 223  
15 filed in March of 2007, and continued to claim that  
16 the Quechan drilling was located in an area, "that had  
17 been mined in the past."

18 What did you then do to disprove that  
19 repeated assertion by the United States in this NAFTA  
20 proceeding?

21 A. I returned to the site in July of this year  
22 and took photographs of the exploration sites in the

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17:11:28 1 area around that, those drill holes, to show the  
2 activity that had gone on there.

3 Q. And, Mr. Purvance, we are now looking at  
4 hearing Exhibit 7. Would that be the paragraph that  
5 you have just preferred to?

6 A. Yes, it is. You can see on the left are the  
7 prospect holes that are shallow prospect hits that are  
8 typical of the entire area, Imperial Project included.  
9 The exploration drill hole sites are a light-colored  
10 material. The drill holes were unreclaimed, so you  
11 can still see the cuttings from the drill holes are a  
12 light-colored kind of a cream-colored material.  
13 They're still evident there.

14 And as you can see, there is no disturbance  
15 at the area other than what has been taking place

16 there.

17 Q. Mr. Purvance, the prospect holes there, can  
18 you give us a rough idea of the diameter of those  
19 holes.

20 A. They're approximately 5 feet in square, maybe  
21 10 feet deep. Typically hand dug prospect holes,  
22 historically, and have been, you know, scattered all

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17:12:35 1 over the area.

2 Q. By the area, what area are do you mean?

3 A. The Imperial Project area, the Cargo  
4 Michacho, the district, the mining district.

5 Q. And the mountain range that we are seeing  
6 right in the background next to the drill hole sites,  
7 what mountain range would that be?

8 A. That is the south end of the Cargo Michacho  
9 Mountains.

10 Q. And, Mr. Purvance, in this area where the  
11 exploration drill holes were carried out, has there  
12 ever been any commercial mining?

13 A. No. Obviously, there has not been any  
14 commercial mining at that site.

15 MR. McCURUM Mr. President, we are now  
16 getting into an area where we may be referring to  
17 confidential cultural resource information.

18 PRESIDENT YOUNG: Thank you. At this point,  
19 we will turn off the cameras. I'm not sure how long  
20 you anticipate that will--this part of the question  
21 will take.

22

MR. McCRUM I would say less than 10

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17:13:41 1 minutes.

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PRESIDENT YOUNG: Okay. Thank you.

3

(End of open session.)

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11 (End of confidential session.)

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17: 22: 49 1

OPEN SESSION

2 BY MR. McCRUM

3 Q. Mr. Purvance, are you familiar with the  
4 Norwest expert report dated March 15, 2007, submitted  
5 with the U. S. Rejoinder which asserts that the great  
6 majority of the overburden rock at the Imperial  
7 Project Site consists of, quote, gravel? And do you  
8 have a response to that assertion?

9 A. Yes, I am familiar with that report, and  
10 definitely I have an assertion or I have a response to  
11 that assertion. The Norwest report in several  
12 instances refers to the rock unit as gravel. In no

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13 terms--I'm project geologist for the development and  
14 for all the drilling that took place at that site, and  
15 I was in charge of the assigning the rock types and  
16 the character of the rocks that were going to be  
17 mined.

18 Q. Let's bring up Purvance hearing Exhibit 12.

19 Mr. Purvance, did you take--well, has Glamis  
20 Gold, Limited, maintained core samples from the  
21 Imperial Project over the years since the drilling  
22 that you supervised in the early 1990s?

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17:23:59 1 A. Yes, we have maintained the core samples.  
2 This is a core sample from--a representative core  
3 sample from the deposit that I chose in the  
4 mid-nineties to be submitted to a laboratory for  
5 testing.

6 Q. And the picture that we are looking at now,  
7 Purvance hearing Exhibit 12, was that submitted with  
8 your rebuttal statement in July of 2007?

9 A. Yes, it was.

10 Q. And it shows a particular sample, does it  
11 not--how would--sample number?

12 A. The sample number is the designated by--WC  
13 designates the type of hole it is. It is a core hole  
14 that was drilled in the West Pit, the hole number is  
15 4. The depth is the final number there, was at  
16 74 feet. And as you can see, the core has been  
17 identified to make sure that the lab does not mix  
18 samples up. We take a Magic Marker and write the

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19 number right on the core.

20 Q. Mr. Purvance, you said Magic Marker. Is that  
21 something that can rub off easily?

22 A. No, we definitely use an ink and a pen that

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17:25:09 1 does not rub off.

2 Q. In other words, an indelible marker?

3 A. Yes.

4 Q. Mr. Purvance, I'm going to hand you a  
5 physical sample in a bag. Do you recognize that?

6 A. Yes, this is the sample that's in the  
7 photograph.

8 Q. Is that the same bag that we are looking at  
9 in the photograph?

10 A. Yes, it is the same bag.

11 Q. Can you read the number on the bag.

12 A. WC-4-74.

13 Q. And what is in the bag, Mr. Purvance?

14 A. It's the core sample that we have retained  
15 that says the exact same thing.

16 Q. And, Mr. Purvance, as an experienced mining  
17 geologist, do you have an opinion about whether this  
18 material that you're holding is gravel, or is it some  
19 other type of rock?

20 A. No, it's definitely not gravel. It's  
21 referred to and would be classified as conglomerate.  
22 It's well cemented, and it's typically and

17: 26: 09 1 representative of the overburden that's at the  
2 Imperial Project Site.

3 Q. In your training at the University of Utah in  
4 the geology department, when did you learn the  
5 distinction between gravel and conglomerate?

6 A. I learned it very early on in my field trips  
7 with a couple of the noted professors at the  
8 University of Utah.

9 Q. Is this a difficult geologic classification  
10 to make?

11 A. No, this is not. It's very plain that this  
12 is well cemented hardrock.

13 Q. Let's look at the other photographs in this  
14 exhibit that were submitted with your rebuttal  
15 statement, if we could.

16 Are these--is this another paragraph that was  
17 submitted with your rebuttal statement?

18 A. Yes, it is. It's a core hole that was  
19 drilled on the east deposit at a depth of 37 feet.

20 Q. Do you have an opinion about whether that is  
21 cemented conglomerate or gravel?

22 A. It is cemented conglomerate, as the first

17: 27: 07 1 sample.

2 Q. And let's look at the next photograph  
3 submitted with your rebuttal statement.

4 A. Again, this is EC-3 at a depth of 226 feet,

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5 and you can see we have identified the core to make  
6 sure the lab doesn't mix them up, and again you can  
7 see the rock is solid.

8 Q. Let's look at the next photograph in this  
9 exhibit.

10 A. Again, this is another core hole that was  
11 drilled in the West Pit area, number three, is at the  
12 depth of 90 feet. And again you can see the rock is  
13 well cemented.

14 Q. Let's look at the next photograph attachment  
15 in this exhibit from your rebuttal statement in  
16 Exhibit 11.

17 A. Again, the West pit WC-4, at 73 feet, and  
18 it's got the sample number on there, and the markings  
19 as to the footage that it came from that it represents  
20 in the hole.

21 Again, can you see that it's typical or real  
22 similar to the sample I have in front of me here.

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17: 28: 09 1 It's solid cemented conglomerate.

2 Q. These samples that we have been looking at,  
3 do they--how do they relate to the material that would  
4 have to be extracted at the Imperial Project Site?

5 A. These samples represent and are  
6 representative of the overburden that will be or the  
7 conglomerate rock unit that will be removed at the  
8 rock site or at the mine site.

9 Q. And is the vast majority of that overburden  
10 gravel or cemented conglomerate?

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11 A. Definitely cemented gravel--cemented  
12 conglomerate, gravel.

13 Q. I'm sorry, let's get that clear on the  
14 record, Mr. Purvance.

15 Is the overburden material dominantly  
16 cemented conglomerate or gravel?

17 A. It is cemented conglomerate.

18 Q. Now, these samples we have been looking at,  
19 were they identified by number in charts that you  
20 prepared as the Project geologist in the mid-1990s?

21 A. Yes, that's the whole point of sending them  
22 off-site for analysis. We prepared a chart that lists

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17:29:12 1 the findings of the analysis that was done.

2 Q. Let's look at Purvance hearing Exhibit Number  
3 11. And this is a letter bearing your signature, Dan  
4 Purvance, Project Geologist, from 1996, and,  
5 Mr. Purvance, is that a letter that you prepared back  
6 in 1996?

7 A. Yes, it is.

8 Q. And let's look at the next attachment here.  
9 Let's look at the third in the yellow highlighted  
10 section below the third entry from the bottom, the  
11 hole designated as WC-4 at depth of 74. Would that  
12 sample description correlate with the sample that you  
13 have before you, Mr. Purvance?

14 A. Yes, that is the same sample, and that is the  
15 description of it there in the table.

16 Q. Now, on the far left, it bears the



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17 description C-0-N-G-L period/gravel.

18 A. That is the abbreviation for conglomerate.

19 As I mentioned, that's the rock type that had been

20 assigned to it.

21 Q. What is the term gravel?

22 A. Gravel was a simplified shorthand term that

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17: 30: 38 1 we used quite commonly, but at no time was this rock

2 ever classified or considered as gravel.

3 Q. Did you understand it at the time to be

4 cemented conglomerate or gravel?

5 A. It is cemented conglomerate.

6 Q. And is the sample that's referred to in that

7 chart the same sample you have here today?

8 A. Yes, this is the same sample.

9 Q. Let's look at the next chart in this exhibit.

10 And again, this is another exhibit filed with

11 your rebuttal statement that identifies the hole WC-4

12 among others at 74 feet with the description to the

13 left C-0-N-G-L period/G-R-A-V; is that correct?

14 A. Yes, that is correct.

15 Q. And now let's look at the next chart in this

16 exhibit.

17 And is the same sample hole description we

18 have been referring to reflected in this third chart,

19 WC-4 at 74 feet?

20 A. Yes, I believe it's the second one from the

21 bottom.

22 Again, the rock type on the far left is noted

17: 31: 54 1 as conglomerate. This is just a listing of all the  
2 samples that we did at the time, and as you can see,  
3 it was considered and is conglomerate at that footage,  
4 and under the remarks we show that it's a full core,  
5 and it's well cemented.

6 Q. Now, these various charts that we have been  
7 looking at, different descriptions, do they all refer  
8 to the same sample that you have in your hand right  
9 now?

10 A. Yes, they do.

11 Q. So, sitting here today, is there any doubt  
12 about whether this material is conglomerate or gravel,  
13 in your mind?

14 A. No doubt at all. It's always been considered  
15 conglomerate. We will treat it and would have been  
16 treated the same as any other rock unit that we mined  
17 at the site.

18 Q. And the charts that we have been referring  
19 to, were they included as attachments in the Norwest  
20 expert report, as well?

21 A. Yes, they were.

22 Q. And yet Norwest considers this material to be

17: 33: 02 1 gravel; is that your understanding?

2 A. Yes, that's what the report indicates.

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3 Q. Mr. Purvance, were you surprised that since  
4 these photographs were submitted in July that there  
5 has been no request by Norwest through the Government,  
6 to our knowledge, to inspect these samples prior to  
7 this hearing?

8 A. Yes, considering that Norwest had stated that  
9 they believed that we had mischaracterized the rock or  
10 I had mischaracterized the rock as gravel. Obviously,  
11 the rock is conglomerate.

12 Q. Thank you, Mr. Purvance.

13 MR. McCRUM That concludes our direct  
14 testimony.

15 PRESIDENT YOUNG: Ms. Menaker?

16 Mr. Clodfelter?

17 (Pause.)

18 MS. MENAKER: Thank you, we have just a few  
19 questions.

20 CROSS- EXAMINATION

21 BY MS. MENAKER:

22 Q. It's not true that Indian Pass Road is a dirt

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17:35:20 1 road; is that correct?

2 A. That's correct. It is.

3 Q. And would you mind putting back on exhibit I  
4 believe it was 2, which was the map of the ACHP site  
5 visit.

6 MR. McCRUM I believe that is Purvance  
7 Hearing Exhibit 3.

8 BY MS. MENAKER:

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9 Q. Okay. So--and you testified that Indian Pass  
10 Road was the road on which the people on the ACHP site  
11 visit traveled; is that correct?

12 A. That's correct.

13 Q. And are there any other roads in the  
14 vicinity, or I should say that intersect the Imperial  
15 Project mine area?

16 A. There are drill exploration roads and small  
17 jeep trail-type roads, but there are no what you would  
18 consider gravel or maintained road except Indian Pass.

19 Q. So, it's correct that there are no roads that  
20 vehicles regularly travel on other than the Indian  
21 Pass Road in the Imperial Project Mine area; isn't  
22 that correct?

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17: 36: 32 1 A. No, that's not correct. The Indian Pass  
2 Road, it provides easy access or a maintained road to  
3 go to Indian Pass, but there are also, you know, we  
4 had access through exploration roads that go  
5 throughout the area out there.

6 Q. And what were those--are those exploration  
7 roads--they're not gravel roads, you said?

8 A. No, they're just roads that were--well, there  
9 is a series of roads. There are Jeep trails that have  
10 been used out there for a long period of time, and  
11 then the exploration roads that we used were just  
12 trails or pass where we were allowed to put in a drill  
13 hole. In other words, the BLM will give you  
14 clearance, and you're allowed to drive your vehicles

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15 to that spot.

16 Q. So, basically once you get BLM permission  
17 because you have permission to drill, you can kind  
18 of--you can go off road and travel to that site to do  
19 the work that you need to do; is that correct?

20 A. Yeah, they're existing trails there that I'm  
21 sure off-road vehicles have created, and then there  
22 are disturbances that we created specifically for the

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17: 37: 34 1 exploration sites.

2 Q. Thank you.

3 Now, you mentioned that you met Lorey  
4 Cachora, and I believe it was on Indian Pass Road  
5 where he stopped you--

6 A. That's correct.

7 Q. --for directions to go to the Running Man  
8 site?

9 A. That's correct.

10 Q. And you testified that that was strange; is  
11 that correct?

12 A. Yes, it was strange.

13 Q. And what relevance does that have to this  
14 case? Why is that strange?

15 A. Because Mr. Cachora, being the Historian for  
16 the Quechan Tribe and had participated in a lot of  
17 field activities obviously would know where Running  
18 Man is, and it had been like--been shown in the field  
19 studies that Running Man had been identified, so I  
20 found it strange that he asked me for directions to

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21 how to get to it.

22 Q. But is it your assertion that it casts doubt

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17:38:37 1 on the fact that the area has cultural or religious  
2 significance to the Tribe just because Mr. Cachora was  
3 purportedly lost or unsure of where to turn off in the  
4 road in order to find this geoglyph in the desert?

5 A. I'm not sure I understand your question.

6 Q. Do you have any reason to doubt the Tribe's  
7 assertion that the area has cultural and religious  
8 significance to the Tribe just because Mr. Cachora had  
9 some difficulty locating the Running Man geoglyph?

10 A. No. The Tribe in several studies had  
11 expressed that the cultural features were known to be  
12 there and had been identified by Tribe and the  
13 archaeologist at the time. As far as their religious  
14 significance, I'm not sure what they have.

15 Q. Okay.

16 MS. MENAKER: Okay. I have no further  
17 questions. Thank you.

18 PRESIDENT YOUNG: Mr. McCrum? Any further  
19 questions for Mr. Purvance?

20 MR. McCRUM: No, Mr. President. We have no  
21 further questions.

22 PRESIDENT YOUNG: Thank you, Mr. Purvance,

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17: 39: 46 1 you're excused.

2 Oh, before you do, I'm sorry, allow me to ask  
3 my colleagues if they have questions.

4 QUESTIONS BY THE TRIBUNAL

5 ARBITRATOR HUBBARD: I would like to ask one  
6 question about the use of the word gravel after the  
7 slice with conglomerate. Is that because what's in  
8 that conglomerate piece may have at one time been  
9 gravel?

10 THE WITNESS: Yes. Typically conglomerate is  
11 made up of and classified. It's gravel that has been  
12 cemented over a period of time, so, yeah, that could  
13 be said.

14 ARBITRATOR CARON: Mr. Purvance, going back  
15 to the ACHP map, approximately how long--how many  
16 people are on the tour, and about how long are they  
17 stopping at each of these various stops?

18 THE WITNESS: I would estimate the group was  
19 probably 30 to 40 people, something like that, and we  
20 spent approximately 10 to 15 minutes at each site.

21 ARBITRATOR CARON: How many cars was that?

22 THE WITNESS: I would say a dozen cars.

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17: 40: 59 1 ARBITRATOR CARON: And when they reached the  
2 trail segment on the southeast corner of the Project  
3 site, do you remember what they discussed?

4 THE WITNESS: Yeah, specifically I remember  
5 what they discussed. They--we didn't--we had no idea  
6 where they were going to stop. And then when they

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7 stopped there, they walked over to this trail segment  
8 and said this is one of the trail segments that's  
9 going to be destroyed by the mining activities. And,  
10 of course, we pointed out at that point that it  
11 wasn't, that that particular segment, trail segment  
12 had been removed by our mitigation efforts from our  
13 disturbance. And as you can see, the waste rock  
14 storage pile that was supposed to go there had been  
15 moved into the Project approximately 100 feet.

16 And so at that time we actually pointed that  
17 out. We had restaked the top or the bottom of that  
18 waste rock stockpile, and that's represented by that  
19 straight line that is just to the right of the ACHP,  
20 that X there, yeah.

21 Now, that's what it was discussed. And, of  
22 course, they discussed what the trail segment was and

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17:42:05 1 things like that.

2 ARBITRATOR CARON: Thank you.

3 THE WITNESS: Sure.

4 MS. MENAKER: I just wanted to ask if I could  
5 have the Tribunal's indulgence. I had one additional  
6 question that I forgot to ask.

7 Thank you.

8 CONTINUED CROSS-EXAMINATION

9 BY MS. MENAKER:

10 Q. This relates to your testimony regarding the  
11 prior mining or lack thereof at the stone face  
12 prospect. And the document that I'm referring to is



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13 an appendix--in our appendix to our Counter-Memorial  
14 in Volume 10 of the factual materials in Tab 118.

15 And--

16 PRESIDENT YOUNG: Counsel, do you have a page  
17 number available for us?

18 MS. MENAKER: Yes, it's page 34.

19 BY MS. MENAKER:

20 Q. If I could ask the witness to take a look at  
21 this document.

22 (Document handed to the witness.)

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17: 43: 50 1 Q. And do you recognize that document as the  
2 document that the United States cited in response to  
3 your previous--your assertion made in your statement  
4 that no mining had occurred in this area?

5 A. Yes, this is one of the documents that were  
6 included.

7 Q. Okay. And could you turn to page 34 of that  
8 document, please.

9 And do you see there that the document  
10 indicates that prior mining had occurred in the Cargo  
11 Michacho mountain district?

12 A. Yes, it does state that.

13 Q. And can I just distribute this map.

14 (Document handed to the witness.)

15 Q. If you take a look at this map, please, can  
16 you see that the symbol under, on the right-hand side  
17 where it says explanation, and has a symbol that says  
18 mine underneath it?

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19 A. That is correct.

20 Q. And do you also see that where it says mines  
21 and deposits, number one says stone face?

22 A. Yes.

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17:45:07 1 Q. And do you see in the upper left-hand corner  
2 that there is a symbol of a mine with then a bar that  
3 says one next to it?

4 A. Yes, I see that.

5 Q. Okay. Thank you.

6 PRESIDENT YOUNG: Is that the last of your  
7 questions?

8 MS. MENAKER: It is, thank you.

9 PRESIDENT YOUNG: Redirect, Mr. McCrum?

10 MR. McCRUM: Thank you, Mr. President.

11 REDI RECT EXAMINATION

12 BY MR. McCRUM

13 Q. Mr. Purvance, referring to this map that  
14 Government counsel has just presented, are you  
15 familiar with this map?

16 A. Yes, I am.

17 Q. And when the heading above the listing of  
18 location says "Mines and Deposits," what does that  
19 mean to you?

20 A. That can mean various things, but it can mean  
21 anything from a prospect to a project the size of  
22 Mesquite.

17: 46: 11 1 Q. So, does this map listing the stone face site  
2 under the category of mines and deposits indicate to  
3 you as a geologist that the stone face site is the  
4 sight of a mine?

5 A. No, not at all. That's a common--the  
6 symbol's commonly used in a lot of topographical maps,  
7 and like I say, it can represent a prospect or minor  
8 amount of disturbance or a mining operation. In this  
9 case, the stone house is actually referred to as the  
10 stone house prospect in several other reports, and  
11 that is what it is. It's a prospect.

12 Q. So, Mr. Purvance, looking at this map of the  
13 Fort Yuma Indian Reservation up to the--in the upper  
14 left-hand corner where the number one is indicated by  
15 the symbol, what does that indicate to you as a  
16 professional working geologist?

17 A. That means that there has been some kind of a  
18 activity or some kind of an interest or disturbance  
19 that has been noted on a topographic map when they  
20 were producing the map.

21 Q. Turning to page 34 of U. S. Government  
22 Memorial Exhibit 118 that Ms. Menaker referred to, can

17: 48: 09 1 you refer to that, Mr. Purvance? Do you have that?

2 A. I'm not sure.

3 Q. Let me hand you page 34 of Government  
4 Exhibit 118.

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5           And there is a description of the Cargo  
6 Michacho mining district. Does that indicate to you  
7 as a professional geologist that the stone face  
8 prospect is the site of a mine?

9           A. No, not at all. The Cargo Michacho  
10 Mountains--the mine they're referring to in this  
11 document is the American Girl Mine. I'm very familiar  
12 with it.

13          Q. Is that the American Girl Mine where you  
14 worked?

15          A. Yes, it is.

16          Q. And roughly how many miles away is it from  
17 the stone face prospect.

18          A. It's approximately two miles by the crow  
19 flies to the American Girl Mine.

20          Q. Mr. Purvance, would you say that this  
21 exchange reflects an example of the problem of  
22 Government counsel making factual assertions based on

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17:49:11 1 documents in the record without a supporting expert  
2 witness to interpret them?

3           MS. MENAKER: Objection.

4           PRESIDENT YOUNG: We'll take the objection  
5 under advisement, but you go ahead and answer.

6           THE WITNESS: Yes, definitely. The  
7 Government has looked at the map, saw the--basically  
8 the symbol for a mine, and automatically assumed there  
9 was a mine there. I have taken photographs. I  
10 visited the site several times, and I can swear there

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11 is no mining operation at that site.

12 BY MR. McCRUM

13 Q. And, Mr. Purvance, even after you submitted  
14 your first declaration in this case stating that there  
15 had been no mining there, the Government continued to  
16 make that assertion in this proceeding; isn't that  
17 correct?

18 A. Yes, it is.

19 Q. Thank you.

20 PRESIDENT YOUNG: Any further questions for  
21 this witness?

22 MS. MENAKER: No, thank you.

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17: 50: 16 1 PRESIDENT YOUNG: Thank you.

2 Mr. Purvance, we will excuse you with the  
3 Tribunal's thanks.

4 THE WITNESS: Thank you.

5 (Witness steps down.)

6 PRESIDENT YOUNG: We are close to the 6:00  
7 hour, and if everybody will cede two-and-a-half  
8 minutes each of their time, we will rise now rather  
9 than waiting, requiring you to call your next witness.  
10 The next witness called tomorrow will be...

11 MR. McCRUM That will be Dr. Sebastian first  
12 in the morning.

13 PRESIDENT YOUNG: We'll start with  
14 Dr. Sebastian in the morning, then.

15 MR. GOURLEY: And most of that will be  
16 confidential.

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17           PRESIDENT YOUNG: So, most of the--certainly  
18 the first witness, but I think the next three  
19 witnesses, as I recall, will largely be confidential.

20           MR. GOURLEY: That's what I believe.

21           PRESIDENT YOUNG: Well, the next two.

22 Dr. Sebastian and Mr. --

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17: 51: 05 1           MR. GOURLEY: Mr. Kal denberg.

2           PRESIDENT YOUNG: Mr. Kal denberg.

3           MR. GOURLEY: Dr. Cleland is at the end.

4           PRESIDENT YOUNG: Okay. So, we will start  
5 tomorrow without video for the public hearing.

6           Do you have any idea about how long those two  
7 witnesses may go?

8           MR. McCRUM: I they it would take most of the  
9 morning.

10          PRESIDENT YOUNG: Most of the morning. So,  
11 it is likely we will not have the public hearing  
12 available through most of tomorrow morning, so in all  
13 likelihood start again with the public part of the  
14 hearing in the afternoon? Okay?

15          MR. McCRUM: Yes.

16          PRESIDENT YOUNG: Thank you very much. We  
17 will see you in the morning. Thank you very much.

18          I'm sorry.

19          MS. MENAKER: May I ask the Tribunal a  
20 procedural question. Can we get from the Secretary of  
21 the Tribunal the time so we can keep track of how much  
22 time each party has used perhaps at the end of the

17: 51: 50 1 day?

2           PRESIDENT YOUNG: We should be able to do  
3 that. We could do it either at the breaks or the end  
4 of each day if that would be all right.

5           MS. MENAKER: Thank you.

6           PRESIDENT YOUNG: Thank you. We will make  
7 that available. In fact, we have it right now. Why  
8 don't you give it to them off-line.

9           Thank you very much.

10           (Whereupon, at 5:52 p.m., the hearing was  
11 adjourned until 9:00 a.m. the following day.)

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

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

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DAVID A. KASDAN