

NAFTA/UNCITRAL ARBITRATION RULES PROCEEDING

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 In the Matter of Arbitration :
 Between: :
 GLAMIS GOLD, LTD. , :
 Clai mant, :
 and :
 UNITED STATES OF AMERICA, :
 Respondent. :
 ----- x Volume 4

HEARING ON THE MERITS

Wednesday, August 15, 2007

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

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

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

Also Present:

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

0815 Day 4 Final
Assistant to the Tribunal

Court Reporter:

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1 P R O C E E D I N G S

2 PRESIDENT YOUNG: Good morning. We are ready
3 to commence the hearing again.

4 Today is, at least with respect to the
5 morning session, not being simulcast in the adjoining
6 room to the public, and just to remind the parties of
7 that, and that what we're discussing today, at least
8 with respect to the cultural artifacts, is
9 confidential.

10 Also, we will take our break 15 minutes early
11 today, at 10:15 or earlier, if at the end of the
12 day--end of the questioning we have--we are not yet at
13 the 10:15 hour, whenever the two parties are done
14 questioning this witness, which I understand to be the
15 last witness, we'll be done; is that correct?

16 MR. GOURLEY: That's correct.

17 PRESIDENT YOUNG: Okay, thank you.

18 Mr. Gourley, you're calling your witness,
19 which I presume, Ms. Menaker, you will want to ask a
20 few questions, too, first? Thank you.

21 MS. MENAKER: Yes.

22 MR. GOURLEY: We are calling Dr. Cleland.

2 PRESIDENT YOUNG: Good morning, Dr. Cleland.

3 THE WITNESS: Good morning.

4 PRESIDENT YOUNG: We have been asking our
5 witnesses to take an oath that I think is in front of
6 you, if you would be kind enough to read that.

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

10 PRESIDENT YOUNG: Could you pull that
11 microphone a bit closer and see if that--

12 MR. GOURLEY: It's essentially not on. The
13 green light's not on.

14 THE WITNESS: The green light--the green
15 light's on now. Okay.

16 PRESIDENT YOUNG: Thank you.
17 If you would read that again, please.

18 Thank you.

19 THE WITNESS: I solemnly declare upon my
20 honor and conscience that I shall speak the truth, the
21 whole truth, and nothing but the truth.

22 PRESIDENT YOUNG: Thank you very much.

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09: 06: 23 1 Mr. Gourley?

2 MR. GOURLEY: I cede to Ms. Menaker.

3 MS. MENAKER: Thank you.

4 DIRECT EXAMINATION

5 BY MS. MENAKER:

6 Q. Good morning, Dr. Cleland.

7 A. Good morning.

8 Q. Can you please state your name, your full
9 name for the record.

10 A. James Harris Cleland.

11 Q. And could you briefly describe your
12 educational background for the Tribunal.

13 A. Yes. I have a B.A. in anthropology from the
14 University of Michigan, and M.A. and Ph.D. in
15 anthropology from the University of Virginia.

16 Q. And can you briefly describe your
17 professional qualifications.

18 A. Yes. I currently serve as Principal
19 Archaeologist for the firm of Vida, Incorporated. I
20 have approximately 30 years of archeological
21 experience. I have worked on many projects that
22 involve Section 106 and National Environmental Policy

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09:07:10 1 Act compliance.

2 Q. And as a factual witness in this proceeding,
3 are you being compensated by the United States for the
4 time you're spending testifying or for the time that
5 you have spent preparing your witness statements or
6 reviewing the work that you had previously done on the
7 Imperial Project surveys?

8 A. No.

9 Q. And can you please describe for the Tribunal
10 how you became involved in Glamis's Imperial Project.

11 A. Well, in the--I believe it was in the spring
12 of 1997, my firm that I was with at that point, KEA
13 Environmental, was connected by EMA Associates, and we

14 were asked if we would be interested in preparing a
15 proposal on the Project, and we said, yes, we would.
16 We did, and we were selected.

17 Q. So, you were selected to perform the cultural
18 resource survey in 1997; is that correct?

19 A. Yes, that is correct.

20 Q. And did you--did you or your firm perform any
21 additional survey work in relation to the Imperial
22 Project?

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09:08:20 1 A. Well, after we had finished the cultural
2 resource report in late 1997, in the spring of 1998,
3 we were asked to do some additional survey involving
4 potential trail routes in the area of the mine in
5 process.

6 Q. And is that the 1998 trails reconnaissance
7 study that you're referring to?

8 A. Yes, it is.

9 Q. And what did--in your survey work, what did
10 you conclude about the Imperial Project's potential
11 impact on historic and cultural properties?

12 A. We identified a Historic District that was
13 referred to as the Running Man/Indian Pass area of
14 traditional cultural concern. It consisted of
15 numerous cultural properties. We evaluated that
16 district as eligible for the National Register both
17 for its archeological informational potential, but
18 also, and more importantly, really for the Native
19 American traditional values that are represented at

20 that site.

21 And we also identified potential impacts to
22 the Trail of Dreams, which is another cultural

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09:09:45 1 property, and those were, I guess, two of the key
2 findings.

3 Q. Thank you.

4 PRESIDENT YOUNG: Mr. Gourley, your witness.

5 MR. GOURLEY: Thank you, Mr. President.

6 CROSS-EXAMINATION

7 BY MR. GOURLEY:

8 Q. Good morning, Dr. Cleland. I'm Alan Gourley,
9 representing the Glamis Gold, Limited, company in this
10 arbitration.

11 Let's start by looking at your supplemental
12 declaration, the second declaration that you provided
13 to the United States in March of 2007.

14 You have got a witness binder there.
15 Hopefully those pages have not fallen out, although
16 they look like they might have. At the back is--you
17 will find your second declaration.

18 A. The final exhibit?

19 Q. Yeah, with a bunch of--

20 A. Supplemental declaration?

21 Q. With your indulgence.

22 (Pause.)

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09:11:11 1 Q. If you'd take a look at Exhibits A, B, and C
2 to that declaration--

3 A. Yes.

4 Q. --and identify each of those for the record,
5 please.

6 A. Well, Exhibit A appears to be a figure out of
7 our report, a trail map by Malcolm Rogers, date
8 unknown.

9 Q. Okay.

10 A. And it was based on work that Lori Pendleton
11 had done some years previous to that.

12 Q. Does anything in this map identify the Xam
13 Kwatcan Trail or any connection between the trails
14 that are depicted here in the Xam Kwatcan Trail
15 network?

16 A. The question is, does the map identify
17 anything about the Xam Kwatcan Trail?

18 Q. Correct.

19 A. The map does not reference the Xam Kwatcan
20 Trail, no.

21 Q. If you take a look at Exhibit B, can you
22 recall what that map--where it came from and what it

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09:12:17 1 depicts.

2 A. Well, this map is from a publication,
3 "Hohokam and Patayan," and it's an appendix to that
4 publication by Michael Waters, and it's a reproduction
5 of a map that Malcolm Rogers originally put together

6 at the Museum of Man in San Diego.

7 Q. And did anything about this map or the book
8 it was contained in associate the trails that are
9 depicted here with the Xam Kwatcan Trail network?

10 A. I don't believe it uses those terms, but I
11 believe that some of the trails here might be part of
12 that network.

13 Q. And if you would look at Exhibit C, do you
14 recall the origin of this map?

15 A. It's another map that was reproduced in our
16 report for the Project, and it's based on a map we had
17 received from - or information we had received from the
18 Imperial Valley College Museum.

19 Q. And anything on this map or the materials
20 that you used to prepare this map or your group used
21 to prepare this map, identify these trails as
22 belonging to the Xam Kwatcan Trail network?

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09:13:45 1 A. I don't recall whether any of the
2 information - it's possible that some of the site forms
3 that were used in the compilation of this may have
4 referenced that term. I don't really know.

5 Q. Okay. You don't remember?

6 A. I don't remember.

7 Q. And when you went to the Imperial Project for
8 the first time, did you have any awareness of any of
9 the trails there belonging to the Xam Kwatcan Trail
10 network?

11 A. Any of the specific trails in the Project

12 area before I started the Project?

13 Q. That's correct.

14 A. Well, I was aware of the Xam Kwatcan Trail
15 and that it was in that general area, but I had no
16 direct knowledge about the trails in that area prior
17 to my starting that work.

18 Q. Now, if you look back at your supplemental
19 declaration, paragraphs five through seven, if you
20 would like to take a moment and read those to yourself
21 to refresh your--the supplemental declaration which
22 was right before Exhibit A there. You have put a lot

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09:14:55 1 of material into the record. I apologize.

2 A. And which paragraphs do you want me to
3 look at?

4 Q. Five through seven.

5 (Witness reviews document.)

6 A. Yes.

7 Q. Now, is there anything in those three
8 paragraphs of your supplemental declaration,
9 Dr. Cleland, that references the Xam Kwatcan Trail or
10 any connection between the Xam Kwatcan Trail network
11 and the three maps that were Exhibits A, B, and C of
12 your declaration?

13 A. Well, the declaration doesn't reference the
14 Xam Kwatcan Trail.

15 Q. All right. Now, let's take a look at
16 Exhibit 4, what we will call Cleland Exhibit 4, which
17 is, sadly, at the beginning of the book.

18 A. Tab 4?
19 Q. Yeah, please.
20 Are you familiar with a 1986 Woods study
21 entitled: "Archaeology of Creation"?
22 A. Yes, I am.

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09:16:26 1 Q. In fact, it was among the background
2 materials you relied on in doing your work at the
3 Imperial Project, wasn't it?
4 A. I believe so.
5 Q. Now, if you would take a look at map three,
6 which is the next page in this exhibit--
7 A. Map three?
8 Q. You've gone one too many.
9 A. Okay.
10 Q. Do you see that map?
11 A. Yes, I do.
12 Q. And this is Dr. Woods's depiction of
13 myth-related locales in that study?
14 A. Yes, that's correct.
15 Q. And do you see the trail that is--runs from
16 Pilot Knob upwards towards Blythe and Avikwaame and is
17 marked as seven?
18 A. Yes, I see that.
19 Q. And do you know whether that is
20 the--Dr. Woods's depiction of a route of the Xam
21 Kwatcan Trail?
22 A. Yes, and I think my declaration clarifies

09:17:32 1 that Dr. Woods and his colleagues were examining the
2 very southern end of that. I don't believe they were
3 trying to map in detail all the locations of the Xam
4 Kwatcan Trail further north.

5 Q. Let's go to Exhibit 1 of this.

6 Now, you have stated, have you not,
7 Dr. Cleland, that nothing in the three paragraphs of
8 your declaration or the three maps that are associated
9 with it identified the trail segments at the Imperial
10 project with the Xam Kwatcan Trail network; is that
11 correct?

12 A. Would you repeat that question again.

13 Q. You have identified, have you not,
14 Dr. Cleland, that nothing in the three paragraphs of
15 your declaration, five through seven, and nothing in
16 the three Exhibits A through C, the maps, identify the
17 trail segments depicted on those maps as associated
18 with the Xam Kwatcan Trail; is that correct?

19 A. Yeah, I don't have any information that any
20 of those sources specifically reference that term.

21 Q. So, for the United States here to suggest
22 that Glamis had erroneously characterized the Woods

09:18:51 1 map as the only existing map of the Xam Kwatcan Trail
2 at the time it made its initial investment in the
3 Imperial Project is an exaggeration of your

4 supplemental declaration, which is cited as a
5 reference for that point; isn't that correct?

6 A. Well, I don't really understand. I mean,
7 you've given me one sentence possibly taken out of
8 context, so that I haven't reviewed all of the
9 Government's filings, so I'm not quite sure what
10 you're trying to get from me here.

11 Q. I'm just trying to get from you as to whether
12 your declaration--and we can broaden it--to whether
13 the testimony you gave the Government supports the
14 assertion made by the Government that Glamis had
15 erroneously characterized the Woods map as the only
16 existing map of the Xam Kwatcan Trail at the time of
17 its initial investment.

18 Have you ever made such testimony in this
19 case?

20 A. I really don't know whether Glamis
21 characterized it as the only map, and I really don't
22 know what the Government's response to that was. It's

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09:20:03 1 not something that I have any direct knowledge of.

2 Q. Thank you, Dr. Cleland.

3 Who is Boma Johnson?

4 A. Boma Johnson is an archaeologist who has
5 studied the trail system and other archeological sites
6 in Imperial County and eastern California deserts for
7 a number of years.

8 Q. In fact, you've referred to them as generally
9 regarded as an authority on the Xam Kwatcan Trail

10 network in the southwestern archeological community;
11 is that correct?

12 A. I think that's fair to say, yes.

13 Q. And if you turn behind you, that map that's
14 on the big board, is that a map that you obtained from
15 Boma Johnson of the Xam Kwatcan Trail network?

16 A. Yes, it is.

17 Q. Okay. If we could have Exhibit 2--thank you.

18 We can try to do it on the big one. You
19 might have to stand up and point it here. What I'm
20 trying to do is inform the Tribunal, if you look at
21 the map, and there's a--the one on your far right,
22 which is well east of the Colorado River.

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09:21:24 1 A. Yes, there is one there to the east of the
2 river.

3 Q. And is that part of the Xam Kwatcan Trail
4 network?

5 A. I think Boma Johnson believes it is.

6 Q. Okay. Do you believe it is?

7 A. I don't have any basis for judging that. I
8 have never looked at that part of the trail.

9 Q. All right. If you look at the part where
10 below Blythe it splits into two segments, the eastern
11 one, the western one, on the west side of the river.

12 A. Yes.

13 Q. And you see one segment where the word Xam is
14 that's running along the river?

15 A. Yes.

16 Q. And one segment which is further west; is
17 that correct?

18 A. Yes.

19 Q. And the one that runs along the river, was
20 there a name for that segment?

21 A. Well, there is no name on the Boma Johnson
22 map.

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09:22:18 1 Q. But in the literature, is there a name?

2 A. My knowledge of the name of that is based on
3 information that was provided by the Quechan during
4 our consultation process on the Imperial Mine Project,
5 and the Quechan referred to that trail as the Medicine
6 Trail.

7 Q. Okay. Now, the western branch, is the
8 western branch the Trail of Dreams?

9 A. The Quechan had a map that showed the western
10 branch of--they didn't show all the detail that's on
11 the Boma Johnson map. They showed two major trails
12 that they had concerns about, one being the Trail of
13 Dreams and the other one being the Medicine Trail, and
14 the Medicine Trail was the one further east along the
15 river corridor, and the western trail was the one they
16 called the Trail of Dreams.

17 Q. Now, the Xam Kwatcan map and the Xam
18 Kwatcan--well, let's strike that.

19 The Xam Kwatcan Trail network, what is its
20 significance in the Quechan native culture?

21 A. Well, the Quechan--the Quechan Creation story

22 includes reference to the creation mountain, which is

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09: 23: 52 1 at the Avikwaame at the north, and they believe the
2 various tribes of Yuman-speaking groups of the
3 Colorado River were all created there and then
4 descended the mountain and went to the various places
5 that became their traditional territories. And that
6 the Quechan themselves followed a series of trails
7 which are referred to in the literature as the Xam
8 Kwatcan Trail, and they subsequently, after they
9 became--came to their current territory, they used the
10 trails both for physical pilgrimage back to the
11 creation and also for spiritual journeys along the
12 trails where they could go back through history and
13 learn from their history to help address the problems
14 that they face in their daily lives.

15 Q. Thank you.

16 Now, if you look at the Boma Johnson map and
17 you follow that western branch down and it starts to
18 break up into multiple trails; is that correct?

19 A. Yes, that's correct.

20 Q. And If you take the furthest west one that
21 still heads down towards Pilot Knob at the base--

22 A. Yes.

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09: 25: 14 1 Q. --is that where these trails are headed, the

2 idea being to go from Avikwaame to Pilot Knob?

3 A. Yes, that's correct.

4 Q. Now, that furthest west one that loops and
5 then curls down back towards--I was going to try to
6 point--

7 PRESIDENT YOUNG: We actually have a
8 hand-held microphone if you're willing to hold that
9 while you do this. Thank you so much.

10 THE WITNESS: Okay.

11 BY MR. GOURLEY:

12 Q. So, if you follow the western branch down and
13 as it curls towards Pilot Knob--

14 A. Well, I mean, it branches in--there is at
15 least three different routes that could go down to
16 Pilot Knob.

17 And I must say that the map that the Quechan
18 had was not at the scale that I could tell for sure
19 which one of those they had indicated, based on their
20 map, was the Trail of Dreams.

21 Q. But of that western branch of the Xam Kwatcan
22 that comes down to Pilot Knob--

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09:26:50 1 A. Well, Pilot Knob there--at this point at
2 Pilot Knob there is two routes or possibly three, but
3 one goes west of the Cargo Muchacho, and the other one
4 goes east of the Cargo Muchacho Mountains.

5 Q. And the one that goes west of the Cargo
6 Muchacho Mountains, is that roughly consistent with
7 the Woods depiction in map three of the 1986 Woods

8 study?

9 A. I don't know. I would have to look at the
10 Woods map.

11 Q. Could we bring up Exhibit 4, map three,
12 please.

13 A. Am I supposed to look at this?

14 Q. You can look at the big screen, if you like.

15 A. Okay.

16 Well, it looks like Woods has mapped it to
17 the west of the Cargo Muchacho Mountains.

18 Q. So, it's at least consistent up through
19 there?

20 A. I mean, it's somewhat consistent, yes.

21 Q. Thank you.

22 A. Are we done with this for now?

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09:28:11 1 Q. For the moment, yes. Thank you.

2 A. Okay.

3 Q. Now, looking still at map three, the Woods
4 depiction of at least one segment of the Xam Kwatcan,
5 you notice that on this--

6 A. Could you refer me back to the--

7 Q. Oh, I'm sorry. It's Exhibit 4, the second
8 page of Exhibit 4.

9 Now, do you see the various sites that he has
10 marked as myth-related locales, the numbered items?

11 A. Yes.

12 Q. And if you looked at number nine, you can
13 look at next page, that's identified as Picacho Peak?

- 14 A. Okay. It looks approximately correct.
- 15 Q. And did you understand that to be a sacred
- 16 site to the Quechan Native Americans?
- 17 A. Yes, I do.
- 18 Q. Now, do you see on this map--can you tell on
- 19 this map approximately where the Imperial Project was?
- 20 A. I honestly can't for sure.
- 21 Q. Well, let's--
- 22 A. But I would--I mean, it's northwest of

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09:29:45 1 Picacho Mine.

- 2 Q. We have a visual aid for you, Dr. Cleland.
- 3 A. Thank you. I thought you might.
- 4 Q. Let's go to Exhibit 5, where we have taken
- 5 that, Dr. Woods's depiction of the trail and marked on
- 6 that the various projects that exist in the area. If
- 7 you blow up--do you see the Imperial Project?
- 8 A. Yeah.
- 9 Q. And it's significantly east of the Woods
- 10 depiction, that far western branch of the Xam Kwatcan
- 11 Trail, is it not?
- 12 A. Yeah, it's east of where Clyde mapped it,
- 13 yes.
- 14 Q. All right. Were you involved in the North
- 15 Baja Pipeline project?
- 16 A. Yes, I was.
- 17 Q. And that project undertook a number of
- 18 studies of the various cultural areas and
- 19 archeological artifacts through which that project

20 would pass; is that correct?

21 A. Yes, we did cultural resource studies of the
22 North Baja route.

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09:31:01 1 Q. And among those was--were ethnographic
2 contributions from Dr. Woods?

3 A. That's correct.

4 Q. And Boma Johnson was involved in that
5 project, was he not?

6 A. Yes, he was.

7 Q. And you wrote up a historic properties
8 treatment plan for that project; is that correct?

9 A. That is correct, yes.

10 Q. And you also prepared a document called, "A
11 View Across the Cultural Landscape of the Lower
12 Colorado Desert," which was the overall Cultural
13 Resource Study; is that correct?

14 A. Yes, I was one of the authors.

15 Q. Along with Rebecca Apple?

16 A. Yes, correct.

17 Q. Who worked in your firm?

18 A. That's correct.

19 Q. In the same firm that you do?

20 A. Yes.

21 Q. Now, when you undertook that project, were
22 you aware that the pipeline would be passing through

901

09: 31: 56 1 areas where the Xam Kwatcan Trail network also was
2 passing?

3 A. Yeah. I knew that it would be in an area
4 that would contain trails that may be part of the
5 network, yes.

6 Q. And, in fact, you concluded in your report
7 that many of the north-south trail segments that you
8 did find and record as part of that analysis were
9 probably associated with the Xam Kwatcan Trail
10 network; isn't that right?

11 A. I'm not sure which report you're referring
12 to.

13 Q. The 2003 Cultural Resource Study.

14 A. "The View Across the Cultural Landscape"?

15 Q. Correct.

16 A. Actually, I don't remember drawing that
17 specific conclusion. Could you--I don't remember
18 concluding that any of the trail segments that we
19 specifically studied were part of the--clearly part of
20 the Xam Kwatcan Trail, that we may have made that
21 conclusion. I guess I'd have to--I'd like to be
22 pointed to the specific place where we made that

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09: 33: 02 1 conclusion, if we did, indeed, do that.

2 Q. I will hand you a copy to see if that
3 refreshes your recollection.

4 A. Okay.

5 MS. MENAKER: Is this in the witness binders?

6 MR. GOURLEY: No, it's not.
7 THE WITNESS: Okay. This is in the cultural
8 context, discussing the various major trail systems.
9 BY MR. GOURLEY:
10 Q. I'm just asking you whether looking at that
11 refreshes your recollection, Dr. Cleland.
12 A. Okay. Well, there is a statement here that
13 says, "Many of the north-south trails recorded as part
14 of the pipeline project are probably associated with
15 the Xam Kwatcan trail network."
16 Q. Does that refresh your recollection on that
17 point?
18 A. Yes.
19 Q. Thank you.
20 Now, during that process of doing the
21 cultural resource survey and the ethnographic studies,
22 were you involved with--did you engage in

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09:34:14 1 consultations with the various Native American groups
2 that were--that would be affected by the route of the
3 North Baja Pipeline?
4 A. Yes, we did consult with the Native
5 Americans.
6 Q. And, in fact, didn't those groups indicate to
7 you that the entire project area was part of what they
8 considered their cultural landscape and should be
9 analyzed as the whole, not in individual parts?
10 A. Yes, they expressed a concern for their--all
11 the sites within their traditional tribal territory

12 and that they're all interconnected in some way.

13 Q. And that's the same--that's consistent with
14 what the Quechan Native American Tribe told you during
15 your survey of the Imperial Project Site; isn't that
16 correct?

17 A. Yes, they have said that on numerous
18 projects. They've also provided additional
19 information that's relevant to both projects, too.

20 Q. Now, as part of the North Baja Pipeline
21 project, didn't you nominate some trail segments and
22 other identified features for registry on the National

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09:35:34 1 Historic Register?

2 A. We prepared a nomination form for one trail.

3 Q. Was that Trail 398?

4 A. That was Imperial 398, yes.

5 Q. And, in fact, it was one of the mitigation
6 measures for the project to make that nomination;
7 isn't that correct?

8 A. Yes, that's correct.

9 Q. And part of the reason for that mitigation
10 project--mitigation was that the trail would
11 bisect--the pipeline would bisect that trail; is that
12 correct?

13 A. Well, at 398, the pipeline was totally in
14 previous disturbed area.

15 Q. And in the--meaning that the segment--it
16 didn't actually affect a current part of the segment?

17 A. Right. There was no extant part of the trail

18 where the--within the pipeline corridor.

19 Q. But there were--sorry.

20 There were extant segments on either side of

21 that; is that correct?

22 A. I believe it was on either side. I'd have to

905

09:36:36 1 look at the site form for sure, but I believe it was.

2 Q. Now, that trail occurred at approximately
3 Mile Post 50--between Mile Post 50 and Mile Post 51;
4 is that correct? Do you recall that?

5 A. No, I don't think so. 396 I believe is
6 between Mile Post 50 and 51. I believe that 398 is
7 some distance; I would have to look at some maps to be
8 sure, but that's my recollection.

9 Q. But 396 and 398 intersects it; isn't that
10 correct?

11 A. I'm not sure that they do, no.

12 Q. Not in the Project area, but outside.

13 A. I don't have a recollection about whether
14 they intersect.

15 Q. But 396 was also an important trail segment
16 that you located and identified as part of the
17 cultural resource survey; isn't that correct?

18 A. Yes, it was one of the more--it was one of
19 the trails that we identified, yes.

20 And it was considered significant, and we did
21 mitigation on that trail.

22 Q. But on that trail you obliterated--the

09: 37: 44 1 pipeline obliterated 50 meters of the trail; isn't
2 that correct?

3 A. Yes, the pipeline did destroy 50 meters at a
4 place that had been previously disturbed. We were
5 following a corridor.

6 Q. Are you sure about that, Dr. Cleland?

7 A. I'm pretty sure, yes.

8 Q. Would it surprise you to know that your
9 report says that the site was disturbed outside the
10 Project area by a transmission line, but not within
11 the Project area?

12 A. That's what I'm saying. The site had been
13 previously disturbed outside the Project area, but we
14 did disturb--we did disturb parts of the trail in the
15 Project, yes.

16 Q. And among--some of the things that made these
17 trail segments most significant was that they had
18 various artifacts, cultural material associated with
19 them; isn't that correct?

20 A. Yeah, but there was a huge difference between
21 398 and 396 in terms of the amount of associated
22 material. 398 had many, many associated features,

09: 38: 48 1 whereas-- 398 had very many associated features,
2 whereas 396 had very few. No--in the areas that we
3 studied, no features that appeared to have ceremonial

4 significance.

5 Q. And some of those ceremonial features were
6 things like cairns, rock alignments, prayer circles?

7 A. Those kinds of things on 398, yes.

8 Q. Including spirit breaks?

9 A. I don't recall if there were spirit breaks
10 on 398.

11 Q. With your indulgence.

12 (Pause.)

13 Q. If we looked at Exhibit 10, please, and you
14 see this trail that runs right up to the Baja pipeline
15 and stops?

16 A. Well, I see the photo, and it looks like it
17 could be a trail. I wouldn't dispute that it's a
18 trail, but I couldn't verify for sure that it's a
19 trail based on the photograph alone.

20 Q. And how would you go about verifying it?

21 A. I would inspect it on the ground.

22 Q. Because you're looking to see that, in fact,

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09:40:36 1 it reached the subsurface strata and that the rocks
2 had been moved in prehistorically, not currently.

3 A. Trail identification is difficult on the
4 desert. There's game trails, there's trails created
5 by off-road vehicles that are sometimes mistaken for
6 prehistoric trails. I don't dispute that this is
7 possibly 396. I don't know.

8 Q. Now, another part of the pipeline a little
9 further up around Mile Post 28 involved the Palo Verde

10 Point and Palo Verde Peak; is that right?

11 A. Yes, that's correct.

12 Q. And there were--that was, in fact, one of the
13 most significant cultural areas that the pipeline came
14 to; is that right?

15 A. Yes.

16 Q. Now, in fact, based on Mr. Johnson's, Boma
17 Johnson's map, that Palo Verde Hills area is where the
18 two segments of the Xam Kwatcan Trail come together?

19 A. Yeah, this map has them coming together a bit
20 just to the north of Palo Verde Point.

21 Q. And Palo Verde Point is on the north or the
22 south of the Palo Verde Hills?

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09: 42: 23 1 A. My understanding, Palo Verde Point is the
2 projection of Palo Verde Hills under the Colorado
3 River flood plain.

4 Q. So, on the south end?

5 A. The Palo Verde Point would be south of where
6 those--Boma depicts those trails coming together, yes.

7 Q. So, in essence, they're going around either
8 side of Palo Verde Point; is that right?

9 A. Well, the way it's depicted on the map, I
10 guess you could say that.

11 Q. Do you recall seeing significant--did you
12 walk that area of the trail--

13 A. I walked part of that area with Boma
14 actually. I know exactly where the trail that he
15 considers part of the Xam Kwatcan is on the ground, at

16 least he showed it to me.

17 Q. And did you recall seeing other significant
18 trail segments in that area?

19 A. Yes. There's other trails in that area that
20 are significant, yes.

21 Q. Now, we have another picture, if you would
22 look to the third picture in this group which was

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09:43:41 1 taken near that area.

2 Does that look familiar to you?

3 A. Yes, it does.

4 Q. Do you recall what part of the trail system
5 that was?

6 A. Well, let's see. I think I'm looking at--I'm
7 looking at a different picture, actually. Which one
8 are we looking at?

9 Q. It's the third one.

10 A. The third one, okay.

11 I'm sorry, I would like to amend my previous
12 comments.

13 I'm not sure which trail I'm looking at here,
14 but actually it looks familiar enough to say it's
15 probably one of the trails that Boma thinks is part of
16 the Xam Kwatcan Trail, yes.

17 Q. Now, going back to the picture you were
18 looking at that you said was familiar to you, the one
19 right before this in your book--

20 A. Yes.

21 Q. --do you recall what--this picture is--we

22 have heard testimony--you weren't--unfortunately

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09:44:49 1 weren't able to be here with the rest of us since
2 Sunday, but we heard testimony that this picture was
3 taken standing on the Baja Pipeline looking to the
4 Palo Verde Hills.

5 Do you recognize that trail in the background
6 or that item in the background?

7 A. Yes, I do.

8 Q. Can you tell the Tribunal what that is.

9 A. That's what Boma Johnson refers to as a
10 summit path. It's a trail that has been cut straight
11 up a fairly steep hill. At the top of the hill, there
12 is a major cairn. The trail bifurcates and goes
13 around and creates a complete circle of the cairn.

14 And then from there, there is a very short
15 trail that marks a spot where you can view Palo Verde
16 Peak quite well from

17 Q. And was that considered a very sacred spot
18 for the Native Americans?

19 A. Well, you know, I don't know what Boma might
20 base that judgment on. Based on the archeological
21 information alone, I would say that it probably was,
22 yes, but I'm not aware of any specific ethnographic

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09:46:02 1 references to that site.

2 Q. So, you're not aware of the ethnographic
3 references that would tie that to the Xam Kwatcan
4 Trail as a resting spot or one of the big houses?

5 A. The--Boma's--from my recollection of what
6 Boma has told me, he thinks the big house, the resting
7 house, was on Palo Verde Peak, not at this particular
8 location, but I could be wrong about that.

9 We are talking about a location, by the way,
10 that's quite some distance from the pipeline route.

11 Q. However, it is--the pipeline runs between it
12 and the Xam Kwatcan Trail network, does it not?

13 A. Well, that's a little difficult because the
14 trail that Boma represents as being part of the Xam
15 Kwatcan Trail network terminates just prior to where
16 it comes to the pipeline route; and, to my knowledge,
17 I haven't seen anything on the other side of the
18 pipe--it goes down into the flood plain there,
19 according to what the Native Americans told me, and
20 that there is no extent parts of the trail left north
21 of there right between Blythe and through the valley
22 up in the Palo Verde Valley.

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09:47:31 1 Q. Right. There is no extant trails, but the
2 trail network, as believed by the Native Americans, is
3 that it runs from Pilot Knob to Avikwaame.

4 A. Yes, that's correct.

5 Q. But, in fact, along that 100-mile stretch,
6 there are numerous bisecting roads, power lines, and
7 other disturbed features, so that there are large

8 segments are no longer available to see; is that
9 correct?

10 A. That is correct, yes.

11 Q. Now, in your consultations with the Native
12 Americans during the cultural resource survey, in
13 fact, a number of the Native American tribes raised
14 concerns with the Baja Pipeline; isn't that correct?

15 A. Yes. They had concerns for sites along the
16 area, yes.

17 Q. And, in fact, the Mohave Tribe raised
18 concerns with both the physical and spiritual aspects
19 of their trail network being interrupted by the Baja
20 Pipeline; isn't that correct?

21 A. That could be. I haven't reviewed that
22 information recently.

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09: 48: 46 1 Q. Do you recall whether the Mohave Tribe felt
2 that severing the trails with mechanical equipment
3 would have an adverse effect on the spiritual and
4 geographical continuity of these important cultural
5 resources?

6 A. That sounds like something they might have
7 said.

8 Q. Now, do you recall that, in fact, the Mohave
9 Tribe specifically requested boring under trail
10 segments rather than plowing through them with the
11 pipeline?

12 A. Yes, we did consider the potential
13 possibility of boring under trails. We consulted with

14 the pipeline company about that, and we've actually
15 witnessed bore pits that are necessary to bore under
16 trails, and you need a really rather large pit on
17 either side of the trail, and we felt the
18 environmental degradation that would result from
19 boring would be--would override any benefit of
20 cutting--of not cutting through the trail.
21 So, we opted instead to avoid trails wherever
22 possible.

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09:50:03 1 Q. But, in fact, you couldn't avoid all the
2 trails?

3 A. That's true, we could not avoid all the trail
4 segments.

5 Q. And the mitigation that was adopted when you
6 could not avoid trail segments was to record and map
7 where those trail segments were and the features along
8 them; isn't that right?

9 A. That was part of the mitigation, yes.

10 Q. And that was, in fact, done, was it not?

11 A. Yes, that's true.

12 Q. And isn't it also true that the Quechan
13 expressed objection to the Baja Pipeline in terms of
14 the impact on their cultural landscape?

15 A. They expressed concerns about impacts to the
16 cultural resources that are part of the entire
17 landscape that they're concerned about.

18 Q. Including to the continuity of the Xam
19 Kwatcan Trail; isn't that correct?

20 A. That's possible. I'm not real--I haven't
21 reviewed all the background information on the North
22 Baja Pipeline in the last couple of years, so I'm not

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09:51:10 1 sure exactly what they said with regards to the Xam
2 Kwatcan. I recollect rather clearly that they had
3 concerns for trails.

4 Q. And didn't they also express the concern that
5 they would rather have the Baja Pipeline located
6 elsewhere?

7 A. Yes, they did.

8 Q. Now, are you aware that there, in June of
9 2007, a final EIS/EIR was published recommending as
10 the preferred alternative a second parallel pipeline?

11 A. Did you say a draft environmental impact--

12 Q. A final.

13 A. A final? No, I'm not specifically aware of
14 that. I haven't reviewed that document.

15 Q. Have you been involved at all with cultural
16 resource surveying for that second parallel project?

17 A. Yes, we've conducted cultural resource survey
18 for that project. We did not prepare the
19 Environmental Impact Statement, however.

20 Q. And does it have the same--that would add
21 another--strike that.

22 The original pipeline cuts a swathe of at

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09: 52: 22 1 least 40 feet across, something like that; is that
2 right?
3 A. The original pipeline?
4 Q. Yes.
5 A. I believe it's wider in some areas than that.
6 Q. And that was for a 30-inch pipe?
7 A. I don't remember the exact diameter of the
8 pipe, but 30 could be correct.
9 Q. Are you aware that the second pipe is likely
10 to be 48 inches in diameter?
11 A. Yes, I know the second pipe is proposed to be
12 bigger.
13 Q. And is the swathe it cuts bigger as well?
14 A. Well, the swathe it cuts is going to overlap
15 the previous swathe, so actually the amount of
16 additional disturbance is less generally than the
17 original project.
18 Q. But it still expands--
19 A. It does expand the impact area, yes.
20 Q. And one of the ways that you mitigated the
21 cultural resources that had been identified in the
22 Project area was location of the pipeline so that when

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09: 53: 32 1 it cut across a cultural resource site, it only
2 disturbed as few of the artifacts that had been found
3 as possible; isn't that right?
4 A. Yeah. There are several ways that you can
5 avoid in siting a pipeline and constructing a

6 pipeline. One is to bend the pipe. Another way is to
7 shrink the temporary work space to avoid impacts.

8 Q. And now that the pipeline expands, some of
9 those prior avoidances can no longer be avoided; isn't
10 that right?

11 A. Yeah, there are some places where there would
12 be additional impact to some sites.

13 Q. Dr. Cleland, what's a traditional cultural
14 property?

15 A. A traditional cultural property is a place
16 where traditional groups practice their traditional
17 culture.

18 Q. And isn't the under the National Register
19 Bulletin 38, "Guidelines for Evaluating and
20 Documenting Traditional Cultural Properties," isn't
21 the method for defining a cultural, traditional
22 cultural property through consultations with

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09: 54: 55 1 knowledgeable members of the community?

2 A. Yes, that's true.

3 Q. And that was done at the Imperial Project,
4 wasn't it?

5 A. Yes, it was.

6 Q. And during that process, the Quechan
7 repeatedly indicated that it was the entire area from
8 Pilot Knob to Avikwaame that was their traditional
9 cultural property; isn't that correct?

10 A. Well, I think you have to understand that the
11 Quechan don't use the term "traditional cultural

12 property." They expressed deep concerns for a
13 cultural landscape that extends from Pilot Knob to
14 Avikwaame.

15 But I might add, if I may, that they also
16 expressed concerns for specific places within that
17 landscape, so there's at least two levels of potential
18 impact, two levels of traditional cultural properties,
19 if you will, a regional level and a more specific
20 localized area.

21 Q. And where does the term "area of traditional
22 cultural concern" come from?

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09: 56: 09 1 A. To my knowledge, the only use of that
2 particular term was in the Imperial Mine Project.

3 Q. And did you make up that term?

4 A. I don't recall where, you know, the real
5 genesis, you know, who suggested that term.

6 The idea of the term is to--to get to that
7 local level of concern.

8 Q. But in drawing the boundaries around the
9 Imperial Project, you looked at the Running Man site
10 to the south of the Project area, and the Indian Pass
11 petroglyphs to the north of the project area, and
12 simply drew lines around that; isn't that right?

13 A. Well, we did a pretty extensive study,
14 actually. We did a record search to identify all the
15 known sites within that area. We made an attempt to
16 include all of the sites in that area, that localized
17 area, that had recorded ceremonial features because

18 that was the theme of the district that we were
19 looking at. And we, of course, did the intensive
20 survey of the mine and process area. We consulted
21 with Native Americans, and we did transect surveys
22 outside of the mining process there.

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09:57:33 1 So, we had really quite extensive information
2 for purposes of identifying the district.

3 Q. But the boundaries of the district for which
4 you were to do your survey were drawn before you did
5 the survey; is that right?

6 A. I don't think that is correct. What did you
7 just say?

8 Q. The boundaries in which you were to do your
9 survey were drawn before you actually did the survey;
10 isn't that correct?

11 A. The on-the-ground survey was predetermined
12 before we did our survey, and--but we were told we
13 needed to do a very broadbrush literature review of
14 sort of that entire region because of the Native
15 American concerns for the region. They wanted to see
16 something that was integrated that showed how all
17 their sites fit together into something bigger.

18 Q. Now, there's been a suggestion that the
19 motivation for drawing this circle around the Imperial
20 Project was to save Glami's money.

21 Now, when Ms. Menaker was questioning you,
22 you indicated that you made a proposal--your firm made

09: 59: 05 1 a proposal to undergo a project, this cultural survey,
2 at the Imperial Project; is that right?

3 A. Yes.

4 Q. And if you would--that proposal was in
5 response to a statement of work; is that right?

6 A. Well, you know, I really don't recall
7 specifically, but if you have a statement of work
8 here, I would be happy to review it.

9 Q. Funny you should mention that.

10 If you look at your initial declaration from
11 September of 2006, and you see paragraph--

12 A. Which exhibit is that?

13 Q. It's right after the numbered exhibits. You
14 will see Cleland--you have to pass those--

15 A. Okay. Counter-Memorial--

16 Q. There you go.

17 A. Okay.

18 Q. And you look at paragraph six of your
19 declaration, you see that it identifies Exhibit A as
20 your scope of work?

21 A. Yes.

22 Q. Is that testimony truthful?

10: 00: 24 1 A. Yes.

2 Q. Okay. So, if we look at Exhibit A, is that
3 document familiar to you?

4 A. It's Exhibit A.
5 Yeah, I guess I did review this as I prepared
6 my testimony.
7 Q. Okay. Now, we can pull this one up onto the
8 screen, if you look over to task D on the second page.
9 It's Exhibit 8.
10 You see task D there?
11 A. Yes.
12 Q. And you see where it says that part of that
13 task is features-- "Features associated with the trails
14 and trail segments shall be analyzed in context of the
15 trail system and the trails themselves to be placed
16 within the context of the existing trail system of
17 southeastern Imperial County, from Pilot Knob to
18 Blythe and East Mesa to Yuma."
19 A. Yes, I see that.
20 Q. Now, did you ever talk to any Glamis
21 representatives about saving them money by not
22 undertaking such an analysis of integrating these

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10:02:02 1 trail segments with the broader trail segments
2 throughout the region?

3 A. Well, I think we did. I mean, we tried to
4 respond to that item in the statement of work through
5 the compilation of the data on the previously recorded
6 trails in the region. So, that's how we read that.
7 So, we never talked to Glamis about saving
8 them money in that regard. We went ahead and did
9 that.

10 Q. And part of that was to analyze the
11 significance of those trails in the Project area with
12 the existing trail system in southeastern Imperial
13 County?

14 A. Could you repeat that?

15 Q. Isn't it true, Dr. Cleland, that part of this
16 requirement of task D was to analyze the trail
17 segments located within the Imperial Project system in
18 terms of the existing trail system of southeastern
19 Imperial County?

20 A. Yes, and I think we did that.

21 Q. And that--so, you weren't saving Glamis any
22 money by looking at this in terms of the trail systems

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10:03:19 1 of southeastern Imperial County?

2 A. Right.

3 If I may, my understanding of the issue with
4 expanding the scope beyond what was in the statement
5 of work had to do with whether we would to try to
6 study a traditional cultural property that expanded
7 and extended throughout not only Imperial County, but
8 Riverside County and actually into Nevada as well.

9 So, that was the question as to whether we
10 would try to apply the National Register Criteria in
11 Bulletin 38 to a regional traditional cultural
12 property of that magnitude.

13 Q. And Bulletin 38 requires you to consult with
14 the knowledgeable members of the community?

15 A. Yes, and we did that.

16 Q. It does not require a pedestrian survey of
17 the entire--

18 A. No, and I don't think anybody, even to
19 save--even in the discussions of saving Glami s money
20 that we were looking at a complete pedestrian survey
21 of that entire area, no.

22 Q. And who did you speak with at Glami s about

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10: 04: 30 1 saving them money in this regard?

2 A. Well, I don't recall speaking to Glami s about
3 that at all. I do recall a discussion following a
4 meeting we had with the California SHPO, and I believe
5 Glami s had a--I'm not sure that Glami s had a
6 representative at that meeting or not, but I believe
7 Dwight Carey was there from the EMA, and the issue was
8 raised, well, if we were to study that, that would be
9 a huge study.

10 Q. So, you have no personal knowledge of anyone
11 approaching Glami s to save them money by restricting
12 the area that would be reviewed for the pedestrian
13 survey, do you?

14 A. Yeah. Once again, we weren't talking about a
15 pedestrian survey when we were having those
16 discussions, but I don't have any knowledge. I had
17 very few direct dealings with Glami s. Most of that
18 was done by other parties. So, I mean, Glami s
19 attended various meetings that I was at, but I wasn't
20 taking direction from Glami s or providing any kind of
21 client interface with Glami s.

22 Q. So, you have no personal knowledge,

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10:05:39 1 Dr. Cleland, with respect to any offers made to Glamis
2 to save them money by imposing this ATCC concept
3 instead of analyzing a traditional cultural property
4 under National Register Bulletin 38, do you?

5 A. I don't have any direct knowledge of that,
6 but my understanding is that Glamis was reviewing the
7 documents that we were producing, and I was in close
8 coordination with Dwight Carey, who was in fairly
9 close coordination with Glamis.

10 So, I believe that they were aware of the
11 ATCC concept and the Historic District concept.

12 Q. Do you know whether Glamis had anyone on
13 their payroll who was familiar with the ATCC concept
14 or National Register Bulletin 38 or the appropriate
15 process for identifying and analyzing the traditional
16 cultural property?

17 A. To - -

18 Q. Do you have any knowledge of anyone at Glamis
19 who was aware of the ATCC concept, the National
20 Register Bulletin 38, or how that bulletin instructs
21 the identification and evaluation of traditional
22 cultural properties?

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10:07:07 1 A. Well, they didn't have a cultural resource

2 expert on staff, but they did have representatives
3 that were involved in a lot of the discussions, and I
4 don't recall specifically, you know, if they
5 represent, you know-- which discussions the
6 representative was at and which he wasn't.

7 Q. And you don't know whether they, even if they
8 had heard this information, would know anything about
9 what it meant, whether it was appropriate or not, do
10 you?

11 A. I guess I don't have any specific knowledge
12 about how Glamis made its decisions.

13 Q. Now, at the Imperial Project, as you were
14 evaluating the various trail segments, there was
15 significant confusion, was there not, Dr. Cleland, as
16 to what parts of the segments were associated with the
17 Trail of Dreams or the Xam Kwatcan Trail?

18 A. There was some confusion in the minds of
19 the-- myself and some of my staff as to which trails
20 were being referred to at first, yes, but I don't
21 think there was any confusion in the minds of the
22 Native Americans. They were quite specific about

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10:08:46 1 where their concerns were.

2 Q. However, not very specific at the-- while you
3 were doing your fieldwork?

4 A. Oh, no, they were very specific during the
5 fieldwork. They pointed to a trail on the ground and
6 said, "This is the Trail of Dreams."

7 Q. At what point in time was that?

8 A. It was during the fieldwork during the summer
9 of 1997 at some point.

10 Q. And was that at the Running Man site?

11 A. Well, my recollection is--and we are talking
12 about things that happened 10 years ago--but my
13 recollection is it was both at the Running Man site,
14 and then again it was at the trail that we called F-4,
15 I believe, in the mining process area, and I think
16 that they may have also made that--used that term with
17 regards to the Trail 192-T.

18 Q. And--but you say in the summer when you did
19 your fieldwork, which was between June and August of
20 1997; is that right?

21 A. Yes.

22 Q. And yet, in October 1997, there is a draft

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10:09:54 1 Cultural Resource Study in which you say you can't
2 tell which of the two trails, 5359 or 5360, was
3 associated with the Trail of Dreams; isn't that right?

4 A. I don't think that's exactly the words that
5 were in the--in that document.

6 Should we review them?

7 Q. Sure.

8 Let's take a look at Exhibit 11.

9 A. I'm not sure I have Exhibit 11. Can you help
10 me?

11 Q. If you turn to the second page--

12 A. Page 295?

13 Q. --295 of the report, and you see that--we

14 will highlight it up here, the fourth paragraph.

15 Would you read that first sentence into the
16 record for us, please.

17 A. "The exact routes of the Trail of Dreams and
18 the Medicine Trail have not been ascertained in the
19 field or on topographic maps."

20 Q. And if you go down to the bottom--actually,
21 why don't you read the whole paragraph into the
22 record.

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10:11:39 1 A. Starting again at the top: "The exact routes
2 of the Trail of Dreams and the Medicine Trail have not
3 been ascertained in the field or on topographic maps.
4 The Quechan maintain a schematic map of the routes
5 that they have stated--and have stated that the Trail
6 of Dreams passes through the Indian Pass-Running Man
7 ATCC. They have not indicated the Project would
8 affect the Medicine Trail, the route which is well to
9 the east. The two major trails converge at the
10 Running Man site. Rogers called one of these the
11 Black Mesa Trail which, according to Jay von Werlhof,
12 runs from Pilot Knob to Indian Pass. This trail
13 crosses the major spirit break at the Running Man site
14 and proceeds to Indian Pass and thus to the Colorado
15 River. The other trail, called by Rogers the Mohave
16 Trail, or the Mohave War Trail, Imperial CA Imperial
17 5360, runs from Yuma to Palo Verde near Blythe
18 according to von Werlhof personal communication 1997.
19 It crosses the Chocolate Mountains near State Route 78

20 and does not intersect the Project and mine process
21 area at all. Both trails provide access to the
22 Colorado River corridor; thus, either could qualify as

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10:12:58 1 the Trail of Dreams. The Black Mesa Trail, however,
2 reaches the Colorado well south of Blythe. Logically,
3 the trail called the 'Mohave Trail' by Rogers more
4 closely fits the description of the
5 adjoining--description of adjoining the Medicine Trail
6 at Blythe. Clearly, more work is necessary in
7 relating Quechan trails to extant trail segments and
8 topographic features. The Quechan have stated that
9 they could assist in doing this in the field."

10 Q. Thank you.

11 So, as of October 1997, there was still some
12 confusion in the cultural resource survey team's minds
13 as to what--which trails was associated with the Trail
14 of Dreams; is that correct?

15 A. Well, I think the paragraph clearly says that
16 the Indians said it was going through the mine process
17 area, that some of--yes, our team was somewhat
18 confused by that assertion in relation to some
19 previous understandings about the trail system.

20 Q. Thank you.

21 MR. GOURLEY: Perhaps this is where you--I
22 can keep going, but it's up to you, Mr. President.

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10: 14: 19 1 PRESIDENT YOUNG: Thank you. Why don't
2 we--we will break at this point and reconvene at
3 11--10: 45. Thank you.

4 I would remind counsel again not to speak
5 with the witness about the case during the break.
6 Thank you.

7 (Brief recess.)

8 PRESIDENT YOUNG: We are ready to recommence
9 the hearing.

10 Mr. Gourley.

11 MR. GOURLEY: Thank you, Mr. President.

12 BY MR. GOURLEY:

13 Q. Dr. Cleland, when we left, we were talking
14 about the difficulty your team was facing in trying to
15 ascertain which trial segments in the site were of
16 concern to the Quechan Native Americans and associated
17 with the Trail of Dreams segment of the Xam Kwatcan
18 Trail network; is that right?

19 A. Right.

20 And if I may, I'd like to clarify that the
21 first sentence of the paragraph that we just read,
22 "The exact routes of the Trail of Dreams and the

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10: 51: 28 1 Medicine Trail have not been ascertained in the field
2 or on topographic maps," that's referring to the
3 entire routes of the trails, so I don't think there is
4 any contradiction between that and my testimony, that
5 the Indians had shown a place in the field where there

6 was part of the Trail of Dreams.

7 Q. But you were still uncertain yourselves as to
8 which one made sense, given the other information that
9 you had; isn't that right?

10 A. We had some confusion about that issue as to
11 how, if as had been previously discussed in the
12 archeological literature, the trail through the mining
13 process area went down to the Colorado River, that
14 would have been inconsistent with what the Indians had
15 said about it connecting with the Medicine Trail near
16 Palo Verde. So, that was a concern of mine, yes.

17 Q. And during your fieldwork both in '97 and
18 then the subsequent work you did in 1998, you didn't
19 have any reason to believe that anyone from Glamis
20 Gold had any knowledge about the special significance
21 the Quechans Native Americans were attributing to
22 these sail--trail segments, did you?

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10:52:51 1 A. What was the time frame that you just
2 mentioned?

3 Q. 1997 and 1998, unless I misspoke.

4 A. Yes. I think Glamis knew that the Indians,
5 that the Quechan in particular, had strong concerns
6 about trails through their project area, so I'm not
7 sure I understood the question correctly, then.

8 Q. Prior to the work you were doing in the
9 field--

10 A. Oh, Prior to our work.

11 No, I had no knowledge of what--what

12 Glamis--I mean, I think that there had already been
13 public meetings and so on with the Quechan and other
14 Native Americans having expressed concerns about the
15 cultural resources in the area. My recollection is
16 not real clear on the specifics of those concerns that
17 were expressed in 1996, I believe, prior to the time
18 that we came on board the Project.

19 Q. But was there any identification of a Trail
20 of Dreams prior to your work in the field in 1997?

21 A. I don't know the answer to that.

22 Q. Now, in fact, as the--as you went through

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10: 54: 05 1 this process and looking at Boma Johnson's map today,
2 either one of these trails, the Mohave War Trail or
3 the Black Mesa Trail, could be part of the Xam Kwatcan
4 Trail network; isn't that correct?

5 A. Yes. Both of them could be parts of it; and
6 according to Boma's map, both probably are by his
7 analysis.

8 Q. And you have no reason to doubt that
9 analysis, do you?

10 A. No, I have no reason to doubt that there are
11 significant trails in the locations that Boma's or
12 general locations that Boma's mapped.

13 Q. Now, ultimately, you focused on three trail
14 segments and undertook a study to identify that those
15 trail segments were likely connected at one point in
16 time; isn't that right?

17 A. Yes. I mean, I think we looked at, I think,

18 in the neighborhood if 10 or more trail segments in
19 the trail reconnaissance study.

20 Q. And one of those was the 5359 Black Mesa
21 Trail that appears at the Running Man site; is that
22 right?

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10:55:22 1 A. Yes. One of them was 5359 at Running Man,
2 yes.

3 Q. And that trail--Running Man is about a mile
4 outside the Project site; isn't that correct?

5 A. Yes. I think it's near the ancillary
6 facilities area. My recollection on the distances
7 isn't good, I'm afraid.

8 Q. In fact, 5359 doesn't go into the project
9 area where the mining and rock piles would be; isn't
10 that right?

11 A. That's correct. The location where the
12 Imperial Valley College Museum had mapped, 5359 had it
13 veering to the west of the Project area.

14 Q. And it disappears into Indian Pass Road,
15 which is a preexisting road; isn't that right?

16 A. Yeah. I think the trail maps did, yes.

17 Q. Did you find other segments of it?

18 A. Yes, we had found other segments that had
19 been mapped as 5359 west of Indian Pass and west of
20 the Project area, yes.

21 Q. And you ultimately concluded that that--those
22 segments which had been previously identified as part

10: 56: 36 1 of 5359 were probably not part; isn't that right?

2 A. Well, what we determined was that the trail
3 that proceeds from Running Man up toward the mining
4 process area has a high degree of integrity, has
5 numerous ceremonial related features, and logically,
6 probably connected up with the site that had been
7 recorded as 192 north of the mining process area.

8 Q. But the site on the south--and we will get to
9 the other segments, trust me.

10 A. Okay.

11 Q. The site, the segment to the south which was
12 well-defined, had the cultural resources, that was all
13 outside of the Project area, and it disappears into
14 the Indian Pass Road; isn't that right?

15 A. I'd have to refresh my memory on the report
16 as to exactly what happens to that trail and where we
17 pick up other segments that might have been related
18 to it.

19 Q. Now, on the north side, also outside of the
20 Project area, there is this trail 192; is that right?

21 A. Yes, 192 is north, and it may extend into the
22 Project area, too. I don't recall specifically how

10: 58: 00 1 that had been previously mapped.

2 Q. Okay. But you don't know that it goes into
3 the Project area?

- 4 A. I can't say for sure.
- 5 Q. Well, the record would--
- 6 A. The record--I'm sure the record is clear on
- 7 that.
- 8 Q. And that trail heads up towards Indian Pass
- 9 following the--along Indian Pass Road?
- 10 A. Yes, that's correct.
- 11 Q. Now, within the Project area, the only
- 12 segments--and these were multiple segments classified
- 13 together as F-4; is that correct?
- 14 A. Yes, F-4 was, for sure--my recollection is
- 15 F-4 was, for sure, you know, identified by the Quechan
- 16 as being part of the Trail of Dreams.
- 17 Q. And that F-4 also starts outside of the
- 18 Project area and has some segments within the
- 19 northwest and western border of the Project area;
- 20 isn't that right?
- 21 A. You have probably looked at the information
- 22 more recently than I have, so probably, yes, it may

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10: 59: 03 1 extend outside the Project area.

- 2 Q. And it is--it, too, is running parallel and
- 3 in the same general direction as the Indian Pass Road;
- 4 isn't that right?
- 5 A. Yes, it parallels Indian Pass Road heading up
- 6 towards the mine--toward Indian Pass.
- 7 Q. And elements of those segments had already
- 8 been disturbed by tank tracks and tire marks; isn't
- 9 that correct?

- 10 A. Yes, that's probably true.
- 11 Q. Particularly those segments in the southern
12 part of it which were within the Project area; isn't
13 that right?
- 14 A. I don't have a clear recollection of the
15 level of integrity of the site with and then outside
16 the Project area.
- 17 Q. If we could look at Exhibit D to
18 Dr. Cleland's first declaration.
19 We see that highlighted portion 17 on the
20 third page--or L7. I'm sorry, my eyes getting worse
21 every day.
- 22 A. Okay. And then what is--where is that coming

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11:00:19 1 from?

- 2 Q. Well, I'm sorry, take a look at the first
3 page.
4 Do you recognize these documents--this
5 document from your declaration?
- 6 A. We are looking at Exhibit D?
- 7 Q. Yes.
- 8 A. Yes.
- 9 Q. And it is a primary record for the F-4 trail
10 segment?
- 11 A. Yeah, I guess so, yes.
12 Shall I read into the record what it says?
- 13 Q. I don't think it's necessary. The document
14 is in the record.
- 15 A. Okay.

16 Q. These documents are the documents that, after
17 the field study is done, get filed with the county or
18 the local--

19 A. Yes, with the clearinghouse.

20 Q. And are kept confidential, therefore,
21 reviewed by anthropologists and archaeologists
22 studying the area; is that right?

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11:01:16 1 A. Yes, and people with a need to know.

2 Q. Now, if you look at L7, that says there are
3 some tank tracks and tire tracks are present along the
4 southern part of this trail system, and that's
5 referring to the F-4 trail segments; isn't that right?

6 A. Yeah, that's correct. I mean, we assessed
7 the overall integrity as very good.

8 Q. And if you would blow up the map and you see
9 a dashed line, which is the project boundary?

10 A. Yes, dash dot, yes.

11 Q. And you see what's marked as one part of F-4
12 barely reaches into that project boundary, and then
13 there are other segments, including some features that
14 extend down the western border along Indian Pass Road;
15 is that right?

16 A. Yes. I mean, I--there is--yeah, other
17 segments of it. I guess F-4--I mean, you're testing
18 my memory here of 10 years ago, but I believe that
19 those parallel dotted lines along the road are part of
20 F-4 as well as that one that sort of bends down to the
21 southeast a bit.

22 Q. Yeah. I have been assuming that, as well.

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11: 02: 51 1 A. Okay.

2 Q. But all of that is on the--along the Indian
3 Pass Road?

4 A. Yes.

5 Q. And did you understand that Glamis mitigation
6 plan would have avoided those trail segments and those
7 features?

8 A. I don't recall what mitigation plan they had.

9 Q. But in the North Baja Pipeline, the
10 mitigation measure was, in fact, to
11 create--restructure the site, the Project, so that it
12 avoided site disturbance and maintained the trail
13 segments; isn't that right?

14 A. Yeah, that's correct.

15 Q. Dr. Cleland, in your report you indicated
16 that there was insufficient information at the time to
17 recommend--this being your December 1997 report--there
18 was insufficient information at the time to recommend
19 the Running Man Indian Pass ATCC for National Historic
20 Register; is that right?

21 A. I don't think so. I think we evaluated that
22 ATCC as eligible for the register as an Historic

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11: 04: 18 1 District.

2 Q. As eligible?

3 A. Yes.

4 Q. But did you actually make a recommendation at
5 that time?

6 A. Yeah, we recommended that it's eligible.

7 That's right.

8 MR. GOURLEY: Your indulgence for a moment.

9 (Pause.)

10 BY MR. GOURLEY:

11 Q. Your--it's your first declaration, Exhibit B,
12 and go to pages 293 to 294.

13 A. Those pages refer to the Trail of Dreams
14 rather than the ATCC, just to clarify.

15 Q. Correct. I understand.

16 You're recommending here or you're asserting
17 here that the evidence is not sufficient to assess the
18 eligibility of the entire trail in accordance with
19 National Register Bulletin 38; is that correct?

20 A. Yeah, the entire trail from one end to the
21 other, yes.

22 Q. But the ATCC, as this Historic District, as

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11:06:50 1 you have referred to it, could be considered with all
2 of its contributing features as National Historic
3 Register-eligible; is that correct?

4 A. Yes, and with the Trail of Dreams as
5 being--contributed into that eligibility in a very
6 significant way.

7 Q. Did you look to determine whether any

8 elements at the site had already been or within the
9 ATCC had been nominated for the National Historic
10 Registry?

11 A. I'm not aware of any previous nominations,
12 no.

13 Q. So, to your knowledge, the Running Man
14 feature has not been placed on the National Historic
15 Register, has it?

16 A. The Running Man?

17 Q. The Running Man geoglyph.

18 A. I don't know. I really don't.

19 Q. What about the Indian Pass petroglyphs?

20 A. I don't know if they're on the Registry,
21 either.

22 Q. Okay. Now, at the time you were performing

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11:07:51 1 the cultural resource survey, Dr. Cleland, and working
2 with the Quechan Native Americans, was it your
3 understanding that the BLM's approval of the Project
4 was a nondiscretionary action?

5 A. You know, I had been told some aspects of how
6 the BLM interfaces with the regulations and so on to
7 implement the Mining Act of 1872. It's not an area
8 that I have a lot of expertise in, though.

9 Q. But you conveyed the information, you'd been
10 told, to the Quechan nation that this was a
11 nondiscretionary action and would likely be approved
12 provided Glami's Gold's project was consistent with
13 Federal, State, and local laws?

14 A. Yeah, and that's what I had been told.

15 Q. In fact, you met with the Quechan nation
16 representatives in September 10, 1997, and they
17 approved a draft letter in which you asserted that and
18 identified various mitigation measures that they could
19 consider for--to address the impact of the Project on
20 their cultural heritage; isn't that correct?

21 A. We had a meeting with them, and we reviewed a
22 list of potential mitigation measures. My memory is a

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11:09:32 1 bit unclear about, you know, the degree they approved
2 it. I know they had severe concerns about mitigation.

3 Q. Just to clarify--I don't want the record to
4 be confused--I meant and hope you interpreted it this
5 way, that they approved the issuance of the letter to
6 them, not the mitigation measures.

7 A. That we would send them a letter? They
8 approved that we could send them a letter? I suppose.
9 I don't know. We could send them a letter regardless
10 of whether they approved it, but we did review
11 mitigation measures with them, yes.

12 Q. If you would turn to in the same
13 document--it's actually the Baksh attachment to that
14 document, so the easiest way to find it is look at the
15 bottom numbers which are AG 003166, starts over at
16 3165.

17 MS. MENAKER: Counsel, where are you looking?

18 MR. GOURLEY: This is--remains Exhibit B to
19 Dr. Cleland's first declaration.

20 THE WITNESS: Yes. I'm at the right place.
21 BY MR. GOURLEY:
22 Q. And you see on 3165, the first sentence

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11: 10: 57 1 identifies a meeting--

2 A. The bottom on September 10th?

3 Q. Correct.

4 A. Yes.

5 Q. And the purpose of the meeting was to allow
6 Mr. Cachora and Mr. Anton to review a letter prepared
7 by Dr. Baksh and the KEA archeological staff based on
8 the September 9 meeting; is that right?

9 A. Yeah, that's what it says.

10 Q. If we could look at Exhibit 6, if you go back
11 out of this and towards the front of your book,
12 Dr. Cleland.

13 ARBITRATOR CARON: Could you just pause a
14 moment? While I want to catch up to where you are.

15 MR. GOURLEY: Oh, absolutely. I apologize.

16 ARBITRATOR CARON: That's fine, thank you.

17 MR. GOURLEY: Thank you, Mr. Caron.

18 THE WITNESS: Okay. Let's proceed.

19 BY MR. GOURLEY:

20 Q. Is that the letter, Dr. Cleland, that is
21 referred to in Mr. Baksh's report?

22 A. It appears to be. I mean, it has the right

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11:12:19 1 date.

2 Q. And if you would look at the third paragraph
3 and read that into the record for us, please.

4 A. The third paragraph? The one that starts,
5 "The proposed project"?

6 Q. Correct.

7 A. Yes.

8 "The proposed project is a nondiscretionary
9 action. That is, the BLM cannot stop or prevent the
10 Project from being implemented, pursuant to the Mining
11 Act, provided that compliance with other Federal,
12 State, and local laws and regulations is fulfilled.
13 As a consequence, there is a strong possibility that
14 the mining, proposed mining project, may be approved."

15 Q. And, Dr. Cleland, that was your understanding
16 at the time in September 1997?

17 A. Yeah, that was my understanding, but, you
18 know, I have to say that I'm not at all an expert on
19 the 1872 Mining Act. In fact, it's the only project I
20 believe I have ever done that's come under the
21 jurisdiction of that.

22 So, if I made an error in that statement, it

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11:13:12 1 was probably inadvertent.

2 Q. But you--no one said it is an error,
3 actually. You got that information from BLM, didn't
4 you?

5 A. I don't know that I got it from BLM I might

6 well have gotten it from Dwight Carey. I mean, most
7 of the correspondence and discussions that I had were
8 with Dwight. He was the prime contractor for the EIS.
9 He had discussions with BLM about those sorts of
10 things and conveyed--conveyed that information to me.
11 So, whether I heard it directly from BLM or from
12 Dwight, I couldn't say at this point.

13 Q. You were working--you were being paid by
14 Glamis, but you were working for BLM; isn't that
15 right?

16 A. Yeah. We were--

17 Q. Through Dwight?

18 A. Yes. The document we were preparing was a
19 BLM--to be a BLM document, yes, the EIS.

20 Q. And you look at the fax header at the top,
21 and that fax header shows it comes from or was
22 received by El Centro BLM; isn't that right?

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11:14:16 1 A. I guess so. It says from KEA, and it has BLM
2 on it, too, so it looks like it's possibly something I
3 faxed to them.

4 MR. GOURLEY: We have no further questions.

5 PRESIDENT YOUNG: Thank you.

6 Ms. Menaker, would you like to take a minute
7 or two?

8 MS. MENAKER: I would, thank you.

9 (Pause.)

10 PRESIDENT YOUNG: Are you ready to proceed,

11 Ms. Menaker?

12 MS. MENAKER: I am, thank you.

13 REDIRECT EXAMINATION

14 BY MS. MENAKER:

15 Q. Dr. Cleland, you were just referring to a
16 Dwight Carey. Can you tell us who he is, who he works
17 for.

18 A. Well, at the time, Dwight was a principal
19 with the firm EMA, Environmental Management
20 Associates, I believe, and he was the prime contractor
21 for the EIS.

22 Q. And when you say he was the prime contractor

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11:16:34 1 for the EIS, is it correct to say that it was Glamis's
2 contractor for the EIS?

3 A. I don't fully-- am not fully aware of all the
4 client relationships that might have existed. My
5 understanding was a third party contract, in which
6 case, the mining company provides the funding, is
7 involved in selection of the contractor. But after
8 the selection process is over, the contractor is to
9 take direction from the BLM

10 Q. Okay. Thank you.

11 MS. MENAKER: I'm just trying to locate an
12 exhibit.

13 BY MS. MENAKER:

14 Q. If you could take a look at your supplemental
15 declaration.

16 A. Do you-- can you help me? I know this has
17 probably been prepared by the attorneys for Glamis,

18 but...

19 Q. It's towards the back of the binder.

20 A. Okay. Thank you.

21 And which part would you like me to look at?

22 Q. If you just--in paragraph four, you note that

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11:18:05 1 before KEA began its cultural resource inventory, it
2 was aware that there were trails--it was generally
3 aware that there were trails in the vicinity of the
4 Imperial Project area; is that correct?

5 A. Yes. I mean, Rogers had recorded trails in
6 that area.

7 Q. And you don't need to look at this for my
8 next question.

9 Is it correct to say that it's your
10 understanding from your testimony that there is the
11 Xam Kwatcan Trail network, but that certain portions
12 of that trail network, and I think you mentioned in
13 particular the Medicine Trail and the Trail of Dreams
14 are particularly significant to the Quechan and are
15 more important than other trails, maybe?

16 A. Yes. Those were the trails they spoke most
17 strongly about during the Imperial proceedings.

18 Q. And is it also correct that when you spoke
19 with the Quechan and that they expressed concerns
20 about--that the concerns they expressed were greater
21 when you were talking about impacts to an extant
22 segment of one of those trails or a trail that was

11:19:39 1 considered to them to be particularly sacred than
2 would be their concerns were the impacts were to be to
3 a portion of a sacred trail that had either been
4 previously disturbed or to another trail that may not
5 have had any ceremonial features associated with it or
6 may not have had any particularly cultural
7 significance to it?

8 A. Yes. They had indicated, for example,
9 that--and actually, this is having to do with the
10 North Baja conversations, but as an example, they
11 indicated that if you could follow existing
12 disturbance areas, it would be much preferable from
13 their point of view than to impact some area that had
14 already--that had not been impacted. So, they had
15 made those statements, yes.

16 Q. Now, Dr. Cleland, I'd like you to just take
17 another look at this map that you received from Boma
18 Johnson, to glance at it?

19 A. Yes.

20 Q. And if you could also now take a look at this
21 binder, towards the front of the binder, in Exhibit 3.

22 MR. GOURLEY: We would note to the Tribunal

11:21:09 1 that this is not part of his cross--it wasn't part of
2 his direct, either. She's introducing a new topic
3 with this witness.

4 MS. MENAKER: I would note that it is in his
5 witness binder, and they are--they have introduced the
6 topic of the Baja pipeline and how that intersected
7 with the trail network, although they chose not to
8 introduce this map, although they did introduce it for
9 many of the other witnesses. This is the map the
10 Tribunal will recall where Dr. Sebastian interposed
11 the route of the pipeline on top of Mr. Boma's map and
12 then drew certain conclusions from that as to where
13 the pipeline intersected with what she contended was
14 the Xam Kwatcan network, and I would just like to ask
15 Dr. Cleland just really two very short questions about
16 this.

17 MR. GOURLEY: Mr. President, the direction
18 and Procedural Order 11 was to produce rebuttal
19 statements to any new information. Dr. Cleland was
20 not offered--produced no rebuttal statement in
21 response to Dr. Sebastian's last statement that we
22 furnished on July 16, so any new information he might

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11:22:28 1 have to rebut those sections we have not had a chance
2 to see before or hear before today.

3 ARBITRATOR CARON: Counsel, just to refresh
4 my memory, you did ask a question of the expert in
5 reference to the map on Exhibit 5.

6 MR. GOURLEY: Oh, absolutely, and she
7 introduced that--

8 ARBITRATOR CARON: No, I mean to this expert.

9 MR. GOURLEY: In Exhibit 5?

10 ARBITRATOR CARON: Tab 5.
11 MR. GOURLEY: Tab 5, yes, but nothing to do
12 with the Baja Pipeline.
13 ARBITRATOR CARON: Isn't the blue line the
14 Baja Pipeline?
15 MR. GOURLEY: Yes, but the only thing we
16 talked about with respect to Exhibit 5 was the
17 location of Imperial Project to the yellow line, which
18 is Woods's depiction of the Xam Kwatcan Trail, or that
19 portion of the Xam Kwatcan Trail.
20 ARBITRATOR CARON: Thank you.
21 (Tribunal conferring.)
22 PRESIDENT YOUNG: Counselors, this exhibit

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11:26:07 1 has already been introduced in previous testimony, so
2 it is usable, but cross does have to be limited to
3 things--your redirect has to be limited to anything
4 that was raised in the cross-examination, not to rebut
5 any other witnesses, but used only in reference to the
6 cross-examination that was conducted by--already
7 conducted.

8 MS. MENAKER: So, to the extent that he
9 clearly crossed on the route of the Baja Pipeline and
10 crossed on its intersection with the Xam Kwatcan
11 network, now, those questions when he was asking was
12 based on Dr. Sebastian's report, and her underlying
13 assumption for that report was this map.

14 Now, I can clearly--
15 PRESIDENT YOUNG: Counsel, the map is

16 introduced, so you are permitted--in a prior witness
17 permitted to use the map, but you do have to restrict
18 cross to anything related to--your redirect to
19 anything related to his cross of this witness.

20 MS. MENAKER: Okay. So, what you're saying I
21 can use the map but just restrict it?

22 PRESIDENT YOUNG: Restrict it, yes.

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11: 27: 29 1 MS. MENAKER: Thank you.

2 MR. GOURLEY: Because all we addressed was
3 certain trail segments in the Palo Verde Hills at Mile
4 Post 50.

5 MS. MENAKER: I understand, thank you.

6 BY MS. MENAKER:

7 Q. So, if you can take a look at that map and as
8 counsel just indicated when he was questioning you on
9 the intersection of the Baja Pipeline and how that may
10 have impacted trails of a Xam Kwatcan network, that
11 information--

12 So, let me ask you, first, in your view, the
13 route of the pipeline that is depicted on that map, is
14 that and its intersection with the Xam Kwatcan
15 network, is that an accurate depiction, given Boma
16 Johnson's map here?

17 MR. GOURLEY: And we believe that goes
18 outside of the scope of our direct.

19 PRESIDENT YOUNG: Counsel, I will allow the
20 question. We will take the objection under
21 advisement.

22 MR. GOURLEY: 0815 Day 4 Final
Thank you.

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11:28:50 1 THE WITNESS: Well, the question, if I could
2 paraphrase it, is it an accurate portrayal of the
3 impact of the North Baja Pipeline on the Xam Kwatcan
4 network, and I guess I would have to say that the
5 scale that it's produced, it seems to me to exaggerate
6 the correspondence between the Xam Kwatcan network as
7 Boma mapped it and the actual route of the pipeline.

8 One case in point is it appears that--to me
9 that the pipeline route is mapped on the west side of
10 Route 78 and actually is built--it's on the east side
11 of 78, so--and Boma had mapped much of the trail over
12 on the west side, so--and actually corresponding with
13 the Route of 78, too, to some degree.

14 So, I think there are some problems with the
15 registration of the various maps.

16 BY MS. MENAKER:

17 Q. Could those problems, perhaps, be attributed
18 to the fact that Boma's map is drafted using a Magic
19 Marker pen on a quite small-scaled map or large-scaled
20 map?

21 A. Yeah. Part of that--that's part of the
22 problem is that--I'm sure that Boma maintains much

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11:30:20 1 finer grain maps and that he marked up a larger scale

2 map for purposes of summarizing general locations
3 rather than specific locations.

4 Q. Okay. So, in your view, when you referenced
5 this, the map that Boma Johnson had given you, in your
6 statement, do you think that it is helpful in showing
7 the general location and perhaps directions of certain
8 trails, but inadequate for precisely determining their
9 precise location?

10 A. Yeah, I would never use this map for an
11 impact assessment.

12 Q. I'm just getting another exhibit to look at.
13 What I'm distributing is a copy of the
14 historic properties treatment plan for the North Baja
15 gas pipeline. This is in the record in our exhibits
16 as 13 FA 144, and we can add it to the back of the
17 Cleland exhibits here.

18 MR. GOURLEY: Where was this found in the
19 record, I'm sorry?

20 MS. MENAKER: 13 FA Tab 144.

21 MR. GOURLEY: Thank you.

22 BY MS. MENAKER:

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11:32:29 1 Q. And, Dr. Cleland, if you could please turn to
2 page 16 of that report.

3 A. Yes.

4 Q. And under the label "Avoidance and
5 Monitoring"--I would just give the Tribunal just a
6 minute. Page 16.

7 And, Dr. Cleland, if you could just read for

8 us the first paragraph under "Avoidance and
9 Monitoring."

10 A. "NBP has avoided direct impacts to cultural
11 resources wherever possible. Particular attention was
12 paid to avoiding resources associated with
13 religious/spiritual activities, such as geoglyphs,
14 petroglyphs, cleared circles, and rock rings. All of
15 these features that were recorded during the survey
16 and evaluation programs have been avoided. NBP has
17 also rerouted to reduce impacts to significant Native
18 American trails in several instances, and has proposed
19 alternatives that reduce impacts to Palo Verde Point
20 and in the vicinity of Pilot Knob, two areas of high
21 cultural resource sensitivity."

22 Q. And, to the best of your knowledge, is that a

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11:34:03 1 correct statement?

2 A. Yes.

3 Q. To the best of your recollection, with your
4 work on the North Baja Pipeline Project did that
5 pipeline impact any extant segment of the sacred Xam
6 Kwatcan Trail network?

7 A. To my knowledge, it did not impact extant
8 segment of the network.

9 Q. Now, counsel asked you about some--an impact
10 to a trail--

11 A. Actually, I want to amend that.

12 I believe my testimony has been that it did
13 not impact any extant segments of the Trail of Dreams

14 or the Medicine Trail, and, you know, I think the
15 record is unclear on exactly which trails out there
16 are part of the Xam Kwatcan network.

17 So, I don't want to overstate any of the
18 testimony that I have given.

19 Q. No. Thank you for that clarification.

20 A. I would like to be as precise as possible.

21 Q. Thank you.

22 Now, counsel questioned you about an impact

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11:35:10 1 to a trail that occurred near Mile Post 50, and that
2 was described as a 50-meter segment of the trail that
3 was impacted.

4 Is it your testimony that that segment--that
5 that trail had already been impacted by a previous
6 disturbance, particularly by a transmission line?

7 A. Yeah, there is a transmission line that's
8 gone across the trail on that location, including
9 Transmission Line Access Road.

10 Q. And to the best of your recollection, do you
11 recall coming across or finding any archeological
12 evidence when you were surveying the area on that
13 trail segment that indicated that that trail was used
14 for ceremonial use?

15 A. No. The associations on that trail were
16 really pretty minor, very light scatter of artifacts,
17 and no features that we could identify as a ceremonial
18 significance.

19 Q. So, did you have any reason to believe that

20 that trail was of importance to the Quechan--of
21 serious importance to the Quechan or any other Native
22 American group?

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11:36:28 1 A. Well, you know, I do think that that trail
2 probably had significance to them. They're concerned
3 about really all the trails, as they've said over and
4 over again, but they do have different levels of
5 concern, and I think that's a really important
6 distinction for the Tribunal to understand.

7 Q. And was a strong level of concern indicated
8 about this particular trail?

9 A. No. We had field visits all along the
10 pipeline, and this particular trail was not cited as
11 more significant than other trails that they have
12 concerns about.

13 Q. You also testified about a trail near the
14 Palo Verde site, where that was of significance or
15 that you believed was significant to the Native
16 Americans; is that correct?

17 A. Yes. As I said, you know, trails in general
18 are significant to them. There was one trail that we
19 mentioned in particular with regards to Boma Johnson
20 depicting it as being part of the Xam Kwatcan network.

21 Q. And did you find archeological features on
22 that trail that also indicated or corroborated Boma

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11: 37: 49 1 Johnson's assessment that that trail was important?

2 A. Yes.

3 Q. And what were some of those ceremonial
4 features, if you recall?

5 A. There were geoglyphs in particular, and he
6 showed us some trail markers, as well.

7 Q. And is it the case that the pipeline at that
8 point was rerouted and it was narrowed as to avoid any
9 impact to that trail?

10 A. Yeah. The pipeline was restricted to the
11 previously disturbed area within the Stallard Road
12 there to avoid that trail and also to avoid other
13 petroglyph features in the area.

14 Q. When Mr. Gourley was questioning you about
15 the identification of the ATCC, the Area of
16 Traditional Cultural Concern, you testified that
17 although the Quechan had indicated a concern for the
18 entire area of their traditional territory, they had
19 also expressed a particularized concern about a
20 smaller localized area; is that correct?

21 A. Yes, in the Imperial Mine, going back to the
22 Imperial Mine, yes.

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11: 39: 14 1 Q. Yes.

2 And in your report, "Where Trails Cross," you
3 state that the Quechan had, indeed, told you that they
4 had a name in their language for this smaller
5 localized area, and--is that correct?

6 A. That is correct, yes.

7 Q. And can you tell me why did the Quechan
8 express or what concerns did the Quechan express about
9 this particular area, the area in which the Imperial
10 Project was proposed to be located?

11 A. Well, they expressed several concerns. One
12 had to do with the relationship, its relationship to
13 the Trail of Dreams and the use of that trail through
14 that area for pilgrimages, both spiritual and
15 physical. But also the area was a teaching place.
16 There were several teaching places where Tribal
17 members can learn traditional culture, and it was one
18 of--it was the first in a series, and there was a
19 concern that if you could no longer practice the
20 learning that you would learn in that place, then that
21 would mean that the other places would also be
22 considerably reduced in value because the lessons

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11:41:13 1 learned in that place are relevant to lessons to be
2 learned at other places.

3 Q. Now, Mr. Gourley asked you to read a
4 paragraph from your October survey, draft survey
5 report. Do you recall that?

6 A. I remember reading some paragraphs, yes.

7 Q. I'm sorry, there was a paragraph indicating
8 that there were still some questions as to the precise
9 locations of certain trails.

10 A. Yes.

11 MR. GOURLEY: I would object. I didn't

12 actually say there was confusion as to the precise
13 location of trails. The segments are known.

14 MS. MENAKER: I stand corrected. That was
15 inartfully worded.

16 BY MS. MENAKER:

17 Q. The--it was your testimony that the Quechan
18 had identified certain trails segments, both 5359,
19 which is within the ATCC but outside the immediate
20 project area as the Trail of Dreams, and also F-4 that
21 is the segment within the Project area as the Trail of
22 Dreams, and then trail 192-T north of the Project area

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11:42:27 1 as Trail of Dreams; is that correct?

2 A. Yes, that's my recollection.

3 Q. And is it correct that in your October
4 report, the draft of the report, you indicated that it
5 was unclear as to whether 5359 at the Running Man site
6 connected at one time to F-4 within the Imperial
7 Project Site?

8 A. My October draft indicated there was
9 unclarity on that? I would like to read what I said,
10 then.

11 Q. Well, I would ask you to turn to--

12 PRESIDENT YOUNG: Counselor, if you could
13 direct him to that particular part of the report which
14 you're referring to.

15 MS. MENAKER: Yes, I will.

16 BY MS. MENAKER:

17 Q. It is Exhibit B attached to your first

18 declaration, and this is actually the December 1997
19 copy of "Where Trails Cross," so the one that came
20 after the October version.

21 A. Oh, this is December?

22 Q. Yes.

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11:43:54 1 A. Okay.

2 Q. And if you could turn to page 293 of that
3 draft, please--excuse me, of that report.

4 So, in the third paragraph of that report,
5 does that indicate that KEA had not shown that there
6 was a one-to-one correspondence between trail 5359 and
7 trail F-4 so that there was some uncertainty as to
8 whether those two trails at one time connected?

9 And perhaps it would be easiest, Dr. Cleland,
10 if you could look to the very end of that paragraph,
11 the last two sentences, wherever it says--when--the
12 sentence that starts with "however," and perhaps just
13 read that aloud.

14 A. It says, "However, in the Project mining
15 process area, the Quechan had indicated the Trail of
16 Dreams corresponds to a trail recorded by KEA as F-4."

17 Q. And if you could just continue to the end.

18 A. "A recorded location of CA-IMP-5359 is--in
19 this vicinity is to the west of the Project area.
20 Thus, there is not a one-to-one correspondence between
21 the Quechan Trail of Dreams and archaeologically
22 designated trails."

11: 45: 56 1 By that I meant that the trail--the Quechan
2 had identified part of 5359, archaeologically
3 designated as 5359, as being part of the Trail of
4 Dreams, and part of it they had not identified as
5 being part of the Trail of Dreams.

6 Q. And was it because of this still somewhat
7 open question that Glamis requested that KEA do an
8 additional survey, the 1998 trails reconnaissance
9 survey to definitively define the location of 5359?

10 MR. GOURLEY: I'll object. There has been no
11 testimony here that Glamis requested a further study.

12 MS. MENAKER: That's fine.

13 MR. GOURLEY: You are leading the witness
14 trying to get him to say that.

15 MS. MENAKER: I'm sure you haven't done that
16 all week, but that's fine. I withdraw the question.

17 (Simultaneous conversation.)

18 MS. MENAKER: I withdraw the question.

19 BY MS. MENAKER:

20 Q. Did KEA do a study in 1998 to definitively
21 determine the course of 5359?

22 A. Yes, we did.

11: 47: 03 1 Q. And--

2 A. And in relationship to other trails in that
3 ATCC.

4 Q. Okay. And can you just briefly summarize
5 what that study concluded.

6 A. Yes. First of all, we confirmed that the
7 previous information that the trail designated 5359 at
8 the Running Man does cross various ceremonial
9 features, including the major spirit break, that at
10 some point it does disappear. And the route that had
11 been mapped by the Imperial County Museum as 5359 on
12 the west side, we relocated that. We followed it out.
13 It had very poor integrity and very few cultural
14 associations with it.

15 However, we did--we quantified the number of
16 associated features with trails associated with F-4
17 and 192 in mapping--doing GPS mapping, said meter
18 mapping. We showed that there was a strong likelihood
19 that those three trails designated by the Quechan as
20 being part of the Trail of Dreams had a high
21 likelihood of being originally connected, although
22 there were some breaks.

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11: 48: 40 1 Q. Okay.

2 MS. MENAKER: I have nothing further, thank
3 you.

4 PRESIDENT YOUNG: Thank you.

5 Mr. Gourley?

6 MR. GOURLEY: Thank you, Mr. President. Just
7 a few further questions, Dr. Cleland.

8 RE-CROSS-EXAMINATION

9 BY MR. GOURLEY:

10 Q. Beginning with that last point, you're not
11 testifying here today that there are not other
12 elements, segments of the Trail of Dreams outside the
13 Project area along the Xam Kwatcan Trail network on
14 the west side of the--following the west route of the
15 Xam Kwatcan Trail network, are you?

16 A. No. There are other parts of the Trail of
17 Dreams west of the Colorado River and west of the
18 Medicine Trail.

19 Q. Including some up close to the Baja Pipeline;
20 isn't that correct?

21 A. There could be, yes, but the Quechan never
22 said, you know, any of these trails that the Baja

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11:50:03 1 Pipeline crossed is the Trail of Dreams.

2 Q. The ones that the pipeline actually crossed?

3 A. Yes, correct.

4 Q. Let's turn back to the exhibit that

5 the--Ms. Menaker gave to you.

6 A. The treatment plan?

7 Q. Correct. I guess it would be Exhibit 12, and
8 the--she focused your attention on page 16 and that
9 first paragraph under "Avoidance and Monitoring," if
10 you could go back to that paragraph.

11 A. Yes.

12 Q. And she had you read the entire paragraph. I
13 will spare you repeating it, but if you would focus on
14 the third sentence, which states, "All these features
15 that were recorded during the survey and evaluation

16 programs have been avoided. "

17 Do you see that?

18 A. Yes.

19 Q. And when you used the word "avoided" there,
20 you meant that the swathe of the pipeline disturbance
21 did not intersect those features; is that correct?

22 A. Yes.

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11: 51: 11 1 Q. Okay. Now, you then state in the next
2 sentence, "NBP, " North Baja Pipeline, "has also
3 rerouted to reduce impacts to significant Native
4 American trails in several instances. "

5 Do you see that?

6 A. Yes.

7 Q. And when you say reduce impacts, you mean
8 that there is still an impact by having a pipeline in
9 the swathe cut nearby or breaking segments outside of
10 the areas of cultural--

11 A. Yes, the pipeline did impact some trails.

12 MR. GOURLEY: One moment, Mr. President.

13 (Pause.)

14 BY MR. GOURLEY:

15 Q. And focusing on that same document, if you
16 turn back to page six, Mr. Cleland--Dr. Cleland. I
17 apologize.

18 A. We are both from UVA, and everybody is a
19 Mister there.

20 Q. With a lot of sirs. Yes, sir.

21 A. Well, Mr. Jefferson was not a doctor, so...

22 Q. And you see that group that's called the

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11: 53: 32 1 Native American Perspective?

2 A. Yes.

3 Q. And in the middle of that paragraph,
4 referring to the Quechan Tribe's perspective on the
5 Project, it states, "All sites are interrelated and
6 cannot necessarily be evaluated individually. The
7 whole is very much greater than the sum of its parts.
8 To destroy any part is to weaken the whole."

9 Do you see that?

10 A. Is that in the first paragraph? Oh, yes, I
11 see it, yes. And, I mean, that's accurate. That is
12 their point of view.

13 Q. That is their point of view.

14 A. Yes.

15 Q. And, in fact, you did destroy--the North Baja
16 Pipeline did destroy trail segments as it cut across
17 the southern California Desert; isn't that correct?

18 A. That is correct, yes.

19 Q. Now, you mentioned a particular special name
20 that the Quechan indicated was in or around the
21 Imperial Project Site; is that right?

22 A. Yes.

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11: 54: 39 1 Q. Now, if you would turn to, I think you have

2 it open still, the Exhibit B to your first
3 declaration, and if you start at page 27 of the Baksh
4 piece, and it's really at AG 003163 over to 64--oh,
5 it's AG 003163 to 64.

6 Now, the paragraph that starts at the bottom
7 of page 27 of this document, the 3163, and continues
8 over, indicates that this special name is tied to the
9 petroglyph at Picacho Peak; isn't that correct?

10 A. That's not my understanding. I'm not sure
11 what you're referring to.

12 Q. All right. Let's back up a moment.

13 Dr. Baksh, who was he and what was his role
14 on this project?

15 A. Dr. Baksh is a cultural anthropologist who
16 was retained by EMA and to--I believe his contract was
17 with EMA--it was not with my firm--to conduct Native
18 American consultation and ethnographic interviews.

19 Q. So, he was the source of the information
20 about the ethnography of the area, the cultural
21 concerns of the Quechan Native Americans at this site;
22 right?

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11:57:01 1 A. Well, he was one primary source, but in the
2 course of our studies we received information directly
3 from the Quechan, as well.

4 Q. Right.

5 And on this page, what it says is at the
6 beginning at the top of page 28, in response to
7 question by Dr. Cleland--that would be you--as to

8 whether the area has a name, Mr. Cachora responded
9 that the old people never mentioned the area, but that
10 it is tied in with the petroglyph area near Picacho.

11 A. Okay. That's not my--that's not my
12 recollection, but that's--

13 Q. That's what the document states.

14 A. --what Dr. Baksh has reported, yeah.

15 Q. Okay. Thank you.

16 And Dr. Baksh's primary role was to work with
17 the Cultural Committee of the Quechan Tribe; isn't
18 that correct?

19 A. Yeah, that was his role was to conduct
20 ethnographic interviews with the Quechan, including
21 the Cultural Committee and other Tribes.

22 MR. GOURLEY: Thank you, Dr. Cleland.

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11: 58: 20 1 PRESIDENT YOUNG: Redirect? Re-redirect?

2 MS. MENAKER: I think I have just one
3 question.

4 PRESIDENT YOUNG: Please.

5 FURTHER REDIRECT EXAMINATION

6 BY MS. MENAKER:

7 Q. Dr. Cleland, you were just asked to look at
8 Dr. Baksh's report on this topic of whether the
9 Quechan had indicated that it had a name for this
10 particular area, and I would just ask you to turn to
11 your report, which is Exhibit B on page 285.

12 And here on the third paragraph, you state,
13 "It is important to note that the Quechan have stated

14 that there is a name for the ATCC in their language.
15 While they have held this name confidential, the
16 existence of a place name implies that the area is
17 conceived of as a special place with physical
18 manifestations. "

19 To the best of your recollection, is this
20 information correct?

21 A. Yes, it is.

22 Q. Okay, thank you.

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11:59:46 1 A. It's based on conversations that I had with
2 the Quechan.

3 Q. Thank you.

4 MR. GOURLEY: One question further,
5 Mr. President.

6 FURTHER CROSS-EXAMINATION

7 BY MR. GOURLEY:

8 Q. You don't mean to tell us, do you,
9 Dr. Cleland, that the straight-line drawing of the
10 ATCC around the Imperial Project corresponded directly
11 to the special name that the Quechan nation withheld
12 from you; is that correct?

13 A. No, thank you for that clarification. They
14 indicated the area between in the vicinity of Running
15 Man and Indian Pass is the name that--the place they
16 had a name for. They don't bound it. They don't have
17 boundaries like that.

18 Q. And, Dr. Baksh, the information he got
19 extended that, in fact, to Picacho; isn't that

20 correct?

21 A. That the area might extend all the way to
22 Picacho, with the same name. That seems to be what

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12: 00: 48 1 his understanding was, yes.

2 MR. GOURLEY: Thank you.

3 PRESIDENT YOUNG: Ms. Menaker?

4 MS. MENAKER: No further questions.

5 PRESIDENT YOUNG: Bless you.

6 Professor Caron?

7 QUESTIONS BY THE TRIBUNAL

8 ARBITRATOR CARON: Thank you, Dr. Cleland.

9 You mentioned that it was important for the
10 Tribunal to understand that there is a regional sense
11 in which this whole area was special, and then within
12 it, there are specific local sites of particular
13 importance.

14 THE WITNESS: Yes.

15 ARBITRATOR CARON: Within the sense of local
16 sites, I guess I'm wondering, are there different
17 categories of importance. So, on the one hand, we
18 hear of the mountains at either end and Palo Verde
19 Point. Would this area that was just being mentioned
20 for which the name was not provided, is that an
21 intermediate area of concern or would they have that
22 as a concept?

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12: 01: 56 1 THE WITNESS: I guess I would hesitate to go
2 to comparative, you know, ranking of sites along a
3 continuum. I think this probably--some sort of
4 continuum does exist, but exactly where on the
5 continuum this particular location, I don't know that
6 we have that kind of quantitative.

7 But I would say this, that the concerns
8 expressed for this place were the strongest I'd ever
9 heard in my 30-year career in terms of an impact, a
10 project impact, so--and I have heard a lot of Native
11 American concerns for sites, and--but these were
12 the--I know there's other projects were concerns of
13 this more magnitude have been expressed, but in my
14 career, projects that I have worked on, this was the
15 highest level of concern ever expressed by Native
16 Americans for a location and for the impacts of a
17 project.

18 ARBITRATOR CARON: Thank you.

19 I guess I have just one other question, and
20 this is actually to both counsel. Either of you can
21 point me, and so excuse me for not--this may be very
22 clearly in the record, but a question was raised about

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12: 03: 23 1 the scale of the map to be able to perceive its
2 relationship between the pipeline and the trail
3 segments, and the question is, since we have some
4 parts of the EIR preparatory studies concerning the
5 Baja Pipeline, do we have--do there exist large-scale

6 small-area maps that would track the pipeline and the
7 trail segments? So, two questions, do we have, and do
8 that exist?

9 MR. GOURLEY: The answer is I do not know
10 that we do. There would be elements. Certainly the
11 background information of the Baja Pipeline would show
12 you where the pipeline goes. It won't--it will show
13 you where trail segments are, but it won't relate it
14 to Boma Johnson's map directly.

15 What I heard Dr. Cleland say was that Boma
16 Johnson had higher scale maps. Boma Johnson had been
17 a BLM employee. No such maps were ever produced to
18 us, so I don't know if they exist in the BLM files or
19 not.

20 MS. MENAKER: We are not aware of any such
21 maps. We have, like as Dr. Cleland testified, the
22 Quechan have shown him very rough maps, my

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12:04:49 1 understanding it was on plywood with paint saying here
2 are the trails, but just to let them know in what
3 general location they are. When a particular project
4 is surveyed, they will get very precise locations like
5 in the Imperial Project with F-4.

6 But as far as--this is the only map of which
7 we are aware that maps--where someone has attempted to
8 go out and map, you know, many, many parts of the
9 trail network, but we don't have any anything that is
10 more precise than this on this large of a scale.

11 ARBITRATOR CARON: Thank you.

12 ARBITRATOR HUBBARD: Dr. Cleland, just one
13 question: When you were referring to the Project that
14 you said caused greater concern for the Tribe than any
15 that you had been involved in, you were referring to
16 the Imperial Project?

17 THE WITNESS: Yes, the Imperial Project.

18 ARBITRATOR HUBBARD: Were there--would you
19 say that the Baja Pipeline project raised similar
20 concerns or as many concerns?

21 THE WITNESS: No, it did not. It raised some
22 similar concerns. The part about the interconnected

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12:06:00 1 nature of the sites, that's the same. So, they have a
2 very close identification with the land and with their
3 traditional territory and the resources in there, and
4 that's always the starting point.

5 And then there were some other areas that
6 they mentioned that we went close to, like the Palo
7 Verde area and certainly Pilot Knob, but they never
8 raised any concerns about a specific location along
9 the Project in the same kind of degree that they did
10 for the location at the mine site.

11 PRESIDENT YOUNG: Dr. Cleland, thank you for
12 your presence today and your testimony. I wanted to
13 follow up, I think, a little bit on Professor Caron's
14 questions here and see if I can get something a little
15 clearer in my mind.

16 With respect to the pipeline, your--does the
17 pipeline cross trail segments or not?

18 THE WITNESS: Yes. The pipeline does impact
19 in a few locations trail segments.

20 PRESIDENT YOUNG: Thank you.

21 But I think I understood your testimony to be
22 that they are not Trail of Dreams or Medicine Trail;

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12:07:21 1 is that fair?

2 THE WITNESS: Yes, we had no indication that
3 they are either Trail of Dreams or Medicine Trail.

4 PRESIDENT YOUNG: Does it come relatively
5 near Trail of Dreams or Medicine Trail such as you
6 have sort of--you can kind of visually observe
7 disturbances from the pipeline itself or not?

8 THE WITNESS: Well, I think it's fair to say
9 that the Trail of Dreams, in order to get from the
10 Indian Pass vicinity to Palo Verde Point, would
11 probably--the pipeline would probably have crossed it
12 at some point, but it has been pointed out that there
13 are breaks and disturbances. And since we tried hard
14 to stay in areas like that, my working assumption is
15 that we went across the Trail of Dreams at a point
16 where it had already been previously disturbed, so
17 there wasn't an impact to it.

18 And I must also say that the nature of the
19 impacts of a pipeline are considerably different from
20 the nature of impacts of a mine site. A mine site is
21 operated 24 hours a day. Lots of noise, lots of, you
22 know, waste stockpiles piling up and left there, a

12:08:37 1 deep hole in the ground left, you know, unreclaimed.

2 So, the pipeline it's required because of
3 FERC and other to do the best job they can to reclaim
4 the land and so on, so the nature of the impacts are
5 quite different, as well as the nature of the
6 resources that were impacted.

7 PRESIDENT YOUNG: Let me pick up on one part
8 of your answer to that that I'm also slightly curious
9 about.

10 Earlier in your testimony you talk about some
11 of these sites being no more significant--you don't
12 say no less significant, you used the term no more
13 significant than other sites. But what I'm trying to
14 get a sense of is, are the sites around the pipeline
15 of no more significance or less significance because
16 they are unimportant, or because they are already
17 disturbed? Could you get a sense of that from--I
18 mean, we recalled both in the testimony.

19 THE WITNESS: I think we have--right, I think
20 both factors play into that kind of assessment because
21 certainly, you know, we come close to Pilot Knob, I
22 mean, within a mile or so of Pilot Knob, and you know

12:09:57 1 that's very significant, but we come very close to
2 Palo Verde Point, too, and that's very significant.

3 So, I think it was the nature there, the

4 nature of the impacts of the Project where around Palo
5 Verde Point we were going to be burying the line in
6 alluvium, so it was going to be--that's one of the
7 best places where you can reclaim the land, so, you
8 know, very quickly that scar in that area is going to
9 be gone. The scar across the desert is more long
10 lasting, but it's still very different from the nature
11 of the impact of a mine.

12 PRESIDENT YOUNG: Let me also follow up on a
13 bit of testimonial evidence that counsel gave which I
14 had not really heard before, but intrigued me.

15 Running through your reports, your successive
16 reports, there is some discussion about trying to
17 reconcile the historical record with Boma Johnson's
18 work and other archeological studies, as I understood
19 what you're saying, with what the Quechan nation had
20 been telling you.

21 I'm a little curious about the process of
22 that, particularly if these were drawn on pieces of

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12: 11: 16 1 plywood and so forth. I mean, if you think a Magic
2 Marker is inaccurate, I suspect painting on plywood is
3 not overwhelmingly accurate.

4 How did you go through the process
5 reconciling these historical records with what the
6 Quechan nation had told you?

7 THE WITNESS: Right.

8 PRESIDENT YOUNG: And I don't mean it. Maybe
9 they told you something quite different, and maybe

10 counsel is just deluding me here, but whatever, how
11 did you communicate with them and how did that
12 reconciliation process work?

13 THE WITNESS: Well, first of all, I want to
14 start by saying that it's our--it's required under
15 Federal regulations to report the information that's
16 provided by the Native Americans. As you're well
17 aware, I'm sure, there has been such a long history of
18 relations between the U.S. Government and the dominant
19 culture of Native Americans, that in the past very
20 often Native American testimony has been ignored, and
21 the Federal Government has made a concerted effort
22 over the past two decades to try to rectify that

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12:12:30 1 situation, so the laws are, you know, very clear that
2 the Native American point of view has to be taken into
3 account. So, that's just a preface of the remarks.

4 But in terms of your actual question, we met
5 many times with the Quechan. They, on many occasions,
6 said that the Trail of Dreams goes through the mining
7 process area. On at least one occasion, they were in
8 the field, and they pointed to a place on the ground
9 and said this is the Trail of Dreams.

10 So, that's mappable archaeologically, so we
11 can identify specifically where that location is, and
12 so that was the process we went through to get from
13 the Board of the general routes to a specific location
14 useful for an impact assessment.

15 PRESIDENT YOUNG: So, they actually went out

16 in the field with you just on one occasion, or were
17 they with you more?

18 THE WITNESS: Well, we had Native American
19 monitors out for the entire two months we were there.

20 PRESIDENT YOUNG: From the Quechan?

21 THE WITNESS: Yes, from the Quechan.

22 But in terms of times that they pointed to a

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12: 13: 45 1 place on the ground and said this is the Trail of
2 Dreams, that would have been a more limited number.
3 Maybe one or two. I don't have specific recollection.

4 PRESIDENT YOUNG: Okay. Thank you.

5 THE WITNESS: They were very clear as to it
6 going through the mining process area on several
7 occasions and not in the field as well.

8 PRESIDENT YOUNG: Thank you very much. We
9 appreciate your presence here. You are excused, thank
10 you.

11 THE WITNESS: Thank you.

12 (Witness steps down.)

13 PRESIDENT YOUNG: Counsel, I take it you have
14 no more witnesses you want to call at this point, but
15 rather want to start your summation, but would like to
16 do that this afternoon; is that correct?

17 MR. GOURLEY: That's correct.

18 PRESIDENT YOUNG: Okay. So, we will adjourn,
19 then, until 2:15. Thank you.

20 MR. GOURLEY: Thank you.

21 (Whereupon, at 12:15 p.m., the hearing was

22 adjourned until 2:15 p.m., the same day.)

0815 Day 4 Final

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AFTERNOON SESSION

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MR. McCRUM: Mr. President and Members of the Tribunal, we would be ready to start.

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PRESIDENT YOUNG: Okay, thank you.

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We will reconvene the hearing and turn the time over to Claimant. Claimant has two hours and 36 minutes.

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MR. McCRUM: Thank you.

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FACTUAL PRESENTATION BY CLAIMANT

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MR. McCRUM: Mr. President, Members of the Tribunal, on behalf of Claimant, Glamis Gold, we would like to begin this presentation by expressing our appreciation for the opportunity we have had this week to appear before you for the time that you have put into addressing these issues in the evidentiary portion of our case.

That evidentiary phase has now concluded, as there will be no further live witnesses testifying for either the United States or Glamis regarding the contested factual issues in the case.

And there are a lot of contested factual issues in this case, but there is one thing that we

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14:22:32 1 agree on with the United States, and that is that this

2 is a very important case. We share that view with the
3 United States.

4 As was the case with the Memorials, the
5 witness testimony has underscored that the parties
6 strongly disagree about the nature of the fundamental
7 factual issues in this case, and part of the
8 Tribunal's task will be to sort out these factual
9 disagreements so that it can then, in turn, evaluate
10 how the legal standards of Articles 1105 and 1110
11 apply.

12 We will, of course, be discussing those
13 parameters and their application to these facts as
14 part of our closing remarks in September, as planned,
15 and I suspect that you will be hearing a lot about
16 those issues from the Respondent tomorrow.

17 But, before we begin that next phase in
18 September, we would like to review some of the
19 problems in the way the Respondent has characterized
20 and presented facts in the past in this case which, in
21 turn, drive the way it characterizes and presents the
22 law.

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14:23:48 1 In short, the testimony that we have heard
2 this week has cast into sharp relief a number of
3 factual inaccuracies or, at a minimum, exaggerations
4 that the United States has relied upon in the past to
5 support its position.

6 In Respondent's opening statement,
7 Mr. Clodfelter argued that Glamis's only

8 motivation--indeed, the only possible motivation--for
9 raising cultural resource issues in the context of
10 other land development projects in the California
11 Desert is to discredit the Quechan Tribe. This
12 assertion is offensive to us; and, more importantly,
13 it is wrong.

14 The Government's statements and misstatements
15 regarding cultural resources were the lynchpin for the
16 Interior Department's unlawful denial of Glamis's Plan
17 of Operations on January 17, 2001, and they were the
18 basis for California's discriminatory regulations and
19 the statute aimed at targeting the Imperial Project,
20 and they remained a substantial part of the
21 Government's argument that Glamis lacked reasonable
22 investment-backed expectations because of the cultural

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14:25:06 1 resources in the California Desert.

2 Yet, despite numerous other major land
3 development projects on or in immediate proximity to
4 the map route of the Xam Kwatcan Trail and the
5 arbitrariness that the Government approvals have
6 demonstrated, and despite the repeated instances of
7 discrimination against the Imperial Project on the
8 basis of cultural resource considerations, the
9 Government would seek to foreclose this Tribunal from
10 considering the cultural resource issues.

11 The fact is that the United States should
12 have solved this controversy by affording Glamis Gold,
13 Limited, reasonable compensation for its vested and

14 valuable property interests back in 2002 or 2003. The
15 Government's refusal to do so then, and its continued
16 refusal to do so today, notwithstanding the
17 compensation requirements of NAFTA, is the reason the
18 Quechan Tribe representatives regrettably have been
19 subjected to expending their resources to monitor,
20 submit briefs in this NAFTA proceeding. It is the
21 Government's actions and inactions which are at the
22 heart of this controversy.

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14: 26: 25 1 The Government's factual exaggerations,
2 however, are not limited to the cultural resource
3 issues. They have pervaded the Counter-Memorial and
4 the Rejoinder, and we expect they will be present in
5 the presentation by the Government tomorrow, which
6 will occur without the benefit of sworn, qualified
7 expert witnesses. They affect the Government's
8 discussion of the measures, the existing regulatory
9 environment, the nature of Glamis's vested property
10 rights, and the extent of the deprivation that Glamis
11 has suffered. Our goal in this presentation this
12 afternoon is just to highlight several examples of
13 these exaggerations that we take issue with.

14 We greatly appreciate the interest and
15 patience of the Tribunal during this long week. It is
16 only Wednesday, but it seems much longer. We will be
17 brief in this final presentation this afternoon and
18 provide a more detailed presentation at the planned
19 closing argument in mid September.

20 I would like to stand up at this point and go
21 through our PowerPoint slides.
22 One of the fundamental issues in the

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14:28:06 1 background of this case, which Ms. Menaker
2 acknowledged as a relevant issue from her perspective
3 in the opening, concerns the reasonable expectations
4 that Glamis may have had regarding mining in the
5 California Desert Conservation Area. The expert
6 reports and uncontested testimony of Mr. Tom
7 Leshendok, a former BLM senior official, described the
8 common practice of open-pit mining for gold and other
9 minerals without complete backfilling in the
10 California Desert Conservation Area and throughout
11 California and throughout the basin and range,
12 geologic province of the Western United States. The
13 United States has failed to present a single Interior
14 Department official to rebut any of these points.

15 The uncontested testimony of Kevin McArthur,
16 Chief Executive Officer of Goldcorp/Glami s Gold,
17 Limited, an individual responsible for over 9,000
18 employees, described his successful experiences
19 operating the Picacho Mine at the base of the Picacho
20 Peak, and the Rand Mine, both in the California Desert
21 Conservation Area.

22 Those issues are largely uncontested

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14: 29: 34 1 regarding the nature of open-pit mining throughout the
2 relevant region. That leads us into the reasonable
3 expectations in the context of cultural resources. We
4 turn to an example from the United States
5 Counter-Memorial filed in September 2006 where the
6 assertion was made at page 61 that sacred sites in the
7 Imperial Project claims were "well documented long
8 before Glamis located its mining claims." We believe
9 that the sworn witness this week and the record of
10 this case fails to support this assertion.
11 Dr. Cleland acknowledged just this morning that the
12 1986 Woods Report identified 16 Quechan Creation
13 Myth-related sites, including Picacho Peak and Pilot
14 Knob, but nothing within several miles of the Imperial
15 Project Site.

16 The map that bears on this is the map three
17 of the myth-related locales from the 1986 Woods
18 Report, which was prepared under contract with the
19 Bureau of Land Management in 1986 and was based on
20 extensive Native American consultations which were
21 referenced. The author of that report, Mr. Woods, has
22 continued to be a consultant with the United States

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14: 31: 08 1 through 2002, as reflected in his role in the Baja
2 Pipeline review. He characterized the Native American
3 consultations that preceded this map as having been
4 based on massive studies, consideration of all
5 available ethnographic literature available at that

6 time.

7 This particular map, to our knowledge and
8 through the evidentiary phase of this proceeding, is
9 the only known mapped route of the Xam Kwatcan Trail
10 as of 1986, immediately, shortly before the time when
11 Glamis proceeded with its investments in the
12 California Desert for the Imperial Project.

13 This particular map shows that the Imperial
14 Project lies a number of miles east of the known route
15 of the Xam Kwatcan Trail. It is also the closest
16 myth-related locale identified on this map in the
17 context of the Imperial Project is Picacho Mine,
18 several miles to the east. And at that particular
19 site is where the Picacho Mine operated at the base of
20 Picacho Peak without controversy, as Mr. McArthur has
21 testified, because he was the mine manager of the
22 Picacho Mine, which was the first mine, the first

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14:32:37 1 producing mine, that Glamis Gold, Limited, carried
2 out. There are no other--there are 16 other Quechan
3 myth-related locales identified through this region.
4 No other are closer to the Imperial Project than this.
5 Investments are made based on known available
6 information. This is information that was associated
7 or carried out pursuant to a BLM contract at a time
8 right after the California Desert land-planning
9 process had been carried out pursuant to direction of
10 the U.S. Congress in the Federal Land Policy and
11 Management Act of 1976.

12 Another map that bears on this, which has
13 been discussed and presented with sworn testimony of
14 witnesses this week is the map entitled "Native
15 American Areas of Concern," which is based on a map
16 prepared by BLM officials in the late 1970s pursuant
17 to a congressional directive in the Federal Land
18 Policy and Management Act of 1976. It was based upon
19 consultation with Native American representatives. It
20 identifies in dark gray areas of very high Native
21 American concern and in light gray as areas of high
22 concern. The Imperial Project, it is undisputed after

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14: 34: 13 1 the witness phase of this case, is outside either of
2 those previously designated areas as designated by the
3 Bureau of Land Management.

4 That particular map played a role in BLM's
5 land-use planning, which was carried out pursuant to
6 congressional directive of the Federal Land Policy and
7 Management Act and resulted in the 1980 California
8 Desert Conservation Plan. That plan was implemented
9 pursuant to a notice and comment process, and that
10 plan became the basis for BLM's recommendations to the
11 U.S. Congress of what lands in this vast region of
12 25 million acres would be designated by statute or
13 permanent preservation and protection for
14 environmental and Native American cultural values.
15 Those Native American cultural values were not ignored
16 at that time. They were fully considered in the BLM
17 plan as well as the recommendations to Congress, and

18 they were considered in the legislation that Congress
19 enacted in 1974, which became the California Desert
20 Protection Act.

21 We turn again to an assertion by the United
22 States in this case on page 72 of the Counter-Memorial

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14:35:44 1 from September 2006. We have the assertion that no
2 other CDCA, California Desert Conservation Area, mine
3 had a significant impact upon Native American cultural
4 and spiritual resources as did the proposed Imperial
5 Project. The Imperial Project is the only mine in the
6 CDCA that would have caused a significant adverse
7 impact--even after mitigation measures were
8 implemented--on historic cultural resources and native
9 cultural resources.

10 This particular assertion, we believe, has
11 been refuted by the testimony of Dr. Lynne Sebastian
12 and, in particular, as an example by this map
13 attachment 5-A of one of Dr. Sebastian's report
14 submissions, which reflect the documentation by
15 Government-sponsored cultural resource surveys of
16 extensive Native American trails and archeological
17 sites in the heart of the Mesquite Mine area, which is
18 approximately 10 miles away from the Imperial Project
19 in Imperial County in the California Desert
20 Conservation Area.

21 Some of these trails, as Dr. Sebastian
22 testified, such as 1881, which you saw photographs of,

14: 37: 18 1 are quite lengthy, extending through this region quite
2 lengthy identified on the ground, and were determined
3 to be eligible for the National Register of Historic
4 Places.

5 The particular trail feature in blue has been
6 mentioned at length in these proceedings, runs through
7 the mine area in question as well as through the new
8 Mesquite Landfill that was approved by the BLM in
9 1996, was reaffirmed by BLM in 2002, and upon which
10 ground breaking construction activities for one of the
11 largest landfills in the United States has commenced
12 this year in 2007.

13 As you have heard testimony from Kevin
14 McArthur and Mr. Leshendok, this landfill will have of
15 capacity of 100 years, will reach a height after this
16 solid waste is placed on the desert landscape of up to
17 400 feet tall, covering four square miles, two to
18 three miles in length, far larger than the proposed
19 Imperial Project. And the Mesquite Mine itself is
20 larger than the proposed Imperial Project.

21 As you also heard from Dr. Sebastian, all of
22 this activity is occurring right on the immediate edge

14: 38: 50 1 of the previously established Singer Geoglyphs Area of
2 Critical Environmental Concern. In fact, the
3 boundaries of the ACEC were adjusted to accommodate

4 this development activity.

5 Let's turn to another assertion made by the
6 Respondent, page 72 of the Counter-Memorial from
7 September 2006: "The Federal Government was able to
8 minimize the impact of the Baja Pipeline by 'requiring
9 changes to the proposed pipeline route to avoid all
10 archeological features associated with the trails' and
11 by ensuring that the route intersected trail segments
12 'at or very near to places on the trail that have
13 already been disturbed.'" Also, because the pipeline
14 would be located primarily underground, BLM determined
15 it would not leave no significant permanent visual
16 impact or alterations to the landscape."

17 You have seen this week, sponsored by the
18 sworn testimony of Dr. Lynne Sebastian, photographs of
19 features that were left on the landscape of this
20 pipeline that runs approximately 80 miles in length
21 with a disturbance swathe ranging from 40 to 80 feet
22 wide.

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14: 40: 21 1 You have heard the testimony of
2 Mr. Leshendok, who has reviewed the EIS records
3 concerning these various projects and has stated that
4 the total area of disturbance is on the order of a
5 thousand acres. The Imperial Project disturbance was
6 on the order of 1,360 acres.

7 And you have also heard the testimony
8 acknowledged this morning by Dr. Cleland that a second
9 proposed pipeline route is planned to go through this

10 region, based on a Final Environmental Impact
11 Statement in 2007, with this new pipeline running
12 generally along the same corridor.

13 We also think it is significant that the Baja
14 Pipeline route was known to run through the region of
15 the previously identified Xam Kwatcan network through
16 the region, unlike the situation when the Imperial
17 Project proceeded in an area that was not previously
18 known to contain the Xam Kwatcan Trail.

19 We believe the sworn testimony that you have
20 heard from Dr. Sebastian, based on her review of all
21 available information, based on her site visits to the
22 area, demonstrates that archeological features of

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14: 41: 47 1 Native American trails were not avoided. The pipeline
2 runs through the Xam Kwatcan Trail network and
3 truncates numerous trail features in areas where
4 previous disturbance is not visible. The visible and
5 direct impacts of this swathe of pipeline is
6 permanent, and you have heard testimony to that
7 effect.

8 Let's turn to another assertion that we heard
9 about on the first day of this hearing, Sunday
10 afternoon. In the Counter-Memorial, page 238, where
11 we were discussing--where the issue was being
12 addressed of the Quechan gold mineral exploration
13 activity, the Respondent asserted in the
14 Counter-Memorial: "While it is true that the Quechan
15 commissioned a limited survey of the potential for

16 bulk gold mineralization on their reservation in the
17 late 1980s, the only exploratory drilling involved in
18 this survey was on the Stone Face prospect, an area in
19 the northwest corner of the reservation, that had
20 already been mined extensively. "

21 Another assertion repeated in the
22 Respondent's Rejoinder relating to this stated: "As

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14: 43: 16 1 an initial factual matter, the only place where the
2 Quechan conducted exploratory drill testing was on the
3 Stone Face prospect at the base of the Cargo Muchachos
4 Mountains, an area that had been mined in the past.
5 There is no inconsistency between the Tribe's decision
6 to conduct limited drill testing in an area that had
7 already been disturbed and its desire to protect
8 cultural resources in the Imperial Project area.

9 You had heard the live testimony of Dan
10 Purvance, Project Geologist, stating with respect to
11 the Stone Face site, "I have taken photographs, I have
12 visited the site several times, and I can swear there
13 is no mining operation at that site. "

14 We bring this up as an example because, as we
15 saw Sunday afternoon, it illustrates the problem of
16 reliance on technical information without a qualified
17 witness sponsoring that information.

18 And now we will turn to the subject of the
19 Glamis Imperial Project valuation and deprivation. We
20 have statements in the Counter-Memorial, repeatedly in
21 the Rejoinder, that Glamis's unpatented mining claims

22 are worth more than \$150 million today.

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14: 44: 40 1 Another statement: "In fact, given the price
2 of gold, today Glamis's mining claims would be worth
3 over \$159 million."

4 Similar statement in the Rejoinder at page
5 five.

6 These statements are based on the Navigant
7 submission by Mr. Kaczmarek, which, in turn, relies
8 upon the engineering report of Norwest. Each of these
9 reports suffers from a critical flaw, as this week's
10 testimony has identified. Norwest Report assumes an
11 incorrect swell factor based on an assumption that
12 79 percent of the overburden at the site is alluvial
13 gravel. The testimony of Mr. Purvance, the testimony
14 of Mr. Guarnera, and the physical core samples belie
15 this assumption.

16 The Norwest lead author, who was here before
17 the Tribunal yesterday afternoon, admitted that such
18 unconsolidated gravel would allow the 700-foot pit
19 wall to slide, but not collapse.

20 Let's stay back on that one where we were.

21 Mr. Houser places reliance on some technical
22 records that support a 15 percent swell factor in his

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14: 46: 12 1 view, but he recognizes that, if the material is, in

2 fact, conglomerate, the appropriate swell factor is
3 33 percent. And we have seen extensive evidence that
4 a swell factor in the range of 30 to 40 percent has
5 been recognized as typical at metallic mines by the
6 National Research Council, among many others,
7 including even the State Mining and Geology Board in
8 the measures at issue in this case.

9 So, it would appear that Mr. Houser is
10 unwilling to acknowledge what this material clearly
11 was in the face of a WESTEC pit stability slope report
12 as part of the Feasibility Study in 1996, which
13 acknowledged that the pit wall would expose a 700-foot
14 expanse of conglomerate material.

15 When we presented Mr. Houser with the
16 conglomerate yesterday, the sample of the drill core,
17 this is what Mr. Houser had to say: "All I can say is
18 it's a heavy, tubular, cylindrical object right now.
19 I can't say much more about it right now."

20 When asked, "Did you make any request through
21 your counsel to examine core samples that might be
22 available to resolve this issue?" Mr. Houser

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14:47:38 1 acknowledged that he had made no such request.

2 It would appear that Mr. Houser wanted to be
3 blind to the actual facts that were available to
4 anyone that would be qualified and review the facts
5 regarding the Glamis Imperial Project.

6 The Navigant litigation experts admitted
7 candidly yesterday that they had never valued a

8 metallic mine deposit prior to their retention in this
9 case. The Navigant Report presupposes, and
10 Mr. Kaczmarek has testified, that mining properties
11 can be valued like any other asset, in his view.

12 This is not the case. Mr. Kaczmarek
13 testified that his report was 100 percent in
14 compliance with the CIMVal valuation standards. Those
15 CIMVal valuation standards are even referenced and
16 attached to one of the Navigant submissions in this
17 record. However, those valuation standards require
18 that a valuation of a mineral deposit be performed by
19 a qualified valuator who must perform a site visit or
20 engage a qualified expert to do so.

21 Mr. Kaczmarek conceded that he is not a
22 qualified valuator. And despite his opportunity to

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14: 49: 08 1 visit the site, he declined to do so.

2 And then, remarkably, when Mr. Houser
3 testified yesterday afternoon, he acknowledged that he
4 had failed to make a site visit, as well as his
5 colleagues at Norwest. No one visited the site.

6 Mr. Guarnera, by contrast, performed a site
7 visit, not only to consider the materials at the site,
8 but also as a double-check of the layout and an
9 overall verification of the factual issues on which
10 his report is based.

11 Mr. Guarnera, who is indisputably one of the
12 world's foremost metallic mine valutors has explained
13 the importance of the site visit to the Tribunal

14 yesterday. The question was asked of Mr. Guarnera:
15 "Did you and other members of the Behre Dolbear
16 project team visit the Imperial Project Site to make a
17 characterization of the rock material?"

18 He responded: "It was not only just to make
19 the characterization of the rock material, but to see
20 what the rock material looked like and certainly
21 identified it right away as conglomerate. I walked
22 down into the arroyos and saw the highly indurated

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14: 50: 19 1 conglomerate that was present. But, while we were
2 there, we also looked at the entire site area to make
3 sure that the site layout was quite appropriate, that
4 everything was accounted for. That's part of the work
5 we try to do, to try to check every aspect of the
6 project to make sure that it is, in our opinion,
7 correct. "

8 I think this rather frivolous issue over
9 whether a particular rock sample is conglomerate or
10 gravel or consolidated gravel would have been avoided
11 had a proper site visit been made by the Government
12 experts in this case, as the valuation standards
13 indicate must be done.

14 I think it is also worth noting that the
15 CIMVal standards are not the only valuation standards
16 for the Tribunal to look at. We have just today
17 provided the Tribunal with a statement that is in a
18 document on appraisal of property that is available
19 from the U. S. Justice Department Web site, which

20 recognizes that mineral appraisal is a specialized
21 complex subject that should be conducted by someone
22 with specialized knowledge and training concerning a

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14: 51: 33 1 mineral property.

2 And we see, with the example of the swell
3 factor issue, the wisdom of those requirements. This
4 is not just a technicality to visit the site. This
5 bears directly on the ability to perceive issues such
6 as the swell factor issue, and not make misjudgments
7 in valuation of a mineral property based on an issue
8 such as that.

9 Another example of the need for the valuator
10 to have knowledge of the mineralization and basic
11 background in mining and geology is reflected by
12 Navigant's reliance on the Cerro Blanco project which
13 was referenced in the last rebuttal filing of Navigant
14 just a little more than a week ago, where
15 Mr. Kaczmarek considered that very analogous situation
16 to the Imperial Project in his latest expert rebuttal
17 report without referencing any reliance on Norwest for
18 having provided any type of characterization of that
19 situation.

20 And yet, yesterday, Mr. Kaczmarek
21 acknowledged that there were fundamental geologic
22 distinctions between the Cerro Blanco project, which

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14: 52: 59 1 was a deep vein ore deposit structure as compared to
2 the Imperial Project which had been drilled by 400
3 drill holes, as you heard in testimony this week, and
4 contained no such deep vein structure.

5 Mr. Kevin McArthur, the Chief Executive
6 Officer of Goldcorp/Glami s Gold, Limited, an
7 individual who testified as to his great experience
8 operating metallic mines at various stages in his
9 career as mining engineer, as mine manager, testified
10 that the adoption of the California complete
11 backfilling requirements in 2002 and 2003 destroyed
12 the value of the Imperial Project. The United States
13 asked not a single cross-examination question of
14 Mr. McArthur.

15 Let's turn to the topic of the character of
16 the California measures. In the Counter-Memorial at
17 page 203, we have an assertion that Glami s' s proposed
18 Imperial Project was merely the most prominent and
19 immediate example of the harm that open-pit metallic
20 mining would cause to cultural resources and sites of
21 significant religious, cultural, and historic
22 importance. And yet, we have seen somewhat

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14: 54: 28 1 reluctantly Mr. Parrish acknowledge two days ago that,
2 yes, indeed, the Glami s Imperial Project was the only
3 project ever identified as the "emergency basis" for
4 the SMGB regulations.

5 Let's look at the assertion of the Respondent

6 in the Counter-Memorial at page 206. We have
7 assertions that the SMGB enacted the regulations
8 because of the damage projects such as the proposed
9 Imperial Project would cause to the environment,
10 absent the regulations, and not for any reason
11 particular to Glamis.

12 We see a further statement in the
13 Counter-Memorial that the SMGB regulations do not
14 arbitrarily single out a particular parcel of land for
15 less favorable treatment than other parcels of land.

16 Yet, the motive to stop Glamis was expressly
17 stated by the SMGB's emergency rulemaking and in the
18 Governor's September 30, 2006, directive to stop the
19 Glamis Imperial Project. As Mr. Parrish testified and
20 reluctantly acknowledged, no other project was ever
21 identified as the basis for the emergency.

22 Mr. Parrish noted in his testimony late

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14:55:57 1 yesterday that the SMGB includes a statute-mandated
2 position which would be the position of a mining
3 engineer. Mr. Parrish was complete in one respect,
4 and that is that the California Public Resources Code
5 mandates that the expertise to be represented on the
6 Board in particular requires that one member shall be
7 a mining engineer with background and experience in
8 minerals in California.

9 At the very time that the Board was being
10 directed by the Governor through the Secretary of
11 Resources to promulgate new reclamation requirements

12 for metallic mines, the most pertinent position on the
13 Board, that of mining engineer, was vacant, because,
14 from 2001 to 2005, the mining engineer position of the
15 Board was unoccupied.

16 MS. MENAKER: This is not this evidence is
17 not in the record at all. This wasn't presented
18 during testimony.

19 MR. McCRUM: This particular reference--

20 MS. MENAKER: If you would wait for the
21 Tribunal to rule on the objection, please.

22 PRESIDENT YOUNG: Do you have any response to

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14: 57: 01 1 that, Mr. McCrum?

2 MR. McCRUM: Yes. This particular record is
3 contained on Web site of the State of California
4 concerning the State Mining and Geology Board, and we
5 are presenting it as a publicly noticed official fact.

6 (Tribunal conferring.)

7 PRESIDENT YOUNG: Mr. McCrum, we are going to
8 allow you to mention that and give Respondent an
9 opportunity to respond to that tomorrow or Friday in
10 your presentation.

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

13 We were presented with this particular
14 statement by Mr. Parrish yesterday afternoon, and we
15 think it's important that the Tribunal consider these
16 issues in light of the public reality that bears on
17 them.

18 The additional statement was made that the
19 Board is nonpartisan in nature. We note that the six
20 out of the remaining eight Board Members at that time
21 had been appointed by Governor Gray Davis, according
22 to that public information.

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14:58:48 1 Certainly, governmental action can be carried
2 out in response to environmental concerns, concerns
3 concerning the cultural resources protection, but
4 governmental action needs to be carried out in the
5 context of recognition of vested property rights, such
6 as the property rights that were held by Glamis Gold,
7 Limited, which have been recognized as valid existing
8 property rights by a formal finding of the U. S.
9 Department of the Interior Bureau of Land Management,
10 dated September 27, 2002. That particular finding,
11 that particular report, has never been rescinded by
12 the Interior Department. There has been no one from
13 the Interior Department to call into question any
14 aspect of that Mineral Report which found the Glamis
15 Mining claims to be valid and established in
16 accordance with Federal law.

17 We have only outside consultants that have
18 been hired in this litigation, with little or no
19 background in mining, raising any question about the
20 BLM Mineral Report that has verified the vested
21 property rights associated with the Glamis mining
22 claims immediately before the action taken by

15:00:24 1 California in the emergency rulemaking which was
2 unquestionably targeted at Glamis to stop and
3 permanently prevent the Glamis operations from
4 proceeding; to impose cost-prohibitive unprecedented
5 backfilling requirements on this operation,
6 backfilling requirements which the Interior Department
7 itself in the BLM Mineral Report acknowledged were not
8 economically feasible; backfilling requirements which
9 the Governor himself acknowledged were intended to
10 impose cost-prohibitive requirements; backfilling
11 requirements which other State documents the State of
12 California acknowledged were intended to impose a
13 permanent prohibition on the Glamis Imperial Project
14 from proceeding; and backfilling results
15 which - backfilling requirements which the Glamis Gold
16 company headed by responsible, proficient experienced
17 mining engineers, concluded could not be carried out
18 in an economically feasible manner and concluded that
19 the Project was sterilized and could not go forward;
20 and a conclusion that has been verified by the
21 marketplace in a period of booming gold investment,
22 and yet you have heard the sworn testimony of the

15:01:57 1 Glamis CEO, Kevin McArthur and Charles Jeannes, that,
2 during this time, not a single offer has been made
3 from a mining company or any mining investment

4 interest to purchase the reported mineral resources at
5 the Glamis Imperial Project, and that is why Claimant,
6 Glamis Gold, comes before this Tribunal for fair
7 compensation for the destruction of its vested
8 property interests by the Government measures that had
9 been carried out with the intent to do just that.

10 And that concludes our presentation for this
11 afternoon.

12 PRESIDENT YOUNG: Thank you very much.

13 Do either of my colleagues have a question
14 you want to pose?

15 QUESTIONS FROM THE TRIBUNAL

16 ARBITRATOR CARON: Mr. McCrum, I have--I'm
17 feeling out of balance here. I have a few questions,
18 if you could just try to help me a little bit.

19 MR. McCRUM: Sure.

20 ARBITRATOR CARON: In the second section,
21 reasonable expectations regarding cultural resources,
22 and you point to the 1986 map prepared by Woods, and

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15: 03: 35 1 the point to be made you are asserting is that one
2 could look at that map and have an expectation, not an
3 expectation, but to alert Glamis to the sensitivity of
4 the region. Am I accurate in that, roughly?

5 MR. McCRUM: That's correct, Professor Caron.

6 It also is an indication of what BLM--the
7 type of information that was available to BLM when it
8 was carrying out its land-use planning activities.

9 ARBITRATOR CARON: The subsequent map. You

10 pointed to from BLM

11 MR. McCRUM Actually, the BLM map would have
12 been from the late 1970s, and the Woods map would have
13 been subsequent to it in 1986.

14 ARBITRATOR CARON: Excuse me.

15 MR. McCRUM And all of that information was
16 taken into account by BLM through its California
17 land-use planning activities in the California Desert,
18 leading to the congressional action in 1994.

19 ARBITRATOR CARON: When I look at the Woods
20 map, there is a couple of things that strike me
21 that--I don't think it's quite hand-drawn, but it's a
22 rather simpler map, and the trail is rather even and

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15:04:54 1 symmetric, so I might have some doubts about what do I
2 take away from the accuracy of that. And I just am
3 not sure.

4 Am I correct that Indian Pass is not on this
5 map?

6 MR. McCRUM That's correct, Professor Caron.
7 Perhaps it will help our discussion to look
8 at the Woods map from 1986. Here is the Imperial
9 Project, and here is the Xam Kwatcan Trail, which is
10 several miles to the West of the Imperial Project.

11 ARBITRATOR CARON: Right. I'm just saying
12 someone knowledgeable in the region trying to assess
13 information from that, it's curious to me looking at
14 that earlier BLM map you described that Indian Pass,
15 which is an area of high concern, is not listed on the

16 Woods map. The square above the Glamis Imperial
17 Project, Indian Pass ACEC.

18 MR. GOURLEY: The ACEC didn't exist at the
19 time of this.

20 ARBITRATOR CARON: The ACEC reflects an area
21 of myth-related locale?

22 MR. GOURLEY: I don't think there is any

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15:06:26 1 evidence of that.

2 ARBITRATOR CARON: Okay.

3 MR. McCRUM Professor Caron, what this
4 indicates is that this map is not necessarily
5 conclusive as to the entire desert region, but this is
6 the available information that Woods was able to
7 obtain, based upon consideration of all ethnographic
8 information--that's the way the report reads--and that
9 this was the best available information at the time,
10 and this is what BLM relied on, and this is what
11 companies relied on. Companies relied on primarily
12 the BLM action, the land management actions that were
13 taken, and the congressional actions taken as well in
14 response to the known information such as this.

15 BLM can only act based on known information,
16 and investors carrying out development projects in the
17 California Desert can only act on what's known, as
18 well.

19 ARBITRATOR CARON: I totally understand that.
20 I guess my question was, the way the trail is
21 depicted, it seems to--since we know there is not a

22 continuous trail on the ground following that route,

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15:07:33 1 that it is some sort of approximate depiction of the
2 trail; is that correct?

3 MR. GOURLEY: Yes. It's a schematic. It is
4 to scale, as you saw--it's 20 kilometers to roughly an
5 inch, but it is a schematic--so, all it can tell you
6 is a general approximation of where the trail is, and
7 that's all it has been represented to do. And the
8 Boma Johnson map is the same.

9 ARBITRATOR CARON: Okay.

10 Just a quick question on the Mesquite Mine,
11 just to refresh my memory, so, on the 400-foot high
12 eventual landfill, there was a statement at one point
13 that the waste rock would be used to resurface the
14 landfill area, something along that line. Perhaps you
15 can refresh my memory there, but the related question
16 is the last pit of the Mesquite Mine to be left
17 unfilled.

18 MR. McCRUM: Professor Caron, my
19 understanding is the Mesquite Mine remains a very
20 large open pit today. It is not subject to complete
21 backfilling, it never has been, and it is not planned
22 to be filled. It is not subject to the California

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15:08:58 1 backfilling requirements.

2 And I believe that there is a Mesquite
3 expansion that has been approved prior to 2002 which
4 has yet to be carried out but can be carried out
5 without compliance with the complete backfilling
6 requirements because it would be a grandfathered
7 property.

8 And we also have evidence in the record that
9 there was a State lease issued on October 1, 2002, to
10 authorize expanded open-pit mining in connection with
11 the Mesquite Mine on State lands adjacent to that
12 mine, and this is contained in the rebuttal report of
13 Lynne Sebastian from July of 2007.

14 ARBITRATOR CARON: Thank you.

15 The next topic you move to is the pipeline,
16 and you point to the statement from Dr. Sebastian's
17 report that there are visual and direct impacts, and
18 Dr. Cleland's response was, in part, that where there
19 were direct impacts, that was in a different part of
20 the trail network, so leave that to the side for a
21 second.

22 But, he was saying that--one comment he made

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15:10:12 1 at the very end was a mine would have different visual
2 impacts--in fact, also other impacts such as noise of
3 operation--and that the waste pile is a visual impact
4 that is different than a scar across the surface.

5 Do you have any--from the record, is there
6 any comment responding to that?

7 MR. McCURUM: Yes, Professor Caron. I think

8 you for these questions and the opportunity to address
9 them. This is very, very helpful.

10 If you look at one of the photographs that
11 was associated with Lynne Sebastian's presentation
12 here as well and is contained in her rebuttal report
13 from July 2007, one of her photographs shows a
14 previously identified Native American trail, 1881,
15 which was identified as eligible for the National
16 Register by the Government. This was a trail segment
17 that heads directly to the new Mesquite Landfill area
18 which is reflected by that low black silk fence, and
19 off in the background you see the Mesquite Mine waste
20 rock piles somewhat low on the horizon in the picture,
21 and the landfill will rise roughly double the height
22 of that rock material, and that rock material is,

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15: 11: 32 1 after all, natural to the desert.

2 ARBITRATOR CARON: I agree. That's not my
3 question, though. I agree there is a question you can
4 make by comparing the Mesquite Mine and Landfill
5 again, but the question is comparing your statement of
6 comparing the pipeline to the mine.

7 MR. McCRUM: Professor Caron, we would never
8 insert that the visual impacts of the mine were
9 exactly the same as the landfill. To us, the
10 relevance of the--I'm sorry. Never assert that the
11 visual impacts of the mine are exactly the same as the
12 pipeline, but we think the pipeline is quite relevant
13 because it is a major discretionary Government land

14 project that ran through the previously identified
15 known route of the Xam Kwatcan Trail.

16 And we think it's quite--we fully agree with
17 you and Dr. Sebastian, of course, that these trail
18 segments are not an isolated line. It's a braided
19 trail network. It doesn't--you can't map it according
20 to a precise line. But it would appear from the
21 Projected Xam Kwatcan route, according to Woods in
22 '86, that the pipeline generally followed that route,

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15:12:56 1 that it appears consistent with the more recently
2 disclosed, more extensive map by Boma Johnson in
3 2000--well, we think roughly 2001 because Dr. Cleland
4 states that he had this map given to him--not this
5 map, but you understand what I mean--the
6 black-and-white map that this is based on in this
7 color depiction which shows the other development
8 sites. Dr. Cleland has stated in his declaration,
9 filed with the Rejoinder in March of 2006, that the
10 map that he was referring to in his declaration he had
11 in his possession as part of the Baja Pipeline review
12 in 2001, the Baja Pipeline route had not gone through
13 at that point.

14 So, they understood that this trail network
15 would be bisected by the route, by the proposed route,
16 of the pipeline in general, and that was known prior
17 to the BLM taking out--taking that action, and the
18 Federal Energy Regulatory Commission in the State of
19 California.

20 Unlike a mine which has to be only where the
21 ore deposit is, where the rare old gold deposit is
22 identified, there is discretion where you could put

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15:14:08 1 the pipeline. The pipeline could have been into the
2 west moved in the sand dune hills area. It could have
3 been moved, perhaps, into Arizona, as the Quechan
4 proposed to be done. But this was a discretionary
5 action to place the pipeline.

6 Therefore, we do think it's relevant that
7 when you look at some of the photographs that Lynne
8 Sebastian has presented and you see that 80-mile
9 swathe running off into the distance and the SUV
10 looking very small, that that is a permanent visual
11 impact on the desert. It is not exactly like the
12 mine, but it covers a thousand acres in total over
13 that linear distance.

14 The second pipeline now projected to come
15 through in 2007 is going to expand that further. I
16 don't think we had a quantification on how much that
17 would--much further that would be, but I would suggest
18 that a fair inference would be that the total
19 disturbance would exceed the 1,367 acres associated
20 with the Imperial Project, and that's why we think the
21 pipeline is relevant, because it could have been
22 located in other places.

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15:15:12 1 ARBITRATOR CARON: Could I ask a question on
2 that, then. I do have the problem of scale on the
3 Boma map, but--so we have heard that there was an
4 alternative route to Arizona.

5 MR. McCRUM Yes.

6 ARBITRATOR CARON: Maybe you could push my
7 common sense for a moment, but it would make sense on
8 this side that the trail is in a certain place for a
9 reason, probably follows the most accessible part of
10 the area on either side of Palo Verde Point, and that
11 it was probably logical for the pipeline to
12 follow--again, the scale problem is present to follow
13 approximately, and could go in an entirely different
14 direction. If you talk about tunneling, boring--maybe
15 you could explain that.

16 MR. McCRUM Professor Caron, I think that
17 you and I must think a lot in some ways because I had
18 the same logical thought myself. The trail route is
19 where it is because it would run through the desert.
20 It was a natural footpath. The pipeline has roughly
21 followed the trail in the north-south dimension along
22 the same general lines because it was the easiest,

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15:16:20 1 most cost-effective way to run the pipeline along that
2 area.

3 Putting it in other areas probably would have
4 been more expensive, and the Government chose not to
5 reroute the pipeline to vastly different areas, and

6 let it go through what was generally identified to be
7 the known route to the Xam Kwatcan Trail.

8 I have been working on this case--I'm sorry.

9 ARBITRATOR CARON: But we would have to see
10 that at a different scale to know exactly what that
11 means. We have seen some photographs, but I am just--

12 MR. McCRUM: Yes. We recognize that this map
13 is not--this map is not precise. These trail segments
14 are braided, as Dr. Sebastian has testified, but this
15 kind of a map of gives us the best indication of where
16 the apparent route goes.

17 We were quite amazed when this map was
18 produced upon our request on June 6th of 2007. We had
19 never seen it before in years of working on this
20 matter, and it was quite remarkable to us to find out
21 that the Government cultural resource experts
22 apparently had this back to 2001, prior to the 2002

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15:17:33 1 Mesquite Mine expansion, prior to the Xam - pipeline
2 approval, and prior to other land development
3 activities in the area.

4 ARBITRATOR CARON: If I could go to the
5 valuation and deprivation, and I guess my question
6 here is a little--you have done a lot of education
7 about the swell factor, used a lot of your time to
8 talk about that issue, so let me just try to raise a
9 couple of questions.

10 So, a very simple question. First, do you
11 know the dollar difference between 23 percent and

12 35 percent in the valuation?

13 MR. McCRUM I don't know offhand, Professor
14 Caron. If Dr. -- if Mr. Guarnera was here, he certainly
15 would have known.

16 ARBITRATOR CARON: That's fine.

17 MR. McCRUM It's a substantial figure. It
18 substantially affects the valuation.

19 ARBITRATOR CARON: You stated that as far as
20 the CIMVal standards, you point out that it doesn't
21 meet a particular standard about qualified valuator,
22 and related to that that the evaluator pay a site

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15:18:57 1 visit. By that do you mean or do you concede that it
2 meets the other standards?

3 MR. McCRUM No, we certainly don't concede
4 that, and we do rely on the very detailed reports of
5 Behre Dolbear, which have--

6 ARBITRATOR CARON: Which list other problems?

7 MR. McCRUM Which have listed other
8 disagreements that they have with the Navigant
9 Reports, and one of the most striking disagreements,
10 of course, is Navigant reliance on a single spot price
11 to project a 159 million-dollar valuation which--

12 ARBITRATOR CARON: That does not go so
13 much--it goes to a mining practice, perhaps, but not
14 to the--let me back off. I will strike that question.

15 Let me ask a different question. Mr. Houser,
16 in looking at the conglomerate at several points,
17 stated that he would need to know more about the

18 particular conglomerate because when it blasts, it
19 breaks apart. And, to me, the implication was that it
20 can break apart in different ways, that there is
21 rocks, that there is smaller finer grained material
22 that comes out of that blast, and the implication for

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15:20:13 1 me listening to that was that there might be some
2 range of swell factor for the range of conglomerate.
3 Is that--I know you're not an expert in this field, so
4 I'm just asking for you, but--

5 MR. McCURUM Well, Professor Caron, I have a
6 geology degree at undergraduate school, and I did
7 learn the difference between conglomerate and
8 consolidated sand and gravel probably in the
9 introduction to geology.

10 I think that the best indication of this, the
11 best response I can give you is to look at the Church
12 Engineering Handbook that projects swell factors, and
13 it does not support the interpretation offered by
14 Mr. Houser yesterday. You look at that chart, and it
15 provides different swell factors for many different
16 rock types. There is only one for conglomerate.
17 There is no suggestion that you apply different swell
18 factor based on different conglomerate.

19 And if you saw those rock samples, as you did
20 in the last few days, they are quite hard. They're
21 like any other hardrock. In fact, the National
22 Academy of Sciences report was entitled "Hardrock

15: 21: 37 1 Mining on Federal Lands, " for a reason because gold
2 mining is typically carried out in a hardrock
3 environment, and the swell factor is typically in a
4 range of 30 to 40 percent, as you've heard at length,
5 and I think there is really no basis to place weight
6 on this conglomerate versus sand and gravel issue. I
7 think it was a clear error by Norwest, and which has
8 been accepted by Navigant as well.

9 ARBITRATOR CARON: I'm not a geology major,
10 but I took several geology courses. There are rocks
11 and there are rocks. I'm not sure what that means.

12 The--on the character of the California
13 measures, when I--at several points you have
14 emphasized that the Glamis Mine is the only mine
15 mentioned specifically in the emergency regulations.
16 The response of Mr. Parrish is that the mine is the
17 trigger, and that's a different thing than saying it's
18 the only thing that the regulations did or could apply
19 to.

20 And the part of the regulations as pointed to
21 says basis for the emergency. If there is no basis
22 for the emergency, there should be no emergency

15: 23: 09 1 regulations. There should be a project that somehow
2 justifies the issuance of emergency regulation. So, I
3 understand you want to tie it back to the statement of

4 the Governor earlier in the message to the Senate, but
5 independently looking at that one document. Perhaps
6 you could comment.

7 MR. GOURLEY: I think it's very important to
8 take a look at the way the process worked.

9 Yes, it's the--

10 ARBITRATOR CARON: I'm sorry, can you answer
11 my question first about just the document itself and
12 then you can broaden it out, if you would like.

13 MR. GOURLEY: The emergency that is listed is
14 the Glamis Gold, and yet there is not a shred of
15 evidence before the Board in this record that would
16 show that Glamis Gold presented any of the safety or
17 environmental issues at the Imperial Project that
18 became the justification for the regulation.

19 So, it's one thing to say, ah, we see a
20 problem presented by this mine that is about to be
21 permitted, and so we have to act quickly. It's quite
22 another when you say I see this mine, I have been told

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15:24:29 1 to kill it, and now I have these health and safety
2 issues reflected by other preexisting mines. I'm not
3 going to regulate the preexisting mines, but I'm going
4 to kill the one project that is pending approval.

5 ARBITRATOR CARON: I'm not sure that answers
6 my question. I understand your point that it
7 doesn't--we can go on. Okay, thank you.

8 I think that concludes my questions. Thank
9 you very much.

