

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

GLAMIS GOLD LTD.,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

SUBMISSION OF NON-DISPUTING PARTIES
SIERRA CLUB AND EARTHWORKS

Martin Wagner
Sarah Burt
Earthjustice
426 17th Street, 6th Floor
Oakland, CA 94612
510-550-6700 (tel)
510-550-6740 (fax)

Roger Flynn
Jeffrey C. Parsons
Western Mining Action Project
P.O. Box 349
412 High Street
Lyons, CO 80540
(303) 823-5738 (tel)
(303) 823-5732 (fax)

Counsel for Sierra Club and Earthworks

October 16, 2006

TABLE OF CONTENTS

INTRODUCTIONError! Bookmark not defined.

ARGUMENT 3

I. The United States Has Not Violated NAFTA Article 1105 Because its Lawful Actions Accorded Glamis’s Investment a Minimum Standard of Treatment 3

A. Minimum Standard of Treatment..... 3

B. DOI’s 2001 Record of Decision Denying Glamis’s Plan of Operations and its Subsequent Refusal to Approve the Plan of Operations Do Not Violate the Minimum Standard of Treatment Required by Article 1105 4

1. DOI’s 2001 Record of Decision Denying Glamis’s Plan of Operations Was Legal Because it Served to Prevent Unnecessary or Undue Degradation 5

2. Glamis Was Accorded the Same Treatment Normally Accorded Mining Claimants Under U.S. Law, Regardless of Nationality 8

C. California’s Backfilling Regulation Does Not Violate Glamis’s Right to a Minimum Standard of Treatment..... 10

II. Neither DOI’s Failure to Approve Glamis’s Plan of Operations, Nor California’s Backfilling Regulations, Constitutes an Expropriation in Violation of NAFTA Article 1110 12

A. The Actions of the United States in Failing to Approve Glamis’s Plan of Operations Do Not Amount to An Expropriation Under Article 1110..... 13

1. Because Its Plan of Operations Has Never Been Approved, Glamis Has Never Had a Right to Exploit the Imperial Project that Could Be Expropriated 13

2. Even if Glamis Does Have a Valid Property Right, Glamis’s Alleged Expectation of Approval of Its Plan of Operations Was Not Reasonable 15

B. California’s Backfilling Regulation Did Not Expropriate Glamis’s Investment .. 17

C. Neither DOI’s Rejection of Glamis’s Plan of Operations nor California’s Backfilling Regulation Affects Glamis’s Interests Permanently 19

CONCLUSION 20

INTRODUCTION

1. The Sierra Club and Earthworks respectfully file this Submission for the Tribunal's review in this matter. The purpose and value of this submission are set forth in the accompanying Application of Non-Disputing Parties for Leave to File a Written Submission; we will not repeat them here. We also assume the Tribunal's familiarity with the facts related to Claimant's Imperial Project, which were well described in the August 19, 2005, submission of the Quechan Nation.

2. This arbitration addresses the rights of governments to regulate to protect public health, cultural resources, and the environment from the significant impacts of large-scale mining operations such as the Imperial Project that is at the center of this dispute. A study commissioned by the mining industry has recognized the extent of these problems:

In addition to the loss of productivity, mine wastes can have a profound effect on surrounding ecosystems. When they are not physically stable, erosion or catastrophic failure may result in severe or long-term impacts. When they are not chemically stable, they can serve as a more or less permanent source of pollutants to natural water systems. These impacts can have lasting environmental and socio-economic consequences and can be extremely difficult and costly to address through remedial measures.¹

3. Hardrock mining generally leaves formerly productive land sterile and unusable, scarred by steeply sloped waste piles containing millions of tons of rock and deep mine pits that can cover hundreds of acres.² Ground- and surface-water resources are destroyed when toxic drainage from acid-forming minerals and waste rock enters the environment, and when excavated pits fill to form pit lakes.³ The California State Mining and Geology Board has noted that

¹ "Breaking New Ground," ch. 10, p.234, the Mining, Minerals and Sustainable Development Project (MMSD), available at http://www.iiied.org/mmsd/mmsd_pdfs/finalreport_10.pdf (last visited October 12, 2006). This study was commissioned by the World Business Council for Sustainable Development (WBCSD). See <http://www.iiied.org/mmsd/index.html> (last visited October 12, 2006); see also WBCSD website, <http://www.wbcd.org/templates/TemplateWBCSD5/layout.asp?type=p&MenuId=ODA&doOpen=1&ClickMenu=LeftMenu> (last visited October 12, 2006) ("[N]ine leading mining companies launched the Mining, Minerals and Sustainable Development (MMSD) project in 1999.").

² The proposed Imperial Project would cover 1,600 acres and would mine over 400 million tons of rock and ore. The East Pit alone would be one mile long, half a mile wide, and 800 feet deep. Final EIS at 2-7, 2-8.

³ See California State Mining and Geology Board, Executive Officer's Report (Mining Board Report), April 10, 2003, at 15 (Comment Response 8B), Ex. 1, available at <http://www.consrv.ca.gov/smgb/staffreports2003/APR/0410b3.pdf> (last visited October 16, 2006) ("In reality, the open pits have remained open holes in the ground, with large piles of waste rock surrounding them, and with toxic or hazardous water collecting in the pit bottoms.").

[o]pen pit metallic mineral mines often create very large excavations with at least equally large overburden and rock waste piles. Material "swelling" may create overburden and rock waste piles having greater volumes than the pit from which the material was excavated. Industry statements provide that swelling by as much as 40 percent occurs. In addition, metallic mineral mines that employ the cyanide heap leach method for mineral segregation and collection frequently generate very large leach piles. These features remain on the landscape following the conclusion of mining operations, and may pose a contamination problem when residual cyanide (or any other processing solution) not removed by rinsing is exposed to precipitation percolating through the pile and flushing the processing solution into surface waters.⁴

4. One leading U.S. federal court decision highlighted these "devastating environmental consequences" and noted that "the hardrock/metal mining industry was recently ranked the nation's leading emitter of toxic pollution."⁵ In addition, the full extent of the environmental harm often does not become known until long after the mine has closed and the company has left the area, leaving federal, state and tribal governments to pay the bills.⁶

5. To prevent such environmental liabilities, the current trend is to develop mine designs and closure plans that will minimize the risk of environmental problems and avoid ongoing treatment of these problems, which may be necessary in perpetuity. Backfilling mine pits after operations are completed is a key and "best-practice" component of such design. According to the U.S. Environmental Protection Agency, "Mine backfilling is the act of transporting and placing overburden, waste rock, or tailings materials in surface or underground mines. ... The technique is being used increasingly as a remediation measure (e.g., to minimize the potential for acid generation in mine walls and/or the backfilled material) and to minimize the amount of surface disturbance required to store waste materials."⁷ Backfilling reduces the formation of acid mine drainage – the primary source of toxic pollution from such mines – by limiting the exposure of the mining wastes and pit walls to oxygen and water. Because a filled pit will not

⁴ California State Mining and Geology Board, Executive Officer's Report (Mining Board Report), April 10, 2003, at 4, Ex. 1.

⁵ *Mineral Policy Center v. Norton*, 292 F.Supp.2d 30, 33 (D.D.C. 2003) ("Mining activity emits vast quantities of toxic chemicals, including mercury, hydrogen, cyanide gas, arsenic, and heavy metals. The emission of such chemicals affects water quality, vegetation, wildlife, soil, air purity, and cultural resources.").

⁶ For example, clean-up of the Summitville mine in Colorado will likely cost \$225 million; remediation at the Yerington copper mine in Nevada will cost around \$200 million. "Breaking New Ground," *supra* note 1, ch. 10, p.236.

⁷ EPA and Hardrock Mining: A Source Book for Industry in the Northwest and Alaska, Appendix F: Solid Waste Management, at F-6, 7 (January 2003). [http://yosemite.epa.gov/R10/WATER.NSF/840a5de5d0a8d1418825650f00715a27/e4ba15715c97ef2188256d2c00783a8e/\\$FILE/ATTIYYL5/appendix%20f.pdf](http://yosemite.epa.gov/R10/WATER.NSF/840a5de5d0a8d1418825650f00715a27/e4ba15715c97ef2188256d2c00783a8e/$FILE/ATTIYYL5/appendix%20f.pdf). The EPA report highlighted a number of mines, including in California, that utilized backfilling to reduce environmental damage. *Id.* at F-7.

form a contaminated pit lake, there is also less risk of contamination of groundwater and biodiversity. In addition, by limiting the area of exposed rock and pit walls, backfilling reduces wind erosion and air pollution due to the spread of dust into the air. Finally, backfilling ensures that a mine site will be returned as much as possible to the initial contours of the landscape, allowing for some of the original land-uses to be reinstated.

6. While the costs of proper mine closure and remediation, including measures such as backfilling and re-contouring can be costly, the costs of incorporating these measures into mine design and closure plans are significantly less than the aggregate long-term costs of ongoing containment, remediation, and water treatment that may be necessary if a mine is not closed properly. Furthermore, when incorporated into mine design and closure plans, the costs of remediation are rightfully borne by the mining company instead of taxpayers.

ARGUMENT

I. The United States Has Not Violated NAFTA Article 1105 Because its Lawful Actions Accorded Glamis's Investment a Minimum Standard of Treatment

7. Glamis alleges that certain acts and omissions of the U.S. Department of the Interior (DOI) and the State of California breached U.S. obligations to provide Glamis with a minimum standard of treatment pursuant to NAFTA Article 1105. Glamis Memorial, May 6, 2006, at 302. In particular, Glamis asserts that DOI's ongoing failure to approve its plan of operations for the Imperial Project, and California's regulations and Senate Bill requiring backfilling of certain proposed gold mines near sacred cultural sites, constitute measures or a series of measures in violation of Article 1105. Glamis Memorial at 303-310. As show below, the measures taken by the United States and California are lawful regulations to protect health and the environment, and meet the minimum standard of treatment required by Article 1105.

A. Minimum Standard of Treatment

8. Article 1105 requires the United States to accord Glamis's investment "treatment in accordance with international law, including fair and equitable treatment and full protection and security." NAFTA Article 1105. Another NAFTA tribunal recently synthesized standards useful for discerning violations of Article 1105:

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

Methanex v. United States, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005) at Part IV - Chapter C - Page 4 (citing *Waste Mgmt. Inc. v. Mexico*, Arb (AF)/00/3, paras. 98-99 (ICSID 2004)).

9. The minimum standard of treatment required by Article 1105, extends considerable deference to governments in matters of domestic law and policy. It has long been recognized that, in the case of arbitration seeking compensation for the impacts of government regulations, "if the reasons given [for the regulation] are valid and bear some plausible relationship to the action taken, no attempt may be made to search deeper to see whether the State was activated by some illicit motive."⁸ When interpreting and applying Article 1105, a NAFTA tribunal "does not have an open-ended mandate to second-guess government decision-making." *SD Myers v. Canada*, Partial Award, Nov. 13, 2000, para. 261. "A breach of Article 1105 only occurs when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to a level that is unacceptable from the international perspective. That determination must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders." *Id.*, para. 263.

10. In *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 127 (Jan 26, 2006), the Tribunal stated that Mexico has "wide regulatory 'space' for regulation ... Mexico can permit or prohibit any form of gambling as far as the NAFTA is concerned. It can change its regulatory policy and it has a wide discretion with respect to how it carries out such policies by regulation and administrative conduct." In light of the deference extended to domestic authorities to regulate matters within their own borders, the actions of the United States and California in the regular exercise of their broad regulatory authority over mining activities on federal lands should be given deference by this tribunal.

B. DOI's 2001 Record of Decision Denying Glamis's Plan of Operations and its Subsequent Refusal to Approve the Plan of Operations Do Not Violate the Minimum Standard of Treatment Required by Article 1105

11. U.S. mining law subjects all mining claimants to the government's substantial regulatory power. This is because the government, not the claimant, owns the underlying fee title to the public lands on which the mining claims are situated, and the government can therefore regulate those claims for the public good. This is the case regardless of the nationality of the claimant and regardless of the economic impacts of regulation. Likewise, U.S. law has long recognized the authority of states to impose environmental conditions on mining claims that exceed federal standards, *see* 43 C.F.R. § 3809.3-1(a) (1981); 43 C.F.R. § 3809.3 (2002), and all mining claimants operate within this valid - if often uncertain - regulatory climate. The federal government's mining regulations and statutory duties to protect public land apply equally to all open-pit mines on federal lands. Because the measures taken by DOI in reviewing Glamis's plan of operations were in accordance with federal law, and because the laws were applied without

⁸ G.C. Christie, What Constitutes a Taking of Property Under International Law, 38 *British Yearbook of Int'l Law* 307, 338 (1962).

discrimination on the basis of nationality, Glamis cannot claim that it has not been afforded the minimum standard of treatment required by Article 1105.⁹

1. DOI's 2001 Record of Decision Denying Glamis's Plan of Operations Was Legal Because it Served to Prevent Unnecessary or Undue Degradation

12. Despite DOI's statutory mandate to prevent unnecessary or undue degradation of public lands, 43 U.S.C. § 1732(b), Glamis alleges that DOI illegally denied its plan of operations in January of 2001 and that this violated the minimum standard of treatment required by Article 1105. Glamis Memorial at 186, 188. In particular, Glamis alleges that the impacts of a mine on historical and cultural resources "do not provide a basis for denial [of a plan of operations]."¹⁰ Glamis Memorial at 31.

13. In 2003, the U.S. District Court for the District of Columbia considered a challenge to 2001 regulations issued by the Bureau of Land Management (BLM)¹¹ implementing DOI's statutory duty to prevent unnecessary or undue degradation of public lands.¹² *Mineral Policy*

⁹ Indeed, these California and federal requirements are significantly less restrictive of mining than those of a number of other countries and states. For example, Costa Rica has categorically banned open pit mining. See "Costa Rica Bans Open Pit Mining," Reuters News Service, June 7, 2002, Ex. 3. The state of Montana has banned the use of cyanide in gold mineral processing. See *Seven Up Pete Venture v. State of Montana*, 114 P.3d 1009 (Montana 2005) (finding that cyanide ban was not a "taking" under state and federal law). A similar ban was passed by the Czech Republic. See *New Czech Legislation Bans Use of Cyanide Leaching Technologies in Mining*, 23 Int'l Env't Rep. (BNA) No. 22, at 834 (Oct. 25, 2000).

¹⁰ Although Glamis now asserts that U.S. law does not permit denial of a plan of operations based on concerns over historic or cultural resources, Glamis voluntarily dismissed a U.S. lawsuit in which it made similar claims. See *Glamis Imperial Corporation v. U.S. Dept. of Interior and Bureau of Land Management*, Case No. 1:01CV00530 RMU, 2001 WL 1704305 (D.D.C. Nov. 13, 2001). Glamis does not explain why it now resorts to this international process to resolve a straightforward question of U.S. law after voluntarily abandoning a domestic lawsuit that raised similar issues. Nor has Glamis explained its failure to challenge California's backfill statute or regulations in a domestic court.

¹¹ The Bureau of Land Management is an agency within the Department of Interior with regulatory authority over federal lands.

¹² Although the *Mineral Policy Center* case dealt with a challenge to the 2001 revisions to the BLM's mining regulations, the court's analysis regarding FLPMA's unnecessary or undue degradation mandate is the central issue in the case. Although Glamis originally submitted its mining plan of operations under the previous regulations promulgated in 1980, the court made clear that the guiding provision covering BLM's review of a mining plan, regardless of the varying regulations over the years, is Congress's mandate to DOI to "prevent [unnecessary or undue degradation]." *Mineral Policy Center*, 292 F. Supp. 2d at 42, 44.

Glamis Gold Ltd. V. USA
 Submission of Sierra Club and Earthworks
 October 16, 2006

- 6 -

Center v. Norton, 292 F. Supp. 2d 30 (D.D.C. 2003). In its decision, the court noted with approval the regulatory implementation of DOI's statutory mandate:

[The Federal Land Policy and Management Act (FLPMA)], by its plain terms, vests the Secretary of the Interior with the authority – and indeed the obligation – to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.

Mineral Policy Center, 292 F. Supp. 2d at 42. The court quoted the government's legal briefs to support the overarching protective mandate inherent in FLPMA's unnecessary or undue degradation standard:

[T]he 2001 Regulations nevertheless prevent [unnecessary or undue degradation], as properly defined by this court. Defs.' Mot. For Summ. J. at 22, 29 (arguing that the 2001 Regulations "will prevent all [unnecessary or undue degradation], including [unnecessary or undue degradation] occasioning 'irreparable harm to scientific, cultural, or environmental resource values'"); Defs' Reply at 5 (arguing that "both types of degradation are prevented"); see also 66 Fed. Reg. 54, 834, 54, 838 (Oct. 30, 2001) ("BLM does not need a [substantial irreparable harm] standard in its rules either to protect against unnecessary degradation or to protect against undue degradation BLM has other statutory and regulatory means of preventing irreparable harm to significant scientific, cultural, or environmental resource values."); *id* at 54, 841 ("We understand it is our responsibility to implement FLPMA and prevent unnecessary or undue degradation.").

Id. at 44 (emphasis added). The court specifically noted DOI's authority to prevent unnecessary or undue degradation to these resources by "rejecting individual mining plans of operations." *Id.* As is clearly demonstrated by the record in this case, the proposed Imperial Project will "irreparably harm" the "significant scientific, cultural, or environmental resources values" at the proposed mine site. See Non-Party Submission of the Quechan Indian Nation, Aug. 19, 2005. There is thus no merit to the argument that DOI acted illegally in denying Glamis's mining plan.

14. Glamis cites a 2001 legal opinion of DOI's Solicitor to support its argument that DOI acted illegally in rejecting its plan earlier that year. Glamis Memorial at 186. The Solicitor concluded that DOI had no authority to prevent activities that were "necessary to mining," no matter how degrading they might be.¹³ See *Mineral Policy Center*, 292 F. Supp. 2d at 41-42.

¹³ In its Counter-Memorial, the United States asserts that "DOI did not conclude in either the 2001 M-Opinion or the rescission of the ROD that the 1999 M-Opinion's interpretation of the 'undue impairment' standard was substantively incorrect, or that the 'undue impairment' standard was equivalent to the 'unnecessary or undue degradation standard.' Rather, DOI rescinded the earlier decision on the procedural ground that the 'undue impairment' standard should be defined by a formal rule-making process before being applied to a given plan of operations." U.S. Counter-Memorial at 86. Regardless of the Government's interpretation of the 2001 Opinion, it is clear that FLPMA requires that DOI disapprove a mining operation with would "unduly harm or degrade the public land. *Mineral Policy Center*, 292 F. Supp. 2d at 42.

However, the court in *Mineral Policy Center* rejected this 2001 opinion, which was the alleged basis for DOI's 2001 reversal of the previous administration's disapproval of Glamis's plan of operations, see Glamis Memorial at 186-188, as inconsistent with FLPMA. *Mineral Policy Center*, 292 F. Supp. 2d at 42 ("The court finds that the Solicitor misconstrued the clear mandate of FLPMA. FLPMA, by its plain terms, vests the Secretary of the Interior with the authority – and indeed the obligation – to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land."). The 2001 Solicitor's opinion thus provides no support for a violation of the minimum standard of treatment. Rather, as stated by the *Mineral Policy Center* court, FLPMA requires that DOI disapprove a mining operation that would "unduly harm or degrade the public land." *Id.*¹⁴

15. Nor does BLM's ongoing withholding of approval of Glamis's plan of operations violate Glamis's right to a minimum standard of treatment. Glamis has acknowledged that the California backfill regulation renders its claim uneconomic. See Glamis Memorial at 220. BLM has confirmed this conclusion. See *id.* at ¶ 295. In such a circumstance, DOI's Bureau of Land Appeals (IBLA) has explained, BLM must reject (or withhold approval of, see 43 C.F.R. § 3809.411(d)(3)(iii)) the plan of operations:

[I]n determining whether a discovery exists, the costs of compliance with all applicable Federal and State laws (including environmental laws) are properly considered in determining whether or not the mineral deposit is presently marketable at a profit, *i.e.* whether the mineral deposit can be deemed to be a valuable mineral deposit within the meaning of the mining laws. *If the costs of compliance render the mineral development of a claim uneconomic, the claim, itself, is invalid and any plan of operations therefore is properly rejected.* Under no circumstances can compliance be waived merely because failing to do so would make mining of the claim unprofitable. Claim validity is determined by the ability of the claimant to show a profit can be made after accounting for the costs of compliance with all applicable laws, and, where a claimant is unable to do so, BLM must, indeed, reject the plan of operations and take affirmative steps to invalidate the claim by filing a mining contest.

Great Basin Mine Watch, 146 IBLA 248, 256 (1998) (citing *Southwest Resource Council*, 94 Interior Dec. 56, 67 (1987)) (emphasis added). See also *Clouser v. Espy*, 42 F.3d 1522, 1530 (9th Cir. 1994) ("Virtually all forms of ... regulation of mining claims – for instance, limiting permissible methods of mining and prospecting in order to reduce incidental environmental damage – will result in increased operating costs, and thereby will affect claim validity."); *United States v. Kosanke Sand Corporation*, 80 IBLA 538, 546-547 (1973) (Expenditures made necessary by state environmental regulations "may properly be considered ... as part of the costs in determining whether appellant has a reasonable prospect of success in developing a valuable mine within the claims."); *United States v. Pittsburgh Pacific Co.*, 84 Interior Dec. 282, 290

¹⁴ Counsel for the defendant-intervenor in *Mineral Policy Center*, the National Mining Association ("NMA"), was represented by the same law firm (Crowell and Moring) and attorneys (R. Timothy McCrum) that represent Glamis in this action. Notably, the NMA did not appeal the *Mineral Policy Center* decision.

(1977) (Even where "legislation and regulations have been promulgated since the evidence [at issue before the court] was first formulated[...]the cost of compliance with governmental and other environmental requirements are of course significant in determining whether there has been a discovery."), *aff'd sub nom. South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980); *Robert L. Mendenhall*, 127 IBLA 73 (1993); *Southern Utah Wilderness Alliance*, 100 Interior Dec. 15, 22 (1993). In light of the significant caselaw supporting DOI's authority to deny a mining plan of operation, Glamis's claim that DOI acted illegally is without merit.

2. Glamis Was Accorded the Same Treatment Normally Accorded Mining Claimants Under U.S. Law, Regardless of Nationality

16. Because Glamis's treatment was consistent with the customary treatment of all similarly situated U.S. mining claimants, and because that nondiscriminatory treatment is well within international notions of due process and judicial propriety, the United States accorded Glamis the minimum standard of treatment it is owed under Article 1105.

17. Gold mining on U.S. federal lands is governed by a combination of environmental and land use statutes superimposed on the mining claims location system established by the General Mining Law of 1872 (the Mining Law). See Act of May 10, 1872, 17 Stat. 91 (codified as amended at 30 U.S.C. §§ 22-47 (2004)). In order to possess a valid mining claim, a claimant must show that he has discovered a "valuable mineral deposit." 30 U.S.C. § 22; see also *Best v. Humboldt Mining Co.*, 371 U.S. 334, 336 (1963) (Mining claims on federal land are "valid ... if there has been a discovery of [a valuable] mineral within the limits of the claim, if the lands are still mineral, and if other statutory requirements have been met."); *Lara v. Secretary of Interior*, 820 F.2d 1535, 1537 (9th Cir. 1987) ("a mining claimant has the right to possession of a claim only if he has made a mineral discovery on the claim.").

18. In addition to the claim validity requirements, the Mining Law also limits the holding of mining claims to "citizens of the United States and those who have declared their intention to become such." 30 U.S.C. §22. Thus, foreign persons (including corporations) cannot own a mining claim under federal mining laws, and no property right in a mining claim can ever be held by a foreign entity. In this case, Glamis's expropriation claim depends on its having property rights in mining claims in California that can only be held by a U.S. citizen. However, Glamis's reliance on NAFTA's protections depends on its being a foreign investor. Glamis cannot have it both ways. It cannot claim "foreign" citizenship to bring a NAFTA claim, while at the same time arguing that it is a "citizen of the United States" for the purposes of protecting its alleged property rights as a mining claimant. Further, any argument that Glamis was unfairly treated by the federal and state governments as a foreign entity is groundless because, by definition, only "United States citizens" can hold mining claims. Thus, any negative economic impact to those claims cannot affect foreign nationals. See Alison A. Ochs, *Glamis Gold Ltd. - A Foreign United States Citizen?: NAFTA and Its Potential Effect On Environmental Regulations and the Mining Law of 1872*, 16 Colo. J. Int'l Envtl. L. & Pol'y 495 (2005).

19. DOI is charged with determining whether a claimant has discovered a valuable mineral deposit. *Clouser v. Espy*, 42 F.3d at 1530, n. 9. The BLM is the agency within the DOI that is

Glamis Gold Ltd. V. USA
 Submission of Sierra Club and Earthworks
 October 16, 2006

- 9 -

responsible for the management and regulation of mining operations conducted on federal public lands under DOI jurisdiction. See 43 C.F.R. § 3809 (BLM mining regulations).

20. The U.S. Supreme Court has explained that all unpatented mining claims¹⁵ – the kind of claim Glamis asserts it possesses – are held subject to the federal government’s continued authority to regulate the exercise of those claims:

Although owners of unpatented mining claims hold fully recognized possessory interests in their claims, we have recognized that these interests are a “unique form of property.” The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired. ... [Mining c]laimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests.

United States v. Locke, 471 U.S. 84, 104-105 (1985); see also 30 U.S.C. § 26 (mining claims conditioned upon “compl[iance] with the laws of the United States, and with State, territorial, and local regulations”). In the *Locke* case, the court upheld the application of new regulatory requirements to preexisting mining claims and rejected an argument that those regulatory requirements could only be applied to new mining claims filed after the passage of the new regulatory scheme. *Id.* The court noted that new conditions and restrictions may be imposed on mining claims even if they adversely affect property rights already established in those claims:

Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties.

Id. at 104.

21. Where a mining claim is on BLM lands, exploitation of the claim is governed by the FLPMA, and the regulations thereunder. See 43 C.F.R. § 3809.2(a). FLPMA requires that, “[i]n managing the public lands the Secretary [of the Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b). The requirement to avoid unnecessary or undue degradation is the “heart of FLPMA [and] amends and supersedes the Mining Law.” *Mineral Policy Center*, 292 F. Supp. 2d at 33. Further, for mining operations proposed in the California Desert Conservation Area (CDCA), where Glamis’s claims are located, FLPMA also requires DOI to prevent mining operations from

¹⁵ An “unpatented” claim is a possessory interest in a particular area solely for the purpose of mining; it may be contested by the government or a private party. By contrast, if a claim is patented, the claimant receives a fee simple interest from the United States and the claim cannot be contested. See *Espy*, 42 F.3d at 1525, n. 2.

causing "undue impairment" to the "environmental values of the land." 43 U.S.C. § 1781(f). Congress explicitly recognized that these requirements would "impair the rights of any locators or claims under the Act, including, but not limited to, rights of ingress and egress." 43 U.S.C. § 1732(b). As noted above and throughout the U.S. Counter-Memorial, both the California regulations and the FLPMA requirements are generally applicable to every mining claim on public land, particularly in California.

22. U.S. courts have interpreted FLPMA as creating an "obligation" for DOI "to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land." *Mineral Policy Center*, 292 F. Supp. 2d at 41-42. DOI's adjudicative body, the Interior Bureau of Land Appeals (IBLA) agrees. *See, e.g., Kendall's Concerned Area Residents*, 129 IBLA 130, 139-140 ("If unnecessary or undue degradation cannot be prevented by mitigation measures, BLM is required to deny approval of the plan."); *Draco Mines, Inc.*, 751 IBLA 278 (1983) (BLM may properly condition approval of a plan of operations on acceptance of stipulations designed to prevent unnecessary or undue degradation).

23. Under the regulations implementing FLPMA's "unnecessary or undue degradation" standard, a mine operator must obtain BLM approval of a plan of operations for all mining and exploration activities over five acres. *See* 43 C.F.R. §§ 3809.11; 3809.21. The regulations also establish that a mine will cause unnecessary or undue degradation, and thus BLM cannot approve its plan of operations, if it "fail[s] to comply with ... Federal and state laws related to environmental protection and protection of cultural resources." 43 C.F.R. § 3809.5.¹⁶ As shown above, the measures taken by DOI and BLM with respect to Glamis's Imperial Project were consistent with the laws and regulations applied to all mining claims on federal lands. Therefore the measures are consistent with the minimum standard of treatment required under Article 1105.

C. California's Backfilling Regulation Does Not Violate Glamis's Right to a Minimum Standard of Treatment

24. The U.S. Supreme Court has long recognized the right of states to regulate mining on federal lands. *See, e.g., California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987) (state permit process is acceptable regulation of federal lands so long as the process is intended to be used for "reasonable...environmental regulation"). BLM's mining regulations also recognize this authority:

¹⁶ Although Glamis originally submitted its mining plan of operations under the previous regulations promulgated in 1980, Glamis concedes that the 2001 amendments to the 1980 regulations "had only limited applicability" to Glamis. Glamis Memorial, at 30, ¶ 62. Even under the 1980 regulations, however, mining operations over five acres were required to have a BLM-approved plan of operations and to comply with state law. *See* 45 Fed. Reg. § 3809.1-4 (An approved plan of operations is required prior to commencing" operations over five acres or in the California Desert Conservation Area); 3809.2-2 ("all operations under ... a plan of operations .. shall comply with all pertinent Federal and State laws").

If State laws or regulations conflict with [the BLM regulations] regarding operations on public lands, [the mine operator] must follow the requirements of this subpart. *However, there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart.*

43 C.F.R. § 3809.3 (emphasis added).¹⁷

California regulates mining pursuant to the Surface Mining and Reclamation Act of 1975 (SMARA). 9 CAL. PUB. RES. §§ 2710 *et seq.* (West 2005). SMARA provides that Imperial County is the lead state permitting agency for the Imperial Project, proposed within Imperial County. Notably, Imperial County has never approved the proposed Imperial Project – nor has it ever signaled its intention to do so. Glamis's application with Imperial County is pending.

25. Glamis argues that California's measures violate the minimum standard of treatment because those measures were directed specifically and exclusively against Glamis. *See, e.g., Glamis Memorial* at 196-210. In support of this claim, Glamis relies on several statements made by California's governor and mining board concurrent with the enactment of the challenged measures. *See id.* at ¶ 375.

26. Although both California measures at issue here, the Mining Board regulation (§ 3704.1) and the substantially narrower (and more permanent) California Senate Bill 22, evidently impact the Imperial Project, neither applies specifically or exclusively to Glamis. Both measures are part of a complex regime of environmental regulations that applies equally to all mines in the state. In particular, the Mining Board regulation requires backfill not just of Glamis's mining pits, but of all pits and grading throughout the state. According to the language of the regulation, its primary goal was "to achieve the approximate original contours of the mined lands prior to mining activities." *See Glamis Memorial* at 199, ¶ 362. Similarly, the Senate Bill established permanent backfill and grading requirements, applicable to all projects "located on, or within one mile of, any Native American sacred site." *See id.* Moreover, despite Glamis's claims that the California regulations were not supported "by any technical, empirical, or theoretical studies" *Glamis Memorial* at 211, backfilling is widely recognized to be one of the most effective measures for minimizing the serious threats that open-pit mines pose to humans and the environment. EPA and Hardrock Mining, *supra* n. 7, at F-6, F-7.

27. The Mining Board Report, *supra* n. 3 Ex. 1, prepared in support of the backfill regulations, showed how the backfill requirements apply across-the-board and will impact other mining companies as well. For example, the CR Briggs Corporation specifically described the

¹⁷ This principle was codified well before Glamis acquired its interest in the Imperial Project. BLM's first mining regulations, promulgated in 1980, provided that "[n]othing in this subpart shall be construed to effect a preemption of State laws and regulations relating to the conduct of operations or reclamation on Federal lands under the mining law." 43 C.F.R. § 3809.3-1 (regulations prior to January 20, 2001). This provision remained in effect until it was replaced by the present provision in 2001.

negative economic impact of the requirements on its proposed expansion of its Briggs Mine. Mining Board Report at 18-19, Ex. 1. Further, the representative of the California Mining Association, an industry trade group, discussed the negative impacts on the industry across the state. *Id.* at 20-22.

28. Neither the fact that the Imperial Project may have brought the severe environmental and cultural problems to the attention of California's lawmakers, nor the fact that the Imperial Project is one of the first mining projects to be impacted by the measures, supports a conclusion that California's measures violated the minimum standards of treatment requirement. Indeed, the majority of legislation around the world results from newly discovered regulatory needs; many laws and regulations are developed to prevent general threats revealed in a specific situation. To conclude that the California measures violate Article 1105 would thus seriously undermine the ability of governments to govern. This would be a particularly inappropriate outcome in light of Article 1114's explicit recognition of the right of each NAFTA Party to adopt measures it "considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." The NAFTA parties could not have intended Article 1105 to require governments to have to pay speculative business enterprises for the right to prevent environmental threats.

II. Neither DOI's Failure to Approve Glamis's Plan of Operations, Nor California's Backfilling Regulations, Constitutes an Expropriation in Violation of NAFTA Article 1110

29. To establish a claim under Article 1110, Glamis must demonstrate that it has an "investment" that has been expropriated by the United States. Glamis defines its investment as "100 percent interest in 187 mining claims and 277 mill sites located on approximately 1600 acres of federal public lands." Glamis Memorial at 223, ¶399. An understanding of U.S. mining law as discussed herein and of the law of expropriations under NAFTA, however, demonstrates that no action of the United States or the State of California has ever expropriated any part of Glamis's purported investment.

30. The threshold inquiry in analyzing whether a government action constitutes an expropriation is whether the claimant has established that it holds a compensable property interest. Once this property interest has been established, determination of whether an expropriation in violation of international law occurred is made through a factual inquiry into the circumstances of a particular case, which involves considering: (1) the economic effect of the action on the claimant's property; (2) the extent to which the government action interferes with the claimant's reasonable investment-backed expectations; and (3) the character of the government action. (See Glamis Memorial at 234; U.S. Counter Memorial at 108.) See also *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Because the U.S. Government in its Counter-Memorial provides a comprehensive analysis of Glamis's expropriation claims, this submission will address select weaknesses in Glamis's expropriation argument.

Glamis Gold Ltd. V. USA
 Submission of Sierra Club and Earthworks
 October 16, 2006

- 13 -

A. The Actions of the United States in Failing to Approve Glamis's Plan of Operations Do Not Amount to An Expropriation Under Article 1110

31. It is well established in U.S. law that the failure to approve a mining plan of operations or otherwise regulate potential mining in a way that impacts the economic value of potential mine operations generally constitutes a valid regulatory measure not subject to compensation under U.S. takings law. Nor do these measures rise to the level of expropriation under the standards of international law applicable to the NAFTA parties.

1. Because Its Plan of Operations Has Never Been Approved, Glamis Has Never Had a Right to Exploit the Imperial Project that Could Be Expropriated

32. According to BLM's regulations, which Glamis has not challenged, Glamis "must not begin operations until BLM approves [its] plan of operations."¹⁸ 43 C.F.R. § 3809.412. Because BLM has never approved Glamis's plan of operations, Glamis has never enjoyed the right to operate the Imperial Project. Without a right to operate the Project, Glamis had nothing that the government could have expropriated.

33. This is similar to the situation in the *Azinian* case, in which a NAFTA tribunal held that where the relevant domestic court had found that a "contract governed by Mexican law was invalid under Mexican law, there is by definition no contract to be expropriated." *Robert Azinian et al. v. United Mexican States*, Award, Nov. 1, 1999, para. 100 (emphasis in original). Likewise here, where Glamis has no right to operate under U.S. law, there is no right of operation that could be expropriated.

34. Nor did Glamis have any right to approval of its plan of operations. BLM regulations require the agency to "disapprove[], or withhold approval of [a claimant's] plan of operations because the plan ... [p]roposes operations that would result in unnecessary or undue degradation of public lands." 43 C.F.R. § 3809.411(d)(3)(iii).¹⁹ As explained above, DOI's rejection of Glamis's plan of operations was a valid exercise of its responsibility to prevent mines that cause unnecessary or undue degradation, and Congress anticipated that the prohibitions on degradation of public lands would "impair the rights of any [mineral] locators or claims under the Act." See

¹⁸ Contrary to Glamis's assertions, the fact that BLM's Mineral Report had preliminarily found Glamis's mining claims to be valid did not in any way vest Glamis with any "rights" to project approval. Under the rule confirmed in *Mineral Policy Center*, even valid mining claims are held subject to BLM's "obligation" to "disapprove" proposed mining plans that "would unduly harm or degrade the public land." See 292 F. Supp. 2d at 42.

¹⁹ Although the plan content requirements and performance standards contained in the 2001 regulations would not apply to Glamis's plan of operations if that plan was pending on January 20, 2001, 43 C.F.R. § 3809.400(b), BLM's right to disapprove or withhold approval of that plan of operations under FLPMA applies. *Id.* The fact that Glamis's plan of operations was denied on January 17, 2001, Glamis Memorial at 181, ¶ 334, suggests that the 2001 regulations apply to any renewed effort to seek approval of that plan. 43 C.F.R. § 3809.400(b).

supra; 43 U.S.C. § 1732(b) (FLPMA). Because these FLPMA mandates have been in place since 1976. *see, e.g., Reeves v. United States*, 54 Fed. Cl. 652, 672 n.6 (2002) (“[I]n 1976, FLPMA ... superseded the relevant sections of the Mining Law of 1872. *See* 43 U.S.C. § 1732(b).”), when Glamis acquired its mineral rights subsequent to 1980, those rights were subject to the pre-existing FLPMA mandates.

35. In *Reeves*, the U.S. Court of Federal Claims held that until BLM approves a plan of operations, the claimant has no mineral right that can be expropriated. The *Reeves* court moreover held that BLM’s application of FLPMA’s environmental protection mandates could not be a “taking” under the Fifth Amendment. 54 Fed. Cl. 652 (2002). In that case, the plaintiff argued that BLM’s denial of its proposed mine plan was a Constitutional “taking” deserving compensation. The court disagreed, holding that because private interests in BLM land are held pursuant to BLM’s FLPMA authority, the exercise of that authority cannot amount to a taking. *Id.* at 669-674. In the court’s view, the “key issue” in the case “is the threshold question in any takings claim analysis, namely, whether plaintiffs possess the property right which they claim was taken by the United States.” *Id.* at 671. The alleged “property interest” was the claimant’s mining claims located pursuant to the Mining Law. The claimant argued that BLM’s complete denial of any use of these claims was a regulatory taking.

36. According to the *Reeves* court, “[t]he nature of the plaintiffs’ property interests ... determines the extent FLPMA can proscribe the use of plaintiffs’ mining claims. The government ‘may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.’” *Id.* at 672 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992)). “In analyzing a governmental action that allegedly interferes with an owner’s land use, there can be no compensable interference if such land use was not permitted at the time the owner took title to the property.” *Id.* at 672 (emphasis added).

37. The court discussed the property rights of mining claimants in relation to FLPMA’s public land protection mandates, including the duty (in that case) to “manage such [Wilderness Study Area, or WSA] lands ... in a manner so as not to impair the suitability of such areas for preservation as wilderness.”²⁰ Despite the property interests in a mining claim, the court held that such rights are subservient to BLM’s duties under the FLPMA. “Because plaintiffs never acquired a mining claim free of FLPMA restraints, they do not own a property interest that was taken in this case.” *Id.* at 673. Like the plaintiffs in *Reeves*, Glamis “obtained only a limited property interest to hold and use [its] claims in a manner which would not impair the surface of the public lands.” *Id.* at 674.

²⁰ 43 U.S.C. § 1782(c). The plaintiffs also argued that this WSA protection provision did not apply and that the less-restrictive unnecessary or undue degradation requirement was the proper BLM management standard. The court rejected this argument and held that the nonimpairment standard of § 1782(c) applied. In any event, this conclusion would not have affected the more fundamental holding that, regardless of which FLPMA standard applied, the BLM did not commit a taking by applying the FLPMA standard.

Glamis Gold Ltd. V. USA
 Submission of Sierra Club and Earthworks
 October 16, 2006
 - 15 -

38. Although the *Reeves* case focused on FLPMA's WSA provisions, the court's ruling makes clear that any mineral rights obtained after FLPMA was enacted in 1976 are conditioned on compliance with that statute, and any denial by BLM of a proposed use could not constitute a taking under U.S. law. For example, BLM's denial of a proposed mining plan under the undue or unnecessary degradation standard would not be a taking. Further, the Montana Supreme Court recently held that the government's failure to approve a mining plan was not a "taking" under state or federal law. *Seven Up Pete Venture v. State of Montana*, 114 P.3d 1009, 1016-1020 (Montana 2005).

39. BLM's continued withholding of approval of Glamis's plan of operations also does not constitute expropriation. BLM regulations place no time limit on the agency's authority to withhold approval of a plan of operations. Moreover, notwithstanding DOI's subsequent rescission of the 2001 Record of Decision denying approval of the plan of operations, DOI could validly deny the plan of operations again for the same or other reasons at any time. *See, e.g., Rocky Connor*, 139 IBLA 361, 365 (1997) ("[A] mining claimant acquires no vested rights by location of a mining claim.... [T]he continuing authority of the [Interior] Department to inquire into the validity of claims so long as legal title remains in the Department has been repeatedly reaffirmed by the courts."). As the Interior Department has further held: "[T]he mere filing of a plan of operations by a holder of a mining claim invests no rights in the claimant to have any plan of operations approved. Rights to mine under the general mining laws are derivative of a discovery of a valuable mineral deposit and, absent such a discovery, denial of a plan of operations is entirely appropriate." *Great Basin Mine Watch*, 146 IBLA 248, 256 (1998).²¹

2. Even if Glamis Does Have a Valid Property Right, Glamis's Alleged Expectation of Approval of Its Plan of Operations Was Not Reasonable

40. Glamis asserts that it had an expectation that its plan of operations would be approved. Glamis Memorial at 246. Such an expectation is only relevant to finding an expropriation, however, if it is reasonable; Glamis's expectation was not.

41. Glamis has not cited any U.S. "representation" regarding approval on which it could have relied,²² *cf. Methanex*, Final Award at Part IV - Chapter C - Page 4 (claimants may "reasonably rely" on "representations" made by host states relating to the claimant's investment), much less a representation that was "definitive, unambiguous or repeated" assurance. *See Feldman v.*

²¹ Glamis also neglects to inform the Tribunal that it voluntarily proposed to suspend DOI's review of its plan of operations when Glamis and the federal government were considering a "buyout" of Glamis's interests. In a December 9, 2002 letter to BLM, Glamis requested "that your office suspend all ongoing efforts to process the Imperial Project Plan of Operations during pendency of the settlement process." Letter from C. Kevin McArthur, President and CEO, Glamis Gold Ltd., *See* U.S. Counter-Memorial at 90, *citing* FA Tab 265.

²² As noted above, *see supra* n. 18, BLM's Mineral Report did not vest Glamis with any rights. Under FLPMA, BLM's mining regulations and SMARA, no mining is authorized to proceed until all federal, state, and local approvals have been obtained.

Mexico, ARB(AF)/99/1, Final Award, (ICSID Dec. 16, 2002), at para. 148; *id.*, para. 149 (“ambiguous and largely informal” assurances are not enough to create a reasonable expectation).

42. Glamis claims that its expectation was reasonable because nearby mines had been approved.²³ See Glamis Memorial at 120-121. Even if those other mines presented exactly the same level of threat to public lands as did Glamis’s proposed operations, changes in the way DOI applies its laws and regulations does not necessarily give rise to an expropriation. As another NAFTA tribunal has explained,

not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation under Article 1110. *Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue.*

Feldman, para. 112 (emphasis added). Against the preexisting exposure of U.S. mining claims to “substantial regulatory power” in the United States, *Locke*, 471 U.S. at 105, it would be difficult to imagine that this principle does not apply here. In any event, Glamis ignores the fact that these other mines did not threaten the significant and irreplaceable cultural, historical, and religious resources that will be severely degraded and/or eliminated by the Imperial Project. Glamis’s argument that the fact that some mines can satisfy the law automatically means that other mines in other locations also satisfy the law is illogical and groundless.

43. This is particularly true where Glamis’s development of its mining interests took place in the context of

a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of [mining operations] and commonly prohibited or restricted [certain mining practices] for environmental and/or health reasons.... [T]he process of regulation [of mining practices] in the United States involved wide participation of industry groups, non-governmental organizations, academics and other individuals, many of these actors deploying lobbyists.

²³ Glamis also notes that the California Desert Protection Act guaranteed that there wouldn’t be buffer zones around wilderness areas. See Glamis Memorial at 58. There is no evidence that DOI’s rejection of Glamis’s plan of operations was based on Glamis’s proposed mine being near a wilderness area, and Glamis cites no guarantee that mines would not be regulated under the authority of other statutes such as FLPMA.

Methanex. Final Award at Part IV - Chapter D - Page 5.²⁴

44. Because of the complex system of regulations to prevent mining operations from causing unnecessary or undue degradation of public lands, Glamis should not have been surprised by DOI's careful consideration of the potential impacts of Glamis's proposal and the agency's failure to approve the company's mining plan. In addition, Glamis was aware that "the Government retains substantial regulatory control over [mining] interests," *Locke*, 471 U.S. at 105, and that approval of its mining plans was subject to compliance with state laws. See *Granite Rock Co.*, 480 U.S. 572 (1987); 43 C.F.R. § 3809. Against this backdrop, Glamis's argument that it acquired its Imperial claims in expectation of U.S. approval of its plan of operations is groundless.

B. California's Backfilling Regulation Did Not Expropriate Glamis's Investment

45. Glamis asserts that the California law and regulations requiring backfilling expropriated its investment. However, because neither BLM nor Imperial County had approved Glamis's plan of operations at the time the California requirements went into effect (indeed, BLM and Imperial County still have not approved the plan of operations), Glamis had no right to extract minerals that the California regulations could have expropriated.

46. In any event, the backfill requirements would not have constituted an expropriation. First, "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process ... is not deemed expropriatory and compensable unless [the government had specifically promised the foreign investor that it] would refrain from such regulation." *Methanex*, Final Award at Part IV - Chapter D - Page 4; see also *Feldman*, Final Award at para. 103 ("Reasonable government regulation... cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.").

47. The California backfilling regulations are not discriminatory. They apply equally to all mines in the state. As noted above, the fact that the regulations were implemented out of an explicit concern for the harm posed by Glamis's proposed mining operation - and thus were accompanied by specific reference to the fact that they would prevent that harm - does not make them discriminatory or illegitimate. To conclude otherwise would seriously undermine the ability of governments to govern, as many laws and regulations are developed to prevent general threats revealed in a specific situation.

²⁴ The principle that a consistent practice of regulating in a certain field undermines a claim that further regulations give rise to an expropriation claim has been recognized as part of the customary international law of expropriation. See US-Chile Free Trade Agreement, January 1, 2004, U.S.-Chile, ch. 10, annex 10-D, para. 1, Hein's No. KAV 6375, Temp. State Dep't No. 04-35 (indicating that the expropriation provision reflects customary international law), para. 4(a) (extent to which regulation interferes with "reasonable investment-backed expectations" is a factor in identifying indirect expropriation).

48. The California regulations were implemented for a public purpose and in accordance with due process. The value of backfilling in protecting against the numerous threats of open-pit mining is widely acknowledged. See Mining Board Report, *supra* n. 3 at 3-4, 15, Ex. 1. There is no basis for concern that the regulations were not implemented in accordance with due process. The Mining Board Report discusses the various public hearings and opportunities to comment and appear before the Board, as Glamis and other mining companies did. Mining Board Report at 1, Ex. 1 (noting public hearings on November 14, 2002, December 12, 2002, and January 16, 2003, and Glamis Gold Ltd.'s participation).

49. Finally, the government of California did not specifically promise that it would refrain from regulating open-pit mines. To the contrary, Glamis's California mining operations took place in the context of California's political economy, in which, like the federal system of mining regulations, it was widely known that the government commonly prohibited or restricted mining practices for environmental or health reasons. See *Methanex*, Final Award at Part IV - Chapter D - Page 5. For example, SMARA declares the California legislature's intent since 1975 "to assure that: (a) Adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses [...], and] (c) Residual hazards to the public health and safety are eliminated." 9 CAL. PUB. RES. § 2712. Further, SMARA specifically authorizes the promulgation of regulations governing "backfilling ... and other reclamation requirements," 9 CAL. PUB. RES. § 2756. The challenged backfill regulations specifically rely on this authority granted by the state legislature to protect the public health and safety. See generally Mining Board Report, Ex. 1.

50. Glamis also should have anticipated the possibility of new mining regulations because of its knowledge that "the Government retains substantial regulatory control over [mining] interests," *Locke*, 471 U.S. at 105, and that approval of its mining plans was subject to compliance with state laws. See *Granite Rock Co.*, 480 U.S. 572; 43 C.F.R. § 3809; see also *Seven Up Pete Venture*, 114 F.2d at 1019-1020 (state cyanide ban enacted prior to applicant's obtaining mining permit held not to be a "taking"). In the words of a leading mining law commentator, a mining claimant has "no reasonable expectations that the government will not render their operations unprofitable through regulation." Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 Ecology Law Quarterly 57, 79 (1997).

51. Numerous state courts have relied on U.S. federal law to hold that state measures impacting the economic viability of mining claims are lawful. For example, the Montana Supreme Court recently upheld the imposition of new mining regulations enacted after the establishment of mining properties but prior to the state's completion of the mine permit application. *Seven Up Pete Venture*, 114 P.3d at 1016-1020. In that case, the mine claimant argued that the state's imposition of a ban on the use of toxic cyanide in mineral processing (the same chemical proposed for use by Glamis) illegally deprived it of its mining property rights. Despite the claimant's argument that the cyanide ban "precludes the only economically viable use of mineral extraction for its project," *id.* at 1016, the court held that there was no property right to violate state mining laws. The court stated:

Glamis Gold Ltd. V. USA
 Submission of Sierra Club and Earthworks
 October 16, 2006

- 19 -

[E]ven if government action might otherwise constitute a taking of property, it will not if it is shown that what the government prohibits does not amount to a private property right in the first place. Said another way, an owner cannot maintain an action for loss of a property right that it never had.

Seven Up Pete Venture, 114 P.3d at 1017, quoting *Kinross Copper Corp. v. State*, 981 P.2d 833, 836-837 (Or. App. 1999). *adhered to on reconsideration*, 988 P.2d 400 (Or. App. 1999). The court further held that there was no property right in the "opportunity to obtain a permit" when the permitting agency has authority to deny mining permits under valid state and federal requirements. *Id.* at 1017-18. Relying on a decision of the U.S. Court of Appeals for the Fourth Circuit, the court explained that

a property-holder possesses a legitimate claim of entitlement to a permit or approval [if the] agency lacks all discretion to deny issuance of the permit or to withhold its approval.... [U]nder this standard, a cognizable property interest exists "only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured."

Id. at 1017-1018 (quoting *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63, 68 (9th Cir. 1992)) (emphasis in original); see also *Oil-Dri Corp. v. Washoe County*, CV02-02196 (Nev. 2004), Ex. 2 (upholding county's refusal to approve mining proposal because of concerns about mine's environmental impacts, despite DOI's prior approval of the mine); *Kinross Copper Corp. v. State*, 981 P.2d 833 (Or. App. 1999), *adhered to on reconsideration*, 988 P.2d 400 (Or. App. 1999); *State ex. rel. Andrus v. Click*, 554 P.2d 969 (Idaho 1976); *LeFaivre v. Environmental Quality Council*, 735 P.2d 428 (Wyo. 1987).

52. For all the reasons stated above and detailed in the U.S. Counter Memorial, approval of Glamis's plan of operations was far from assured.

53. California's ongoing application of the backfilling requirement also does not constitute expropriation for which Glamis is entitled to compensation. As explained above, mining claims are only valid if the claimant can demonstrate the discovery of a "valuable mineral deposit." 30 U.S.C. § 22; *Lara*, 820 F.2d at 1537 ("a mining claimant has the right to possession of a claim only if he has made a mineral discovery on the claim."). Here, Glamis itself admits that "it is not economically feasible to fully backfill all of the pits" as required by California law. Glamis Memorial at 220. Absent such economic feasibility, there is no valid mining claim here and nothing to expropriate. See *Great Basin Mine Watch*, 146 IBLA 248, 256 (1998) ("If the costs of compliance render the mineral development of a claim uneconomic, the claim, itself, is invalid and any plan of operations therefore is properly rejected.")

C. Neither DOI's Rejection of Glamis's Plan of Operations nor California's Backfilling Regulation Affects Glamis's Interests Permanently

54. Tribunals interpreting NAFTA's Article 1110 have held that "[a]n expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights." *SD Myers v. Government of Canada*, Partial Award, November 13, 2000, para. 283. DOI's rejection

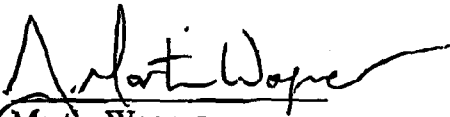
Glamis Gold Ltd. V. USA
Submission of Sierra Club and Earthworks
October 16, 2006
- 20 -

of Glamis's plan of operations is not necessarily permanent. Glamis states that California's backfilling regulation interferes with its investment by making extraction of the gold uneconomic. *See, e.g.,* Glamis Memorial at 220. Many factors contribute to the economy of extraction however, including the development of new, less expensive extraction technologies and the price of gold. Because these factors can vary, and because Glamis may maintain its claims indefinitely under the Mining Law, the impact of the backfilling regulation may not be permanent.

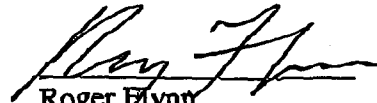
CONCLUSION

55. The subject matter of this arbitration raises issues of public importance. Because the Tribunal's decision in this case will be considered by tribunals in future investment arbitrations, its decision will help determine the rights and obligations of governments in implementing future health and environmental measures. Thus, a decision requiring the United States to compensate Glamis will not only pressure California to rescind important environmental and health measures, but will also compromise the legitimate powers of governments to protect the health, safety, and the environment of their citizens.

Respectfully submitted this 16th day of October, 2006.



Martin Wagner
Sarah Burt
Earthjustice
426 17th Street, 6th Floor
Oakland, CA 94612
510-550-6700 (tel)
510-550-6740 (fax)



Roger Flynn
Jeffrey C. Parsons
Western Mining Action Project
P.O. Box 349
412 High Street
Lyons, CO 80540
(303) 823-5738 (tel)
(303) 823-5732 (fax)

Attorneys for the Sierra Club and Earthworks