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C/O Eloise Obadia, Counsel, ICSID
1818 H Street, N.W.
Washington, DC 20433

Via Confirmed Fax & Cert. Mail: 202.522.2615
August 19, 2005

Re: Service of Quechan Indian Nation
Application for Leave to File a Non-Party Submission and Submission,
Glamis Gold Ltd. v. The United States of America

Dear Chair Young:

Pursuant to your letters of June 21, 2005 and July 28, 2005, attached, please find an application for leave to file a non-party submission and submission in the above-captioned matter, submitted on behalf of the Quechan Indian Nation, a federally-recognized American Indian tribe. These materials are being both faxed and mailed to your office and those of the parties today.

We trust that these submissions will be of use to this Tribunal in its consideration of this matter. Thank you again for your invitation and courtesy.

Very truly yours,

Courtney Ann Coyle
Attorney at Law

Attchs. (2)

Cc: Andrea Menaker, Counsel for Respondent
Tim McCrum, Counsel for Claimant
Mike Jackson, Sr., President Quechan Nation
Pauline P. Jose, Chair Quechan Culture Committee
Emilio Escalanti, Council Liaison

APPLICATION FOR LEAVE TO FILE A NON-PARTY SUBMISSION

GLAMIS GOLD LTD.

v.

UNITED STATES OF AMERICA

Submission of the Quechan Indian Nation

This application is made on behalf of the Quechan Indian Nation. The Quechan are a federally recognized American Indian Nation governed by a duly elected Tribal Council. Its membership is about 3,000, and it occupies a reservation of approximately 45,000 acres total in the southeast corner of California and southwest corner of Arizona. The Tribe remains on a portion of its ancestral lands; the location of the proposed mine was on the Tribe's ancestral lands. Many members still speak their native language and engage in traditional practices.

It is the legal responsibility of the Tribal Council to safeguard and enhance the economic and spiritual welfare of its people. In fulfilling these responsibilities, the Tribal Council has always strongly opposed the mining project which has been promoted for years by the Claimant in these proceedings, Glamis Gold Ltd. ("Glamis" or "the Claimant"). Moreover, the Tribal Council has led efforts to secure federal and state protection for this and other sacred places in California and the United States. This committed involvement by the Tribe has taken many forms over the past decade.[1]

The Quechan were active in the administrative permitting process for the mining operation promoted by the Claimant, as referenced in Department of the Interior (DOI)'s Record of Decision (ROD) in 2001. Glamis has placed the actions of this agency at issue in this claim.

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[1] Tribal involvement has included: submitting detailed comment letters on both drafts of the mine project's Environmental Impact Statements/Reports (DEIS/Rs), participating in public hearings on the DEIS/R and a public hearing with the National Advisory Council on Historic Preservation (ACHP); conducting its own public hearing on the reservation; meeting government-to-government with ACHP Task Force Members, the Bureau of Land Management (BLM) and other federal and state agency management and staff; commenting on the project's Final Environmental Impact Statement/Report; retaining consultants in the fields of cultural resource management and economics; actively participating in the environmental review and consultation associated with BLM's withdrawal of the Indian Pass area from new mining claims in 2000; moving to intervene in both lawsuits brought by Glamis to challenge actions taken by the Department of Interior to restrict mining in the area; sponsoring or supporting sacred lands bills at both the state and federal levels and appearing at a Senate Indian Affairs Committee hearing on sacred place protection.

The Quechan also sponsored the legislation impugned by Glamis in its claim and actively supported the administrative regulations adopted by the California State Mining & Geology Board (SMGB), also made the subject of Glamis' claim.

To its best knowledge, the Tribe does not have an affiliation, either direct or indirect, with any disputing party; except that, it may, from time to time, receive federal grants to support some of its governmental programming.

The Lannan Foundation, an American nonprofit corporation, has provided financial assistance to the Tribe in its efforts to protect its sacred lands, including financial assistance in preparing this submission.[2]

The Quechan's interest in this NAFTA arbitration is multi-faceted. First, the Tribe has proactively tracked all of the legal, administrative and policy initiatives known to it, to ensure that the sacred places at Indian Pass would be protected to the maximum extent possible and treated with appropriate dignity. This NAFTA claim is one of those processes that could affect the integrity of the sacred area and the Tribe's relation to it.

Second, the manner in which this sacred area and the Tribe's interest in it will be portrayed in this arbitral process is of great concern for native peoples worldwide, who are similarly attempting to protect their irreplaceable sacred places and ensure religious freedoms. This is because NAFTA proceedings have obtained a high profile in international law and politics, and – while there is no official rule of precedent – the practices and decisions of this Tribunal may well have an impact on similar, future national and international proceedings. The Tribe wants to ensure that the sensitive and serious nature of indigenous sacred areas are properly taken in account in this, and in all future, international proceedings.

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[2] Lannan is a family foundation dedicated to cultural freedom, diversity and creativity through projects which support exceptional contemporary artists and writers, as well as inspired Native activists in rural indigenous communities. See, <www.Lannan.org/>. Lannan's support has also enabled the Tribe to retain expert counsel, Barrister & Solicitor Todd Weiler, to assist in preparation of this submission.

Further, a decision requiring the United States to compensate Claimant could put political pressure upon California to try to rescind the mining reclamation measures or affect the cost to United States or California taxpayers of maintaining them.

The Tribe will address several specific issues of fact and law in its written submission. Issues of fact include those related to the value of the area's cultural and environmental resources, the permitting history for the mine and the regulatory framework and intent for both the California statutory and administrative mining regulations.

Issues of law addressed by the Tribe include the framework for protection of indigenous sacred places under domestic and international laws and how an award in favor of Glamis, without regard to other issues, could negatively affect the management of this sensitive area, in addition to providing an ill-deserved windfall to the Claimant.

The Tribunal should accept the Tribe's submission because it will assist the Tribunal in the determination of factual and legal issues by bringing the perspective, particular knowledge and insight that is unique to American tribal sovereign governments. Neither of the parties to these proceedings can make this kind of contribution for three reasons.

First, neither the United States Government nor Glamis, a Canadian corporation, can adequately represent the Quechan Nation's interests in this matter. The Tribe is recognized as a sovereign government in the United States Constitution, one of but three kinds of domestic sovereign governments recognized: the federal government, states and Indian tribes (*U.S. Constitution*, Art. I, section 8, cl. 3). Thus, as a sovereign nation, the Tribe cannot be said to be adequately represented by another sovereign: the United States Government.

Second, no Party could or has an incentive to make or adequately support all of the Tribe's positions and viewpoints in this matter. The Claimant is adverse in interest to the Tribe, and the Respondent is not constitutionally equipped to speak for it. For its part, the DOI may possess a bias towards defending certain of its actions related to this complex matter and may try to influence its counsels' presentation of facts and law to this Tribunal.

Third, no party can speak with expertise or authority to the cultural, social or religious value of the Indian Pass area to the Tribe or the severity of impacts to the area and the Tribe, except for qualified members of the Tribe. The Tribe is thus uniquely positioned to comment on the impacts of the proposed mine to cultural resources, cultural landscape or context.

The Tribe's submission also addresses matters within the scope of this dispute, including facts and issues already raised by the disputing parties in their submissions to this Tribunal, to date.

The Tribe has a significant interest in the arbitration. The Quechan people have occupied the lower Colorado River region, including the mine site, since time immemorial. The Project record for the proposed Glamis mine shows there is no dispute that the project area has been used by the Tribe for gathering, trade and religious purposes and that it lies within the Tribe's aboriginal territory.

The Indian Pass area remains of extremely high value to the Tribe because of its historical cultural associations and its continuing ceremonial and religious values to the Quechan people. The Advisory Council on Historic Preservation, an independent arm of the Respondent, has found that, if implemented, the mine would be so damaging to historic resources that the Tribal members' ability to practice their sacred traditions as a living part of their community life and development would be lost.

The Tribe's unique interest in the treatment of the Indian Pass area and Glamis' proposed project was also specifically recognized by two separate United States federal district courts. First, in Glamis' unsuccessful challenge to the 2000 Opinion issued by Respondent's DOI Solicitor, John Leshy, the federal district court noted that the case directly affected the citizens, environment, and economy of the Imperial Valley, as well as the religious and cultural traditions of the Quechan Tribe.[3]

[3] *Glamis Imperial Corporation v. Bruce Babbitt et al*, U.S. District Court District of Nevada, Case No. CV-N-00-0196-DWH-VPC (2000).

Similarly, when the Tribe's motion for intervention by right in Glamis' lawsuit against DOI for denying the mine permit was granted by a second federal district court in 2001, the Court found that the Tribe demonstrated standing because the mine project and explorations would affect and destroy sites at the Indian Pass area causing direct and irreparable harm to the Tribe's interests.[4]

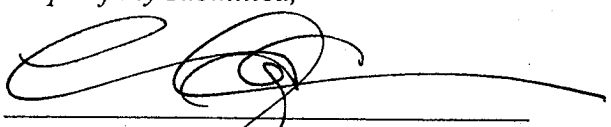
The Tribe's historic and sacred interests in the area were also recognized in both the DOI ROD, which approved the withdrawal of the area from new mining claims, and in the DOI ROD that denied Glamis' mine (prior to its being rescinded without notice, hearing or other due process by DOI Secretary Gale Norton).

That there is also wide public interest in the subject matter of the arbitration is demonstrated in the strong and increasing media and political interest in these proceedings.[5]

Conclusion

Based on the foregoing, the Quechan Indian Nation's application and submission should be accepted and considered by the Tribunal and the disputing parties. The Tribe respectfully requests that the Tribe be provided the opportunity to respond to the disputing parties Memorials, and other submissions, as may be necessary and appropriate.

Respectfully submitted,



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[4] *Glamis Imperial Corporation v. U.S. Department of Interior and Bureau of Land Management,* U.S. District Court for the District of Columbia, Case No. 1:01CV00530 RMU (2001).

[5] Since the filing of Glamis' claim, many news articles and opinion pieces have been published in diverse media including: Indian Country Today, American Indian Report, The Washington Post and State Legislatures Magazine. Further, a Legislative Committee of the State of California held an oversight hearing in October 2004 entitled, "Offshoring California's Democracy and Capital: NAFTA, CAFTA and the Tradeoffs of Free Trade," which included analysis and impact of the Glamis claim and in which the Tribe participated.

NON-PARTY SUBMISSION

GLAMIS GOLD LTD.

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Nature of the Cultural Resources and Sacred Places at Issue in Claim

The Glamis Imperial Mine, proposed by the Claimant, Glamis Gold, Ltd., ("Glamis"), in 1994, would have been a massive, open-pit, cyanide heap-leach gold mine spreading across 1,600 acres of off-reservation federal public land. This proposed mine would have been located on the ancestral lands of the Quechan people, in the heart of an area now withdrawn from future mining claims to protect Native American religious and heritage values. This natural area is also adjacent to two formally designated wilderness areas, critical habitat for the federally-listed desert tortoise and an area designated as a place of critical environmental concern for Native American cultural values.

The area contains some 55 recorded historic properties eligible for listing on the National Register of Historic Places, including the Indian Pass-Running Man Area of Traditional Cultural Concern.[1] The area also holds items subject to the Native American Graves Protection and Repatriation Act (NAGPRA) and a high density of religious sites including prayer circles, ceremonial places, shrines, ceramic scatters, petroglyphs (rock drawings) and spirit breaks linked by ancient trails and segments of the Trail of Dreams. Recorded resources for the area include some 1,422 flaking stations, 114 pot drops and scatters, 75 trail segments and 31 geoglyphs (earth drawings).

The Trail of Dreams traverses the area of the mine, linking Avikwaame (Spirit Mountain) to the north near Needles California and Avi kwalal (Pilot Knob) to the south near the United States border with Mexico. Both "ends" of this spirit trail are already listed as traditional cultural properties on the National Register. The cumulative impacts of existing roads, new pipelines, other utilities, illegal collecting, unauthorized off road vehicle route proliferation and other development elsewhere in the fragile desert areas between these places, only heightens the value of the largely undisturbed and deeply sacred places within the Indian Pass area.[2]

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[1] The National Register is the Nation's official list of cultural resources worthy of preservation, part of a national program to coordinate and support public and private efforts to identify, evaluate, and protect our historic and archeological resources. Properties that are listed on the National Register or determined eligible for listing on the Register are offered, by law, the same degree of management and planning consideration. See, e.g., <www.cr.nps.gov/nr/publications/bulletins/my property/>.

[2] The Tribe's ancestral lands have been the site of a disproportionate number of hardrock mines. Moreover, the industrial and large-scale nature of open pit mining over the last two decades has resulted in environmental justice impacts to the Quechan.

The Quechan's ancestral lands include the area protected by the denial of the mine in 2001 by the U.S. Department of Interior (DOI). That the area is now about 15 miles from the boundary of its reservation is of no importance: Quechan lifeways began to change with the colonization by non-Indians in the mid-1800s with the coming of the Europeans and the first gold-seekers. By the late 1800s, the Tribe, which once enjoyed a land base of over 880 square miles, was forced onto a reservation near the southern corner of its territory. Once it had contained the Quechan as a people, the U.S. Government actively, and forcibly, tried to strip the Tribe of its language, lifeways, traditions and religion.[3]

In the late 1930s, and with the formation of the Tribal Council, the Tribe began the first of many long battles with the federal government to secure its rightful water rights and land base, and to safely practice its traditional lifeways. It was then foretold by the elders that the Tribe would have to speak out once again to protect its heritage and traditional ways. That time came with the processing of the proposed Glamis mine on these sacred lands. The Tribe was forced to speak about the important values directly imperiled by the proposed mine, despite the Tribe's traditional reluctance to openly discuss sacred matters.[4]

As documented in historical records, the Tribe has utilized the Indian Pass area since time immemorial for religious, ceremonial and educational purposes; it continues to use the area today and intends to continue to use the area into the future with future generations. Tribal members also consider the area sacred apart from physical use, settlement of the lands or the features visible on its surface; sacred aspects of this place include intangible resources. The irreparable and unmitigable impacts to the Tribe's cultural heritage and religious practices was specifically referenced by DOI in its ROD denying the mine.[5] According to legal scholars, that decision was a constitutionally appropriate

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[3] Such Governmental actions, are evidenced in historical documents, including those housed at the National Archives. Because of page limitations, the Tribe is unable to append attachments. However, should the Tribunal desire copies of documents referenced herein, the Tribe can provide them.

[4] The Quechan, like many other American Indian peoples are historically, and remain, very reluctant to communicate about their ceremonies and religious practices, particularly where revealing such things has historically lead to attempts by others to limit or stop those very practices and ceremonies or vandalize, steal or desecrate the sacred places and objects.

[5] The ROD denying the mine found that: 1) The project would have an adverse effect on 55 historic properties determined eligible for listing on the National Register. These eligible properties are located both inside and outside the footprint of the proposed project; 2) The eligible properties would have been disturbed or destroyed through excavation of open pits and construction and operation of the leach pad, waste rock and soil stockpiles, diversion channels, haul and access roads, and associated processing and support facilities. In addition to the direct physical effects, mining related noise and visual impacts of the project would further diminish the quality of the eligible properties; 3) Mitigation measures would reduce but not eliminate adverse effects to 23 of the 55 historic properties determined eligible. Moreover, the mitigation measures proposed by Glamis would not be effective in reducing adverse effects on 32 of the 55 historic properties. Even after implementing the mitigation measures, characteristics relating to integrity of setting, feeling, association, which qualify properties for listing to the National Register, would be irreversibly disturbed by mining activities: integrity of the Trail of Dreams, other prehistoric trails, and related ceremonial sites would be impaired; the existing natural landscape would be permanently altered; opportunities for solitude would be diminished; and the overall spiritual value of the area would be irreversibly damaged. (Mine ROD, pages 11-12).

accommodation of cultural and religious interests.[6] Without question, the cultural and religious resources at Indian Pass are worthy of protection.

Permitting History for the Claimant's Proposed Open Pit Gold Mine

The Quechan Nation participated extensively in the permitting and other processes for the proposed Glamis mine. (*See*: Quechan Application for Submission, pages 1-2). After an exhaustive, six-year public permitting process including three major environmental documents, several rounds of public hearings, over 1,000 comment letters in opposition to the mine and formal government-to-government consultation between the federal government and the Quechan Tribal government, BLM denied the mine using six different rationales in January 2001.[7]

In November 2001, however, newly installed DOI Secretary Gale Norton summarily issued a one-paragraph statement rescinding the denial of the mine based on a purported legal error: that without regulations to define "undue impairment," DOI cannot determine when a project would unduly impair Indian heritage resources. The rescission of the mine denial occurred without public notice, hearings, consultation with affected tribes, a site visit to the area, consideration of the extensive evidence in the administrative record or addressing the other reasons for the denial.[8]

The Secretary's action drew substantial opposition from the California House Congressional Delegation (29 Congressmembers), both of the United States Senators from California Dianne Feinstein and Barbara Boxer, Governor Gray Davis, the California State Attorney General, the California Legislature, the National Congress of

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[6] The Quechan's struggle to protect their cultural heritage and religious freedoms has appeared in national media including the: *Wall Street Journal, New York Times, Los Angeles Times, Washington Post,* ABC World News Tonight, the History Channel and National Public Radio. It has been cited in several law review articles on federal lands management, cultural resources on public lands and domestic mining law. It was a catalyst for California's and federal attempts to enact sacred lands protection measures over the last four years.

[7] The Claimant incorrectly states that the denial of the mine "was based solely on the purported impact of the Imperial Project on alleged cultural resources" (*Claimant's Notice of Arbitration*, paragraph 15). However, according to the ROD itself, the mine was denied because: 1) The project is located in an area determined to have nationally significant Native American values and historic properties and would cause unavoidable adverse impacts to these resources; 2) The project would result in unavoidable adverse impacts to visual quality in this substantially undisturbed landscape; 3) The impact of the project cannot be mitigated to the point of meeting the statutory requirement of the Federal Lands Policy and Management Act (FLPMA) that BLM must prevent "undue impairment" of the public lands in the California Desert Conservation Area (CDCA); 4) The proposed project is inconsistent with the CDCA Plan; 5) The identified unavoidable and adverse environmental impacts resulting from the project override the possible economic benefits that might be derived from the project; 6) The proposed project fails to meet the overall statutory requirement in FLPMA that BLM must prevent "unnecessary or undue degradation" of the public lands.

[8] Since the rescission, to the Tribe's knowledge, DOI has made no effort to promulgate a regulation to define "undue impairment." However, a federal district court, in another mining case, subsequently found that FLPMA, by its plain terms, vests the DOI Secretary with the authority, and indeed the obligation, to disapprove of an otherwise permissible mining operation because the operation, through necessary for mining, would unduly harm or degrade the public land. *Mineral Policy Center v. Gale Norton and National Mining Association,* U.S. District Court for the District of Columbia, Civil Action 01-00073(HHK)(2003).

American Indians, the Association on American Indian Affairs, the California Native American Heritage Commission, the Inter Tribal Council of Arizona, among other tribes and organizations across the nation.[9]

Severe Environmental and Cultural Impacts of the Proposed Mine

The proposed mine would have introduced many adverse impacts to this area, some of which could not be mitigated.[10] DOI had denied the mine because of combined adverse and unmitigable impacts to air quality, visual quality and cumulative adverse impacts to Quechan religious sites from other development and on environmental justice grounds, citing two Presidential Executive Orders.[11] Valid existing rights and public access were still allowed under the former Secretary Babbitt decision to deny the mine – only the massively destructive mine was prohibited.

The cultural and environmental impacts of the proposed mine were so bad, it was denied under the existing CDCA-specific "undue impairment" and the general (1980) "unnecessary or undue degradation" standards, *not* the controversial newer "substantial irreparable harm" standard found in the revised 3809 regulations (that implement the Mining Law of 1872) promulgated under President Clinton.[12]

The ore targeted by Glamis is of such low grade that it would require that approximately *422 tons* of rock be mined, moved, processed and stored for *each ounce* of gold produced. In fact, DOI concluded it was one of the lowest grade gold deposits in California and the entire United States.

Under Claimant's plan of operations, the mine's deepest pit, at about *850 feet deep*, would never be backfilled, and would remain a public nuisance in perpetuity on otherwise protected public federal lands. New mountains created by the waste rock, *up to 30 stories*

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[9] In June 2002, the National Trust for Historic Preservation listed the Indian Pass area as one of its 11 Most Endangered Historic Places in the U.S.; in March 2003, the California Wilderness Coalition listed the Indian Pass area in its "Also In Trouble in 2003" list of most threatened wild places in California

[10] For example, The FEIS/R concluded the mine would cause significant and unmitigable impacts to air quality. The American Lung Association states that Imperial County has one of the highest rates of childhood asthma among California counties. The air quality impacts in the Imperial Valley have only worsened since the FEIS/R was published in 2000. The mine was also inconsistent with the existing, 25-year old, Congressionally-designated California Desert Conservation Area (CDCA) Plan and its protective Class L (Limited Use) land use designation governing these lands. (Mine ROD, page 13). Class L lands are those where preservation is to be placed before consumptive uses and archaeological values will be preserved and protected. The process creating the CDCA Plan was one of the most extensive public participatory processes in the history of federal land management.

[11] Yet, the Claimant asserts that it has "compli[ed] with all applicable requirements for commencement of mining." (*Claimant's Notice of Arbitration*, paragraph 13). This is incorrect on at least two accounts. First, because the mine was going to be denied, the development of mitigation measures for cultural resources was not, and did not have to be, completed. Second, the project's environmental documents did not require backfilling of all three open pits as a mitigation measure.

[12] The Claimant incorrectly alleges that its plan of operations "remains fully consistent [with BLM regulations and] even with the new regulations." (*Claimant's Notice of Arbitration*, paragraph 12). However, as mentioned above, Glamis has not demonstrated that its plan had adopted all required mitigation measures nor has DOI ever approved Glamis' plan to date.

high, would forever alter the landscape and visual quality of the valley, and compete with the natural landforms. The operation would have also consumed up to *389 million gallons of water per year* from the pristine desert groundwater aquifer.

California Intent in Enacting Mining Reclamation Measures

It was within this context, and after the Federal Government changed Executive Administrations and reversed the prior mine denial, that the State of California acted to protect the environment and citizens of California and Tribal interests.

In April 2003, the California Legislature passed, and Governor Davis signed, emergency legislation requiring complete backfilling and recontouring of new open pit metallic mines in protected areas of the California desert near native sacred places, such as at Indian Pass. Shortly thereafter, the SMGB promulgated statewide regulations requiring complete backfill and recontouring for all new open pit metallic mines. Both actions were reasonable environmental requirements aimed at protecting the health and well-being of California's land and its citizens.

That both California actions have not been challenged in any Court by any party; that there is no serious expert debate regarding the measure's ability to reduce both short and long term environmental harms; and that the Claimant here does not directly challenge the measures' ability to prevent against environmental and cultural harms, speaks to their validity as reasonable environmental measures.

The Claimant nonetheless asserts that it can see no environmental value in the California measures. (*Claimant's Notice of Arbitration*, paragraph 20). Yet, California found many environmental harms to be reduced or avoided with backfilling. They include: preventing contamination problems when residual cyanide (or any other processing solution), not removed by rinsing, is exposed to precipitation percolating through the waste piles and flushing the processing solution into surface waters and returning the land to a truly usable condition or beneficial alternate use after reclamation.

Both actions were supported by state, regional and national conservation groups, who had long advocated the imposition of complete backfilling measures.[13] The measures were championed by Senator Byron Sher, the original author of California's Surface Mining and Reclamation Act (SMARA) (*Public Resources Code*, Sec. 2710 et seq.). Senator Sher maintained a long and deeply held interest in preventing or minimizing the impacts of mining on California's environment and people.

Nor did the actions constitute a ban of open pit mining, and therefore, did not run afoul of the United State Supreme Court decision in *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987). *Granite Rock* held that state environmental regulations of

[13] Conservation groups formally supporting the measures included: California Wilderness Coalition, Mineral Policy Center, Desert Protective Council, Desert Survivors, Natural Resources Defense Council, Defenders of Wildlife, Great Basin Mine Watch, Friends of the Panamints and the National Parks Conservation Association.

general applicability that apply on federal lands are not preempted by the General Mining Law or other federal laws.

In its submissions to date, the Claimant makes several unsupported assertions to try to bolster its claim. First, it misstates the findings of the National Academy of Scientists/National Research Council in its report *Hardrock Mining on Federal Lands* (1999). The Claimant argues, in essence, that the Committee rejected backfilling (*Claimant's Notice of Intent to Submit a Claim to Arbitration*, page 12). This statement is incorrect.

Contrary to Claimant's assertion, the Committee wrote that partial or complete backfilling can be environmentally and economically desirable in some circumstances; it just could not find a basis, at that time, to establish a general presumption either for or against backfilling in all cases. However, it found that the circumstances under which backfilling is most likely to be viable include locations where backfilling may eliminate negative environmental impacts, such as acid mine drainage or formation of pit lakes, concerns the State had with Glamis' mine.[14]

Claimant next asserts that the measures targeted Glamis because it is a Canadian company. This statement is also false. Glamis' country of origin played no role in the development or enactment of the measures. In fact, legislative history shows that American mine companies operating in California, namely Canyon Resources Corporation and Newmont Mining Corporation, owners of the Briggs Mine, were equally as concerned as Glamis about the application of these measures to its pending projects.[15]

Finally, the Claimant asserts that delay by DOI in processing its permit caused its permit to be considered pending by the State of California when it adopted its backfilling measures. (*Claimant's Notice of Arbitration*, paragraph 10). This statement is also untrue. Glamis filed two lawsuits in this matter as referenced in the Tribe's Application, pages 4-5. One of these lawsuits, challenging the Leshy Solicitor's Opinion, was aimed at

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[14] Moreover, the report admitted that it was not clear about the extent to which existing laws and regulations, such as the National Historic Preservation Act, the American Indian Religious Freedom Act, BLM's authority to avoid "unnecessary or undue degradation," and various state laws, adequately protected cultural resources and tribal interests. The Committee also stated it was consistently frustrated by the inability of federal land management agencies to provide timely, accurate and current information on how they manage lands and mining activities. These issues provided data gaps, without which the Committee could not make recommendations or determine the adequacy of existing mitigation measures.

[15] The Environmental Coordinator of the CR Briggs Corporation commented in writing to the SMGB that it has been greatly impacted by the emergency regulation and will be further impacted by the proposed rulemaking. Briggs stated that at the time of regulation, it had defined a 20,000 gold ounce pit south of an existing pit and was preparing to request an amendment to its existing reclamation plan; it claimed the rules resulted in the new pit becoming uneconomic and postponed its exploratory activities at that mine. Moreover, a SMGB Staff Report acknowledged the importance of establishing an environmental protection standard for Glamis, *and other*, mine operation and reclamation plan approvals which may be pending at this time, but which the SMGB may be unaware, and which might receive approvals before a permanent regulation is in place.

delaying a decision on the mine's plan of operations.[16] Both lawsuits had the effect of delaying a final outcome on the project and were initiated by the Claimant itself.

In sum, the intent of California in enacting these mining reclamation measures was without discrimination to Claimant; these measures remain reasonable environmental measures that had long been sought by the conservation community. It was Claimant's bad timing, not its country of origin, that caused it to become the poster child for successful mining reform in California. Deference should be accorded to these well-considered governmental actions by this Tribunal.

Legal and Policy Frameworks Support Indigenous Cultural Resource Protection

Without question, extensive consideration must be given to cultural heritage and sacred places during the permitting process for mining activities under both domestic and international legal and policy frameworks. Indeed, a failure to consider these frameworks under domestic law could result in an arbitrary and capricious decision by the governing agencies, vulnerable to judicial, or other, review.

Domestic Protections: California and Federal

In the United States, and in California in particular, there has been a trend towards deeper understanding of diverse cultural properties. This trend has gradually been reflected in increased statutory protection for, and policy consideration of, indigenous cultural resources and sacred places.

In California, governmental entities must consider impacts to historical and cultural resources under the California Environmental Quality Act (*California Public Resources Code,* sec. 21000 et seq. (statute); *California Code of Regulations,* sec. 15000 et seq. (guidelines));[17] requirements of the State Native American Heritage Commission (*Public Resources Code,* sec. 5097.91 et seq.); California NAGPRA (AB 978, 2001); and *California Executive Order,* W-26-92 (affirming that all state agencies shall recognize and, to the extent possible, preserve and maintain the significant heritage resources of the State).

A number of California provisions also address intentional desecration or destruction of cultural places.[18] Many entities also have requirements for consultation with tribal governments prior to making decisions that affect tribal interests, among other policies. California also shows a continuing trend towards offering indigenous sacred places more consideration and protection, including during land use planning.[19]

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[16] This legal challenge was found to be without merit and was dismissed by the Court.

[17] Unlike NEPA, CEQA requires the adoption of mitigation measures as part of the conditions of project approval and provides that the environmentally preferred alternative be selected wherever feasible.

[18] *California Public Resources Code*, secs. 5097.995 and 5097.99; *California Penal Code*, sec. 622.4 and *California Health & Safety Code,* secs. 7050.5, 7052.

[19] SB 18, enacted in 2004, requires local governments to timely and meaningfully consult with tribal governments during their general and specific planning process and during open space planning. It also allows tribes to hold conservation easements. The Quechan were a bill sponsor.

Similarly, the United States Federal Government owes many obligations to protect tribes and tribal cultural resources.[20] Of particular note is its special trust relationship with Indian tribes pursuant to treaties, statutes, Executive Orders, judicial decisions and other domestic legal instruments. Inherent in this relationship is an enforceable fiduciary responsibility to Indian tribes to protect their lands and resources. The Federal government also recognizes tribal governments as the governments of separate, sovereign nations. This relationship is unique as the Federal government does not owe any other entity, state or private, a trust responsibility. As trustees, the United States is obligated to ensure that tribal trust resources and tribal lands are protected to the maximum extent practicable within the law.

International Protections

In addition to domestic provisions, there is also a considerable body of international pronouncement, spanning nearly fifty years, on cultural resource protection.

For example, Article 27 of the *International Covenant on Civil and Political Rights* reads:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Other relevant documents include: UNESCO, *Recommendation concerning the Safeguarding of Beauty and Character of Landscapes and Sites,* 11 December 1962 (Adopting a principal that preventative measures should protect sites from the dangers posed by mines and the disposal of their waste products); UNESCO, *Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works,* 19 November 1968 (Member States should give due priority to measures required for the preservation *in situ* of cultural property endangered by private works to preserve historical associations and continuity); and UNESCO, *Convention concerning the Protection of the World Cultural and Natural Heritage,* 16 November 1972 (to ensure effective and active measures to protect and conserve cultural and natural heritage, party states shall take legal, technical and administrative measures to protect this heritage).[21]

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[20] Respondent sets out many of these authorities in its Statement of Defense, pages 5-6; we will not repeat those here. Other relevant authorities include: the Antiquities Act of 1906; National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties,* National Register 1990; Departmental policies and manuals within BLM and other federal agencies; the *American Indian Religious Freedom Act,* 42 U.S.C. Sec. 1996 (1994); Executive Order 12898 (Environmental Justice), 59 Fed.Reg. 7629 (1994); and the American Folklife Preservation Act, 20 U.S.C. 2101.

[21] Other relevant sources of international law include: UNESCO, *Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas,* 26 November 1976 (Historic areas and their surroundings should be regarded as forming an irreplaceable universal heritage, with a governmental and civic duty to safeguard heritage and integrate it into the social life of our times); UNESCO, *Recommendation on the Safeguarding of Traditional Culture and Folklore,* 15 November 1989 (Protects folk and oral traditions and those who are the transmitters, having regard to the fact that each people has a

The Issues in Dispute

In its notice of arbitration, the Claimant has identified two provisions of the NAFTA upon which it hopes to rely: Articles 1105(1) (the "minimum standard of treatment") and 1110 (requiring compensation for expropriation). It is submitted that, in its interpretation of these provisions, the Tribunal should be guided by, at least, two considerations:

- That the preservation and protection of indigenous rights in ancestral land is an obligation of customary international law which must be observed in accordance with the principle of good faith; and
- That an investor seeking compensation for an alleged taking of property cannot rely upon a claim to acquired rights in which no legitimate expectation to enjoy such rights existed.

The Minimum Standard of Treatment

NAFTA Article 1105(1) requires the Respondent to provide NAFTA investors with "treatment in accordance with international law, including fair and equitable treatment and full protection and security." On 31 July 2001, the North American Free Trade Commission issued a binding statement of interpretation requiring this phrase to be construed as requiring NAFTA Parties to adhere to: "the customary international law minimum standard of treatment for aliens," in respect of their treatment of investors and their investments. Subsequent tribunals have concluded that the effect of this statement has been to confirm that the treatment required under Article 1105(1) is that which is also required under current minimum standards owed as a matter of customary international law.[22]

Under NAFTA Articles 102(2) and 1131(1), this Tribunal is required to interpret the text of the Agreement in accordance with the applicable rules of international law, including the principle of good faith. As codified in Article 31(1) of the *Vienna Convention on the Law of Treaties*, the principle of good faith requires a treaty interpreter to construe the text of an international agreement in a manner that ensures consistency between and among all applicable international obligations.[23] Accordingly, it is incumbent upon this Tribunal to interpret the text of Article 1105(1) in a manner consistent with the

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right to its own culture); UNESCO, *Declaration concerning the Intentional Destruction of Cultural Heritage,* 17 October 2003 (recalling the tragic destruction of the Buddha's of Bamiyan, that cultural heritage is an important component of the cultural identity of communities and social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights); and UNESCO, *Convention for the Safeguarding of the Intangible Cultural Heritage,* 17 October 2003 (recognizing that indigenous communities in particular play an important role in the production, safeguarding, maintenance and recreation of intangible cultural heritage, including oral traditions, knowledges and practices concerning nature and the universe, thus helping to enrich cultural diversity and human creativity).

[22] See, e.g.: *Waste Man., Inc.* v. *United Mexican States*, ICSID Case No. ARB(AF)/00/3 (Final Award) 30 April 2004, at paras 89-99 <http://naftaclaims.com/Disputes/Mexico/Waste/WasteFinalAwardMerits.pdf>.

[23] See, e.g.: Gabrielle Marceau, "WTO Dispute Settlement and Human Rights" European J. Int'l L. 13 (2002) 753, for discussion of how human rights obligations must be considered in the interpretation and application of WTO treaty texts < http://www.ejil.org/journal/Vol13/No4/art1.html>.

Respondent's conventional and customary international law obligations to preserve and protect indigenous peoples' rights to land and its resources.

The obligation to respect, to protect, and to take positive steps to promote the rights and interests of indigenous peoples in their ancestral lands is grounded in the communal rights of such peoples to property and to be free from discrimination under international law. As noted by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities:

> It must be understood that, for indigenous populations, land does not represent simply a possession or means of production ... It is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture.[24]

Similarly, Convention No. 169 of the International Labor Organization,[25] *Concerning Indigenous and Tribal Peoples in Independent Countries*, states at Arts. 4 and 13(1) that:

> Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned ...
>
> In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

ILO Convention No. 169 stands as a *de facto* restatement of the core principles of international law generally applicable to the conduct of States in respect of the rights and interests of indigenous peoples. As Professor Anaya has noted, in his seminal text on indigenous peoples in international law, in applying Convention No. 169, ILO institutions have emphasized that, when natural resource development activities may affect indigenous communities, such activities cannot be approved unless and until effective consultation has taken place with such communities and appropriate mitigation measures have been designed in respect of any natural resource extraction from indigenous ancestral or traditional lands – "regardless of formal ownership of the lands or the exclusivity of indigenous occupation."[26]

The relevant portions of ILO Convention No. 169 provide as follows:

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[24] *Study of the Problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7, Add. 4, at 39 (1986), Jose R. Martinez Cobo, special rapporteur. See, also: U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous Peoples and Their Relationship to Land – Final Working Paper*, U.N. Doc. E/CN.4/Sub.2/2001/21 (2001), Erica-Irene A Daes, special rapporteur.

[25] See: <http://www.ilo.org/public/english/standards/norm/egalite/itpp/convention/32.pdf>.

[26] S. James Anaya, *Indigenous Peoples in International Law*, 2nd ed. (Oxford: New York, 2004) at 143.

> 14(1). The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
>
> (2). Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession . . .
>
> 15(1). The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
>
> (2). In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

These provisions reflect a consensus that has solidified in the wider international community concerning the minimum standards applicable to the relationship between States and indigenous peoples.[27]

For example, in *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*,[28] the Inter-American Court of Human Rights concluded that Nicaragua violated indigenous rights by granting to a foreign investor a concession to log within the community's traditional land. It was concluded that rights in the communal property of indigenous peoples were protected under the *Inter-American Convention on Human Rights*, even where such land was not held under deed or title or otherwise recognized by the host State. The Court further concluded that affirmative state measures were required to protect rights recognized by the *Convention*, and that Nicaragua's failure to do so in this case violated the Mayagna Community's right to property protected under Article 21 of the *Convention*. Recourse to the precepts of Article 14(2) of ILO Convention 169 also took place in this judgment.

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[27] It does not matter that the Respondent in this case is not a party to ILO Convention 169, as the core obligations it contains transcend the text and have been accepted by international tribunals, and through State practice, as obligations owed under customary international law.

[28] Inter-Am. Ct. H.R. (Ser. C) No. 79 (Judgment on Merits & Reparations) 31 August 2001, 19 *Ariz. J. Int'l. & Comp. L.* 395 (2002).

A similar conclusion was made by the Inter-American Commission on Human Rights, in application of the *American Declaration on the Rights and Duties of Man*, whereby indigenous rights in ancestral lands were recognized and protected in international law, notwithstanding the operation of U.S. Indian law which was purported to have extinguished such rights as a matter of domestic law.[29] In its reasoning, the Commission made clear that a *sui generis* regime of international norms protecting indigenous rights in land now exists and should be applied within the context of any international dispute, as in the Inter-American system of human rights, even where the parties to that dispute were not parties to ILO Convention 169.

The Commission accordingly concluded that:

> ... general international legal principles applicable in the context of indigenous human rights include: the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property; the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property...[30]

NAFTA Article 1105(1) requires Respondent in the instant case, and all of its instrumentalities (such as the State of California), to act in accordance with international law. The Claimant would apparently have this Tribunal believe that the Respondent is only required to observe the international obligations that serve the Claimant's ends: i.e. obtaining compensation because a federal government measure and certain state measures bring about what it will argue constitutes an improper result. However, the Respondent does not have the luxury to obey only some of its international obligations; it must obey them all, including the minimum standards of treatment reflected in international instruments such as ILO Convention 169.

Professor Anaya has noted:

> It is thus evident that certain minimum standards concerning indigenous land rights, rooted in otherwise accepted precepts of property, cultural integrity, non-discrimination, and self-determination, have made their way not just into conventional law but also into general or customary international law.[31]

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[29] *Re: Mary & Carrie Dann, Case No. 11.140 (United States)*, Inter-Am. C.H.R. Report No. 75/02 (Merits) 27 December 2002, <http://www.indianlaw.org/WS_Dann_case_IACHR_final.pdf>.
[30] *Dann Case*, at 33-34.
[31] Anaya, at 148.

It is beyond doubt that the territory upon which Glamis would have dug its open pit mine is contained within the ancestral homeland of the Quechan people. Both the Respondent and the Claimant have long-known this fact. It is also well-established that communal rights to property exist for indigenous peoples in international law, above and apart from whichever of their rights in land are recognized within any particular domestic system of law. It was therefore appropriate for both the Respondent, acting on its own and through instrumentalities such as the State of California, to take the steps needed to safeguard the Tribe's interests in the land and resources proposed for despoiling by the Claimant.

The text of Article 1105(1) cannot be construed in a vacuum. The applicable rules of treaty interpretation forbid it. In respect of their treatment of investors and their investments, NAFTA Parties must act in accordance with the minimum standards imposed by customary international law – not just the ones that suit investors.

Expropriation

NAFTA tribunals have consistently concluded that, in application, Article 1110 requires no more of a NAFTA Party than that which is required of them under customary international law, with respect to the taking of property (defined by the Parties as an "investment" under Article 1139).[32] The customary international law of expropriation requires compensation to be paid only in cases where State conduct results in substantial interference with a property interest in which a right of use and enjoyment has legitimately vested.[33]

Because it does not actually have an operating mine, on the ground, at the ancestral lands where it hoped to establish its mining operation, the Claimant must rely upon an acquired rights theory to support its claim under Article 1110.[34] In other words, because it is only able to argue that it was only belatedly granted some form of governmental right to engage in a business – rather than actually having engaged in that business itself – Glamis must demonstrate that it actually possessed a legitimate expectation to be able to profit from the exercise of that right.

To succeed under Article 1110, it is not sufficient for a claimant to merely allege that it possessed an "intangible" form of property falling within the definition of NAFTA Article 1139; it must satisfy a tribunal that whatever interests in such property claimed to have been taken, were actually capable of (or otherwise "ripe for") being taken. Also, as many tribunals have already concluded, NAFTA Article 1110 is not a remedy for any investor whose business plans were ultimately frustrated by governmental regulation.[35]

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[32] See, e.g. , *Pope & Talbot* v. *Canada*, NAFTA/UNCITRAL Tribunal, Interim Award on the Merits, 26 June 2000, at para. 104, <http://naftaclaims.com/Disputes/Canada/Pope/PopeInterimMeritsAward.pdf>.

[33] See, e.g.: Jack J. Coe & Noah Rubins, "Regulatory Expropriation and the *Tecmed* case: Context and Contributions" in, Todd Weiler, ed. *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, 597 at 621-624.

[34] See, e.g.: Ignaz Seidl-Hohenveldern, *International Economic Law* (Martinus Niijhoff: London, 1989), at 137-143.

[35] See, e.g.: *Feldman* v. *United Mexican States*, ICSID Case No. ARB(AF)/99/1 (Final Award) 16 December 2002, at para. 112 <http://naftaclaims.com/Disputes/Mexico/Feldman/FeldmanFinalAward.pdf>.

Despite the obvious problems with the open pit mine it was promoting, and being consistently reminded that whatever business it proposed would – of necessity – need to safeguard the rights and interests of the Quechan people and protect the environment, Glamis now claims that governmental acts – which were required under conventional and customary international law – resulted in the expropriation of its alleged right to proceed with its proposal. To be clear, the State of California was – and remains – obliged, under customary international law, to safeguard the land, and protect the vital interests, of the Quechan people. This obligation is also owed by the Respondent, regardless of whether it recognizes the Tribe's rights in the land in question, under applicable U.S. law.

In fulfillment of these obligations, the State of California imposed measures: Regulation 3704.1 (on 12 December 2002 (as emergency regulations); on 30 May 2003 (as permanent regulations)) and Senate Bill 22 (on 7 April 2003), each of which would require any operator of a new metallic mine to properly prevent or remediate the environmental damage caused by the kind of open pit mining promoted and planned by Glamis. The Claimant even admits, at paragraph 21of its Notice of Arbitration, that a stated purpose of these measures was to protect the vital interests of the Quechan people in the land in question.

Given the extensive involvement of the Tribe in all public processes and procedures involving Glamis' attempt to open pit mine the ancestral and sacred lands of its people, it would be disingenuous, at best, for Glamis to now claim that Secretary Norton granted it an unfettered right to exploit these lands in any way Glamis saw fit. Merely because it was able to satisfy the new Executive Administration in Washington that its proposal might be consistent with the new policies of that Administration – a consistency which to this day has not been finally determined – does not mean that Glamis should have expected the State of California to ignore the international obligations that it also owed to the Quechan people.

Rather, Glamis knew, or should have known, that any right granted to it to exploit ancestral Quechan lands, could only be enjoyed upon satisfaction of the concomitant domestic and international obligations owed by the Respondent to the Quechan people, to take whatever positive steps were necessary to protect and promote their interests in such land.

Concern that Award Could Result in Cultural and Environmental Harms

It has been the Tribe's view that, from the beginning, any lasting solution to this conflict must protect the Indian Pass area in perpetuity, include appropriate management of the area; and avoid providing a windfall to Glamis for merely having failed in realizing its plan to dig an open pit mine that would not have safeguarded indigenous interests.

Of significant concern to the Tribe is whether a decision in favor of the Claimant would directly or indirectly result in the extinguishment of Glamis' claims to mine the area. If it does not, then it is possible that Glamis could both receive a monetary award and then

also have the benefit of its allegedly valueless claims, meaning it could then presumably use or sell them.

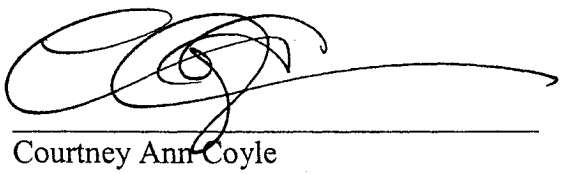
Use of such claims by Glamis would result in the very environmental and cultural harms that independent experts have found so devastating to the Tribe and others have determined highly offensive to the fragile desert environment. Not only would a finding of liability to pay compensation to Glamis under the NAFTA encourage other investors to promote schemes that threaten other indigenous lands, in the hopes of obtaining approval or entitlement to compensation; possible approval of the Glamis mine could result in the Tribe filing a petition with the Inter-American Commission on Human Rights against the United States, bringing this specific issue, if left unresolved, back into the international arena.

Sale of Glamis' claims, in addition to receiving an award, would provide the company an economic windfall at the expense of the American taxpayer and would result in the same magnitude of environmental and cultural harms as if a mine were permitted today; or, if a mine were denied again, that could result in a second NAFTA claim by a prospective new operator or a domestic regulatory takings claim. Such scenarios appear to present unfair and unwarranted results.[36]

Conclusion

There is no debate about the value to the nation of the cultural and religious resources located within the Indian Pass area, the site of the proposed Glamis Imperial Mine. Therefore, both the United States federal and state governments acted with legitimate governmental purposes, under all applicable international laws, when they adopted reasonable environmental measures to protect these irreplaceable and nonrenewable resources. We respectfully request the Tribunal consider the facts, law and contexts provided by the Tribe in assessing Glamis' claim.[37]

Respectfully submitted,



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[36] If Glamis' claim will be that its mining rights are merely diminished in value because of the need to comply with American environmental or cultural laws, then this Tribunal should dismiss the claim because there is no expropriation. Only if the Tribunal makes a finding, to which the Claimant is bound, that the mining claims have been rendered valueless or extinguished, can there be an expropriation for which the Tribunal may then proceed to determine whether that expropriation is compensable.

[37] We understand that other non-disputing parties may desire to submit materials to this Tribunal emphasizing the areas of American public lands law, domestic mining law and international law.