United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

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DEC 27 [illegible]

Memorandum

To: Secretary
Acting Director, BLM

From: Solicitor

Subject: Regulation Of Hardrock Mining

I. Factual Backgound

The Glamis Imperial Gold Mine is proposed to be developed on mining claims in Imperial County, California, in the southeastern part of the California Desert Conservation Area designated by Congress. The mining company, Glamis Gold, has submitted a plan of operations for a cyanide heap-leach gold mine using three open pits on 1,650 acres. The Bureau of Land Management is in the process of preparing an environmental impact statement under the National Environmental Policy Act, 42 U.S.C. §4321 et seq, on the company's proposed plan of operations.

The Glamis proposal is typical of modem, fine-particle, heap-leach gold mining and recovery operations. It involves the disturbance of a large quantity of waste rock and low-grade ore in order to extract a comparatively tiny amount of gold. It would retrieve, on average, approximately one ounce of gold for every 422 tons of earth core and waste material disturbed - a ratio by weight of one to 13.5 million. See Memorandum from R.Waiwood, BLM, to the Office of the Solicitor (Dec. 1, 1999). Because the ore body is of a somewhat lower grade than that found at most operating mines, the ratio of metal recovered to material disturbed is lower than found in many other operations, particularly for a start-up operation.[1] The low grade of the ore may so affect the profit margin that the imposition of reasonable environmentally protective restrictions or mitigation measures may make the venture unprofitable.

[1]It may be cost-effective for an established mine, with the necessary infrastructure and other capital investment already in place, to move to lower grade ore, when it may not be cost-effective for an initial investment to mine such a low grade.

The proposed mine has raised several regulatory questions; the most prominent arises from the fact that the proposed mine footprint is located in the Indian Pass-Running Man Area of Traditional Cultural Concern[2] on ancestral lands of the Quechan Tribe of Indians. Recently, at BLM's request, the Advisory Council on Historic Preservation[3] completed a review of the project, and advised BLM of its findings by letter dated October 19, 1999.

In summary, the Advisory Council advised that: (a) the "religious, cultural and educational values" in the area are "of premier importance to the Quechan Tribe for sustaining their traditional religion and culture"; (b) the proposed mine would "unduly degrade" the area, "introducing activities and intrusions incompatible with the historic area and its unique qualities"; and (c) no available mitigation measures are adequate to compensate for the loss. The Advisory Council concluded:

> If implemented, the project would be so damaging to historic resources that the Quechan Tribe's ability to practice their sacred traditions as a living part of their community life

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[2]An "Area of Traditional Cultural Concern" or ATCC is a term used here to describe the area potentially affected by the Glamis mining project. BLM first used this term when proposing a land withdrawal surrounding the Glamis project from operation of the Mining Law, subject to valid existing rights. See 63 Fed. Reg. 58752 (November 2, 1998).

[3]The National Historic Preservation Act (NHPA), 16 U.S.C. §470 et seq., created the Advisory Council on Historic Preservation. See 16 U.S.C. § 470i. The Council is an independent agency that, among other things, may comment with respect to the effect of any federal undertaking on any "site" or "object" included in or eligible for inclusion in the National Register of Historic Places. See 16 U.S.C. §§ 470f, 470j. If an undertaking does not have the potential to cause effects on historic or cultural properties, an agency has no further obligations under the NHPA. 36 C.F.R. §800.3(a)(1). If there is an effect on an historic property, the agency will further determine if the impact is adverse. Id. §800.5(a)(1). The Advisory Council has the option of entering the consultation on its own initiative, or it may be invited to do so by either the SHPO or the agency. Id. §800.5(c). BLM, the Advisory Council, and the National Conference of State Historic Preservation Officers entered into a nationwide Programmatic Agreement on March 26, 1997, outlining the manner in which BLM will meet its responsibilities under the NHPA.

The Glamis project is an undertaking falling under the NHPA. By letter dated August 25, 1998, BLM formally requested the Advisory Council's involvement, noting that BLM and the SHPO had concurred that the Glamis Project would have an adverse effect on historic properties, and also that the Advisory Council's review of the project was appropriate under Paragraph 4.b.(3) of the nationwide Programmatic Agreement since the Glamis project is a "highly controversial undertaking." The Advisory Council and BLM visited the proposed area for the Glamis project site on March 11, 1999. In a letter to Secretary Babbitt dated October 19, 1999, the Advisory Council made its formal recommendations regarding the Glamis project.

> and development would be lost. Overall, the Council is convinced that the cumulative impacts of the proposed mine on the ATCC, even with the mitigation measures proposed by the company, would result in a serious and irreparable degradation of the sacred and historic values of the ATCC that sustain the tribe. Therefore, the Council concludes that the Glamis Imperial Project would effectively destroy the historic resources in the project area, and recommends that Interior take whatever legal means available to deny approval for the project.

Officials of Glamis Gold responded to the Advisory Council letter by a fourteen-page letter to the Secretary dated November 10, 1999, exploring the legal issues addressed here. We also have a December 14, 1999 letter from the Western Mining Action Project commenting on the legal arguments in Glamis Gold's November 10, 1999 letter.

This opinion responds to the Advisory Council's recommendations and Glamis Gold's letter, and addresses two questions:

> What limits or obligations does the First Amendment to the U.S. Constitution place on the BLM in this context?
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> To what extent does the Federal Land Policy and Management Act authorize or oblige the BLM to protect the cultural and historic resources[4] of the ATCC in connection with the Glamis proposed plan of operations?

II. Statutory Backgound

A. The Mining Law

The Mining Law of 1872 allows miners to secure exclusive rights to mine public lands through the location of valid mining claims. Valid mining claims require, among other things, a "discovery" of a "valuable mineral deposit." See 30 U.S.C. §23. A "discovery" is not defined in the statute, but the Supreme Court has described it as having occurred "[w]here minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. . . ." Chrisman v. Miller, 197 U.S. 313, 322 (1905). More recently, the Supreme Court has supplemented this "prudent person" test with a "marketability test," which holds that profitability is a critical factor in determining if a mineral deposit is

[4]In its letter dated October 19, 1999, the Advisory Council refers to the need for protection of "historic" properties. BLM's regulations and guidelines mainly refer to "cultural" resources and values. The resources that would be affected by the Glamis proposal are both cultural and historic, so we use the terms interchangeably in this memorandum.

marketable. United States v. Coleman, 390 U.S. 599, 602 (1968). Factors considered in determining whether a discovery exists under either test include the costs of extraction, processing, and transporting the minerals, including labor and equipment costs, and the cost of satisfying environmental requirements of applicable federal, state, and local laws and regulations. Great Basin Mine Watch et al., 146 IBLA 248, 256 (1998); U.S. v. Garner, 30 IBLA 42, 67 (1977); United States v. Pittsburgh Pac. Co., 84 I.D. 282, 285 (1977), affirmed, 462 F. Supp. 905 (D.S.D. 1978), 614 F.2d 1190 (8th Cir. 1980); United States v. Kosanke Sand Corp. (On Reconsideration), 80 I.D. 538, 551 (1973). This means that Glamis Gold's ability to comply with environmental protection requirements may affect whether it has discovered a valuable deposit of gold in accordance with the Mining Law and whether its mining claims are valid.

B. The Federal Land Policy and Management Act

In 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 et seq., providing the Secretary of the Interior with organic authority to manage the federal public lands, including those lands containing mining claims located under the Mining Law. FLPMA explicitly acknowledged the continued vitality of the Mining Law of 1872, but amended it in four respects. The last portion of 302(b) provides:

> Except as provided in section 1744, section 1782, and *subsection (f) of section 1781 of this title* and in the *last sentence of this paragraph,* no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress.

43 U.S.C. § 1732(b) (emphasis added). The two italicized references are relevant to consideration of the Glamis operation. Taking them in reverse order, the last sentence of the paragraph states: "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. §1732(b). This made clear Congress's intent that all public lands activities, including those conducted under the Mining Law of 1872, are subject to the unnecessary or undue degradation standard.

The reference to section 1781(f) relates to added protection Congress bestowed on public lands found within the California Desert Conservation Area (CDCA). Section 601 of FLPMA created the CDCA, 43 U.S.C. §1781(c), based on Congress's finding that its lands contain "historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources" in need of special attention. 43 U.S.C. §1781(a)(1). This section continued, in pertinent part:

> Subject to valid existing rights, nothing in this Act shall affect the applicability of the United States mining laws on the public lands within the California Desert Conservation Area, except that all mining claims located on public lands within

> the California Desert Conservation Area shall be subject to reasonable regulations as the Secretary may prescribe to effectuate the purposes of this section. Any patent issued on any such mining claim shall recite this limitation and continue to be subject to such regulations. *Such regulations shall* provide for such measures as may be reasonable to *protect the scenic, scientific, and environmental values of the public lands of the California Desert Conservation Area against undue impairment, and to assure against pollution of the streams and waters within the California Desert Conservation Area.*

43 U.S.C. §1781 (f) (emphasis added). As noted above, this section is explicitly referenced in FLPMA's § 302(b), reconfirming that it applies to mining claims located under the Mining Law.[5]

III. The Quechan Tribal Religion and the First Amendment

Because the Advisory Council has found that the proposed mining operations would have a very damaging effect on the tribe's "ability to practice their sacred traditions," questions have been raised as to BLM's responsibilities with respect to the First Amendment in this context. In Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988), the Supreme Court held that the First Amendment's Free Exercise Clause did not prevent the Forest Service from permitting road construction or timber harvesting in a portion of a national forest traditionally used by members of California Indian tribes for religious purposes. Even though the majority noted that the logging and road-building could have "devastating effects on traditional Indian religious practices," the government was not in these circumstances required to "bring forward a compelling justification for its otherwise lawful actions." Id. at 450. The Supreme Court went on in Lyng to caution that:

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

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[5]The other two references in § 302(b) are not relevant here. One requires recordation of mining claims with the federal government, 43 U.S.C. § 1744, and the other incorporates protections for lands eligible for wilderness protection, 43 U.S.C. § 1782. This Office has issued several opinions on the latter. Interpretation of Section 603 of the Federal Land Policy Management Act of 1976 -- Bureau of Land Management (BLM) Wilderness Study, 86 I.D. 89 (1979); The Bureau of Land Management Wilderness Review and Valid Existing Rights, 88 I.D. 909 (October 5, 1981); Patenting; of Mining Claims and Mill Sites in Wilderness Areas, M-36994 (May 22, 1998). The Glamis proposal does not involve wilderness study areas or issues.

Id. at 453-54. The Court noted with approval the Forest Service's effort to reroute the road to avoid impacting the most sacred areas, and to leave specific sites undisturbed. Id. at 454.

The teachings of Lyng control application of the First Amendment to the Glamis proposal. The Constitution does not compel rejection of the proposed mining plan on the basis of its potential impact on tribal religious practices. But, like the Forest Service in Lyng, the BLM here could make efforts to accommodate tribal interests through exercise of its regulatory authority.

Since Lyng was decided, the President has issued an Executive Order on Sacred Sites, E.O. 13007 (May 24, 1996), which mandates that federal land managers

> shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.

The Advisory Council makes clear that the Glamis proposal would affect the physical integrity of sacred sites as they are defined in the Order (see Order, § l(b)(iii)). The Executive Order therefore guides BLM's administration of its responsibility to regulate hardrock mining on federal lands here in the CDCA, and directs BLM to a policy choice in favor of preserving the physical integrity of the sites unless such a choice is impracticable, forbidden by law, or clearly inconsistent with essential agency functions.

Finally, the Office of Legal Counsel in the Department of Justice has recently advised that the federal government "has broad latitude to accommodate the use of sacred sites by federally recognized Indian tribes" without violating the Establishment Clause of the First Amendment. See OLC Opinion, Memorandum for Bruce Babbitt Secretary of the Interior - Permissible Accommodation of Sacred Sites, September 18, 1996, p. 1; see also Morton v. Mancari, 417 U.S. 535 (1974); Rupert v. Director, U.S. Fish and Wildlife Serv., 957 F.2d 32 (1st Cir. 1992); Peyote Way Church of God. Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991).

IV. **Unnecessary or Undue Degradation**

Section 302(b) of FLPMA directs that the Secretary *"shall* by regulation *or otherwise,* take *any* action necessary to prevent unnecessary *or* undue degradation of the lands." 43 U.S.C. § 1732(b) (emphasis added). Cultural and historic resources are plainly within the ambit of the unnecessary or undue degradation standard. FLPMA itself recognizes protection of cultural resources as an important component of public land management.[6] The National Historic Preservation Act

[6]See, e.g., 43 U.S.C. § 1702(a) (defining "areas of critical environmental concern" to include public land areas "where special management attention is required . . . to protect and prevent

(NHPA), 16 U.S.C. §470 et seq., covers cultural and historic resources on public lands;[7] indeed, the Advisory Council's involvement in consideration of the Glamis proposal stems from that coverage. BLM's subpart 3809 regulations, implementing the "unnecessary or undue degradation" standard for hardrock mining, require BLM to "tak[e] into consideration the effects of operations on *other resources* and land uses, including those resource and land uses outside the area of operations." 43 C.F.R. §3809.0-5(k) (emphasis added). Other provisions of the regulations incorporate environmental laws, which include the NHPA. See, e.g., 43 C.F.R. §3809.2-2 (each operation "shall comply with all pertinent Federal and State laws"); 43 C.F.R. §3809.0-5(k) ("[f]ailure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation").

The conjunction "or" between "unnecessary" and "undue" speaks of a Secretarial authority to address separate types of degradation -- that which is "unnecessary" and that which is "undue." That the statutory conjunction is "or" instead of "and" strongly suggests Congress was empowering the Secretary to prohibit activities or practices that the Secretary finds are unduly degrading, even though "necessary" to mining. Commentators agree that the "undue degradation" standard gives BLM the authority to impose restrictive standards in particularly sensitive areas, "even if such standards were not achievable through the use of existing technology." Graf, Application of Takings Law to the Regulation of Unpatented Mining Claims, 24 Ecology L.Q. 57, 108 (1997); see also Mansfield, On the Cusp of Property Rights: Lessons from Public Land Law, 18 Ecology L.Q. 43, 83 (1991). Further support for that interpretation is found in the fact that, in the 105th Congress, a mining industry-supported bill introduced in the Senate would have, among other things, changed the "or" to "and." S. 2237, 105th Cong. (1998); see 144 Cong. Rec. S10335-02, S10340 (September 15, 1998). See also Utah v. Andrus, 486 F.

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irreparable damage to important historic, cultural, or scenic values . . ."); 43 U.S.C. §1781(a) (California desert, considered further below).

[7]In 1966, Congress recognized that "the historic and cultural foundations of the Nation should be preserved . . . ." and through the NHPA, the Secretary of the Interior was "authorized to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and *culture."* Pub. L. No. 89-665, 80 Stat. 915 (emphasis added). In 1992, Congress amended the NHPA and clarified that "[p]roperties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register." 16 U.S.C. §470a(d)(6)(A).

Originally the NHPA focused attention only on those properties officially listed on the National Register of Historic Places. In 1976, however, the statute was amended to include buildings and sites eligible for inclusion on the National Register. Pub. L. No. 94-422, 90 Stat. 1320. The NHPA was further amended in 1992 to require partnerships with States, Indian tribes, Native Hawaiians, and local governments. Pub. L. No. 102-575, 106 Stat. 4753.

Supp. 995, 1005 n.13 (D. Utah 1979) (quoting brief of the American Mining Congress).

This key sentence in § 302(b) gives the Secretary authority, by regulation "or otherwise," to spell out the requirements necessary to prevent such types of degradation. Finally, the sentence gives the Secretary a mandatory duty to take any action necessary to prevent such degradation.

The generally applicable portion of the definition of "unnecessary or undue degradation" in BLM's current regulations essentially codifies a "prudent operator" standard. That standard effectively focuses only on the directive to prevent "unnecessary" degradation, as opposed to "undue" degradation. The entire definition provides as follows:

> Unnecessary or undue degradation means surface disturbances greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue degradation. Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation. Where specific statutory authority requires the attainment of a stated level of protection or reclamation, such as in the California Desert Conservation Area, Wild and Scenic Rivers, areas designated as part of the National Wilderness System administered by the Bureau of Land Management and other such areas, that level of protection shall be met.

43 C.F.R. §3809.0-5(k). The "objectives" of subpart 3809 are stated as follows in §3809.0-2:

> (a) Provide for mineral entry, exploration, location, operations, and purchase pursuant to the mining laws in a manner that will not unduly hinder such activities but will assure that these activities are conducted in a manner that will prevent unnecessary or undue degradation and provide protection of nonmineral resources of the federal lands;
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> (b) Provide for reclamation of disturbed areas. . . .

Putting the objectives together with the "unnecessary or undue degradation" standard, the Department's current regulations seek to "provide for mineral [activities] in a manner that will not unduly hinder" them, while at the same time to prevent disturbance "greater than what would normally result" from a prudent operation. The Interior Board of Land Appeals (IBLA) has read the regulations this way. See Bruce W. Crawford, 86 IBLA 350, 397 (1985) (the regulatory definition "clearly presumes the validity of the activity but asserts that [unnecessary or undue

degradation] results in greater impacts than would be necessary if it were prudently accomplished"); see also United States v. Peterson, 125 IBLA 72 (1993); Kendall's Concerned Area Residents, 129 IBLA 130, 140 (1994).

While BLM could have adopted (and indeed might be obliged to adopt) more stringent rules in order to ensure prevention of "undue degradation," it has so far chosen to circumscribe only harm outside the range of degradation caused by the customary and proficient operator utilizing reasonable mitigation measures.

The preamble to BLM's regulations states:

> There may exist several alternative ways to achieve a particular result which are reasonable and prudent from a business standpoint. However, an environmental assessment or environmental impact statement may show the authorized officer that the first alternative would have significant detrimental impacts not associated with the second alternative. Since both alternatives are reasonable and practical, it would either be necessary to adopt the second, or the authorized officer would attach conditions to his approval of the plan of operations on implementation of the first alternative so that the detrimental impacts would not occur. Similar reasoning applies with respect to determining whether a proposal will cause unnecessary or undue degradation.

45 Fed. Reg. 78905 (November 26, 1980).

Therefore, while BLM must ensure that the proposed operation is in conformance with the prudent operator standard, including consideration of "other resources" which may be particular to a site, it must also ensure that "reasonable and practical" mitigation is chosen that will best protect such resources. See also 45 Fed. Reg. 78906 (speaking of an obligation to prevent degradation of visual resources "only to the extent practicable"). Under this portion of the regulations, then, while BLM may mitigate harm to "other resources," it may not simply prohibit mining altogether in order to protect them.

The "unnecessary or undue degradation" standard does not by itself give BLM authority to prohibit mining altogether on all public lands, because Congress clearly contemplated that some mining could take place on some public lands. See, e.g., 43 U.S.C. § 1701(12) (policy statement that the public lands "be managed in a manner which recognizes the Nation's need for domestic sources of minerals . . . including implementation of the Mining and Minerals Policy Act of 1970 . . . as it pertains to the public lands"[8]); 43 U.S.C. § 1702(c) (the multiple uses for which the

[8]The Mining and Mineral Policy Act, 84 Stat. 1876, 30 U.S.C. §23a, expresses United States policy as encouraging the development of domestic minerals in an efficient, wise, and environmentally sound way.

public lands should be managed include "minerals"). Therefore, "undue degradation" under section 302(b) must encompass something greater than a modicum of harmful impact from a use of public lands that Congress intended to allow. See Sierra Club v. Clark, 774 F.2d 1406, 1410 (9th Cir. 1985) (rejecting an argument that an off-road vehicle race should not be allowed on federal lands because it would cause irreversible and therefore "undue" degradation, on the ground that accepting the argument "would result in a prohibition of ORV use because it is doubtful that any area could withstand such use without degradation . . . [yet] Congress has determined that ORV use is to be provided" on public lands, citing 43 U.S.C. §1781(a)(4)[9]). The question is not whether the proposed gold mine causes any degradation or harmful impacts, but rather, how much and of what character in this specific location.

Understanding the extent of BLM's authority with regard to the Glamis proposal requires that we also consider BLM's authority with respect particularly to the CDCA.

V. California Desert Conservation Area

The proposed Glamis mine is located on lands within the CDCA. As noted earlier, Congress explicitly amended the Mining Law in FLPMA to protect, among other things, enumerated values of importance in the CDCA. Also as noted earlier, Congress found that "the California desert contains historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources that are uniquely located adjacent to an area of large population. . . ." 43 U.S.C. §1781(a)(l). The statute gives BLM an additional directive to "protect the scenic, scientific, and environmental values of the public lands of the California Desert Conservation Area against undue impairment, and to assure against pollution of the streams and waters within the California Desert Conservation Area." 43 U.S.C. §1781(f).

The three values named in subsection (f) -- scenic, scientific, and environmental -- are fairly read to include "archeological, " "cultural" or "educational" resources of the type threatened by the Glamis proposal. These resources are of substantial interest to science, and may in many cases have scenic and environmental value as well. The fact that subsection (f) does not separately list these resources, while they are named in subsection (a)(l), cannot fairly be interpreted to limit BLM's authority under subsection (f) to prevent their undue impairment, when such resources are encompassed by the values enumerated in subsection (f). Indeed, it would defy common sense to construe "scientific" values as excluding "cultural," "historical" and "archaeological" resources. Any implication to the contrary in the IBLA's dicta in California Portland Cement

[9]In a section of FLPMA dealing with the California Desert, Congress found "the use of all California desert resources can and should be provided for in a multiple use and sustained yield management plan to conserve these resources for future generations, and to provide present and future use and enjoyment, particularly outdoor recreation uses, including the use, where appropriate, of off-road recreational vehicles." 43 U.S.C. §1781(a)(4) (emphasis added).

Corp., 83 IBLA 11 (1984) is expressly disapproved.[10]

The issues raised by the Glamis proposal are (1) the extent to which the "undue impairment" standard gives BLM authority to protect the CDCA and the cultural and historic resources involved; and (2) whether BLM's authority is affected by the classification of the lands on which the proposed Glamis mine is found as Class L (Limited Use) in BLM's CDCA Management Plan.

A. Undue Impairment Standard

BLM's 1980 subpart 3809 regulations do not elucidate the undue impairment standard applicable in the CDCA, nor do they define the values contained in 43 U.S.C. §1781. Rather, they reiterate the statutory requirement:

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

43 C.F.R. §3809.0-5(k).

The preamble to the 1980 rulemaking indicates that "[s]everal comments were received that suggest the promulgation of a separate rulemaking for the California Desert Conservation Area." 45 Fed. Reg. 78902, 78909 (Nov. 26, 1980). BLM rejected that suggestion on the ground that the regulation

> requires the filing of a plan of operations for any activity in the California Desert Conservation Area beyond that covered by casual use. The plan would be evaluated to ensure protection against "undue impairment" and against pollution of the streams and waters within the Area.

Id. This leaves implementation of the section 1781 standard to the stage of reviewing the plan of operations on a site-specific basis, which is where the Glamis proposal is now.

Subsection 601(f) says that mining claims in the CDCA "shall be subject to reasonable

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[10]In California Portland Cement, the IBLA suggested, without elaboration or discussion, that BLM had properly narrowed a stipulation in a mining patent in the California desert to assert authority only to protect "the scenic, scientific, and environmental values of the public lands" rather than explicitly referencing cultural and archeological resources, among others. The Board did not suggest that such resources lacked scientific, scenic or environmental interest.

regulations as the Secretary may prescribe to effectuate the purposes of this section," and that "[s]uch regulations shall provide for such measures as may be reasonable to protect the scenic, scientific, and environmental values of the public lands of the [CDCA] against undue impairment . . . " It might be argued that the Department's decision not to promulgate separate, detailed regulations to implement the "undue impairment" standard, but rather to adopt regulations that implement the directive on a case-by-case basis through the mining plan of operations approval process, is inconsistent with FLPMA's section 601(f). BLM's regulations require the filing of a plan of operations for any activity in the CDCA to be evaluated to ensure protection against "undue impairment." We believe the approach taken in BLM's regulations providing site-specific analysis and protection is an adequate implementation of the statute.[11]

The regulations allow BLM to prevent activities that cause undue impairment to the CDCA separate and apart from BLM's authority to prevent unnecessary or undue degradation. The IBLA has agreed that BLM's obligation to protect the three enumerated CDCA values from "undue impairment" supplements the unnecessary or undue degradation standard for CDCA lands. In Eric L. Price, James C. Thomas, 116 IBLA 210 (1990), the Board held:

> Under 43 C.F.R. §3809.0-5(k), a plan of operations must take "into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations" (emphasis added). Furthermore, a plan of operations affecting lands in the CDCA must take into consideration the specific objectives of section 601(f) of FLPMA, i.e., protecting the scenic, scientific, and environmental values of the affected lands against undue impairment, and to assure against pollution of affected streams and waters. As promulgated by BLM, the general standard contained in the definition of "unnecessary or undue degradation" is to be applied to CDCA lands in accordance with the imperatives of section 601(f) of FLPMA.

Id. at 218-l9.[12] It follows that BLM's decision with respect to the Glamis proposal is governed by both the "undue impairment" standard of subsection 601 (f)[13] and the "unnecessary or undue

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[11]This site-specific approach to providing protection has recently been endorsed by the National Research Council in a report entitled Hardrock Mining on Federal Lands (National Academy Press, 1999) (see discussion on pp. 120-121 regarding the protection of other resources).

[12]In Price, the IBLA upheld a BLM decision to deny a proposed mining plan of operations, primarily because the proposal caused "undue impairment" in connection with its visual impacts to the CDCA.

[13]The CDCA requirement that the Secretary "assure against pollution of the streams and waters with the California Desert Conservation Area," 43 U.S.C. §1781(f), also must be given

degradation" standard of section 302(b), as implemented by the subpart 3809 regulations.

Utah v. Andrus, 486 F. Supp. 995, 1004 n.14 (D. Utah 1979) is generally consistent with this approach, although it is not directly on point. The court there determined that the word "impairment" as used in FLPMA's wilderness review section (section 603(c), 43 U.S.C. §1782(c)), means something different from the "unnecessary or undue degradation" standard in 43 U.S.C. §1732(b):

> If the standard of undue degradation were not separate and distinct from the impairment standard contained in section 603(c), there would have been no need to include both the last sentence and reference to section 603(c) in section 302(b). By making distinct reference to both standards in 302(b), Congress indicated its intent to formulate two different approaches to management of the public lands.

Section 603(c) requires BLM to prevent "impairment of the suitability" of certain identified areas "for preservation as wilderness," subject to certain exceptions not pertinent here. It does not use the qualifiers "undue" or "unnecessary," except with regard to the exception for the preservation of existing mining and grazing uses. Thus the court was not confronted with the issue of whether "impairment" under section 601 equals "degradation." We do not need to decide that issue here either. We do note, however, that in carrying out its duty to prevent "undue impairment," BLM is not confined to restrictions that may be imposed on a "prudent operator in usual, customary and proficient operations of similar character." 43 C.F.R. §3809.0-5(k). Instead, BLM's mandate to protect the "scenic, scientific, and environmental values" of the land from undue impairment is distinct from and stronger than the prudent operator standard applied by the subpart 3809 regulations on non-CDCA lands.

Section 601(f) twice employs the adjective "reasonable" in the context of regulating hardrock mining operations in the CDCA. Specifically, mining claims are made "subject to reasonable regulations" prescribed by the Secretary, which shall "provide for such measures as may be reasonable to protect" environmental and other values in the CDCA. There is no indication that Congress meant anything by "reasonable" other than that the Secretary must not act arbitrarily in effectuating such regulations, and that they ought to be designed to accomplish their intended task of protecting the other values on the CDCA. BLM's regulations in subpart 3809 that address the CDCA are reasonable and reasonably related to the purposes of FLPMA. Therefore, BLM should examine each proposed plan of operation on a case by case basis and provide for such measures as may be reasonable to protect environmental and other values in the CDCA from undue impairment.

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independent meaning. The extent to which this standard may compel additional regulation of the proposed Glamis mine is beyond the scope of this memorandum. We have not been presented with any facts or questions regarding any "streams and waters" that might be affected by the proposed Glamis mine.

B . CDCA Management Plan

In 1980, the BLM adopted a Management Plan for the CDCA that, with a few minor amendments, is still in force today.[14] This Plan was prepared in response to the mandate of section 601(d), 43 U.S.C. §1781(d):

> The Secretary, in accordance with section 1712 of this title, shall prepare and implement a comprehensive, long-range plan for the management, use, development and protection of the public lands within the [CDCA]. Such plan shall take into account the principles of multiple use and sustained yield in providing for resource use and development, including, but not limited to, maintenance of environmental quality, rights-of-way, and mineral development.

The 1980 Plan placed most of the CDCA lands in four multiple-use categories.[15] The Plan describes itself as providing a "management framework" for, among other things, responding to "future specific land use requests." CDCA Plan, Chapter 3, at p. 21.

The lands where the projected Glamis mine would be located are designated by the CDCA Plan as Multiple Use Class L (Limited Use) land.[16] According to the Plan, Class L "protects sensitive, natural, scenic, ecological, and cultural resource values." CDCA Plan, Chapter 2, at p. 13.[17] This is the second most restrictive of the four categories. About half of the CDCA acreage

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[14]Generally, IBLA has rejected challenges to BLM's implementation of the CDCA Plan. Max Wilson, 131 IBLA 306, 310 (1994); David R. Hinkson, 131 IBLA 251, 254-55 (1994).

[15]Approximately 300,000 acres within the 12.1 million acre CDCA are unclassified. CDCA Plan, Chapter 2, at p. 13.

[16]The Plan designates other lands as: Class C (Controlled Use), which is the most restrictive category, consisting of those areas preliminarily recommended for wilderness designation; Class M (Moderate Use), which reflects "a controlled balance between higher intensity use and protection of public lands"; and Class I (Intensive Use), that provides for concentrated land and resource use to meet human needs. See CDCA Plan Chapter 2, at 13.

[17]There is no indication that the BLM, in crafting the CDCA Plan, understood or took account of the significance of the Indian interests in the lands subject to the Glamis proposal in designating the area as Class L. The Plan noted, at page 24, that only about 5% of the CDCA had, at the time the Plan was proposed, been inventoried for cultural resources. Last year BLM published a Notice of Proposed Withdrawal for the lands on which the proposed Glamis mine would be located. 63 Fed. Reg. 58752 (November 2, 1998). This has the effect of segregating the lands for a period of two years and preventing the location of new mining claims for that period, while not affecting valid existing mining claims.

is designated Class L. Id. According to the Plan, Class L lands are managed to "provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished." Id.

The CDCA Plan establishes "multiple-use class guidelines" which "describe land-use and resource-management guidelines for 19 land uses and resources" within each class. Id.[18] The four classes of land are managed by taking into account these various resources. The Plan acknowledges that:

> Within each multiple-use class designation residual conflicts will occur naturally, although they are most limited in Class C -the "Controlled Use" class - with its dedication to wilderness characteristics and values. The conflicts increase, however, in a Class L - "Limited Use" - designation, where judgment is called for in allowing consumptive uses *only up to the point that sensitive natural and cultural values might be degraded.* Class M - the "Moderate Use class - calls for subsequent tradeoffs between a number of acceptable uses. Even Class I - "Intensive Use" - designed to permit intensive and single uses, is still open to negotiation between those uses.

CDCA Plan, Chapter 3, at p. 21 (emphasis added). As this shows, the CDCA Plan contemplates that, in Class L lands, protection of resources can sometimes outweigh the proposed use of the land. [19]

Another part of the CDCA Plan is the "plan element," which is described as a "more specific application of the multiple use guidelines for a specific resource or activity about which the public has expressed significant concern." Id. at p. 21. The Plan notes that "[m]any uses in a given area will be mutually exclusive and require selective decisions to be made for that area," and that the task of the plan element is to "identify existing or possible conflicts and to assist the manager in resolution." Id.

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[18]A miner on public lands in the CDCA, regardless of the classification of the lands or the size of the proposed operation, must obtain approval of a plan of operations prior to commencement of mining. That is, the streamlined, so-called "notice" provisions of BLM's regulations that allow proposed smaller-scale mining activities on most other public lands to escape BLM's advance environmental approval do not apply in the CDCA. See 43 C.F.R. §3809.1-4(b)(l).

[19]The Plan calls for protection of cultural and Native American resources and values on all classes of CDCA lands. The Cultural and Paleontological Resources guidelines broadly state that "[a]rchaeological and paleontological values will be preserved and protected." Id. at p. 15.

The cultural resource element of the CDCA Plan begins:

> Prehistoric and historic remains within the California Desert are being depleted at a rate which approaches 1 percent per year. . . . These remains represent a national treasure with importance to the public, scientists, Native Americans, and others. Preservation and protection or proper data recovery is essential.

Id. at p. 22. The goals of the Plan's cultural resource element, as amended in 1985, are to "[p]rotect and preserve a representative sample of the full array of the CDCA's cultural resources" and to "[e]nsure that cultural resources are given full consideration in . . . management decisions." CDCA Plan, 1985 Amendment, at p. 14.[20] The Native American element of the Plan, also as amended in 1985, includes as a goal to "[g]ive full consideration to Native American values in all land-use and management decisions, consistent with statute, regulation and policy," and to "[m]anage and protect Native American values wherever prudent and feasible." Id.

Therefore, with respect to the proposed Glamis site, the CDCA Plan contemplates that multiple-use management decisions will be made with the goal of preserving archaeological and paleontological values. In working within the plan to meet that goal, BLM must also give full consideration to the Quechan's religious, cultural and educational values in the area, and must consider how important and unique the resources are that might be destroyed by the Glamis proposal.

The CDCA Plan contains references to the development of mitigation measures where resources cannot be protected. The Plan's guidelines for mineral exploration and development within Class L lands provide, in pertinent part: "Operations on mining claims are subject to the 43 C.F.R. § 3809 Regulations and applicable State and local law. . . . BLM will review plans of operations for potential impacts on sensitive resources identified on lands in this class. *Mitigation, subject to technical and economic feasibility, will be required."* CDCA Plan Chapter 2, at 18 ("Mineral Exploration and Development") (emphasis added). Additionally, the CDCA Plan states "[w]hen protection and/or preservation of cultural and paleontological resources cannot be achieved, mitigation through proper recovery or other means will be undertaken as developed through mitigation plans. . . Mitigation will be employed primarily in Classes M and I where resource protection measures cannot override the multiple-use class guidelines." CDCA Plan, Chapter 3, at p. 24.

Glamis has argued that the emphasized language on Mineral Exploration and Development

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[20]The 1985 amendment made minor word changes to the original 1980 Plan in response to a recommendation by a BLM team to rewrite the goals to make them less vague without changing the intent or purpose of the resource element. Record of Decision on 1985 Amendment, at p. 13.

subjects BLM's authority to prevent "undue impairment" of the CDCA's resources to an "economic feasibility" test. See Letter from Glamis Gold, Inc. to Secretary Babbitt (Nov. 10, 1999) at 4. The reference to feasibility in the Plan, however, occurs only in the context of mitigation measures where plans of operation are approved. It does not preclude BLM from deciding to deny approval of a plan of operations. In addition, section 601(f) of FLPMA is broader and has no such limitation. It refers to "measures" to protect the values of the CDCA against undue impairment, which can include things other than mitigation.

Glamis argues further that the mitigation language means that under section 601, as implemented by the CDCA Plan, conflicts between proposed mineral development activity and cultural and historic resources were not intended to be a basis to prevent mineral development from proceeding. Id. This argument ignores the further language suggesting that mitigation is only necessary in Classes M and I, because those are the areas where protection will not override other uses, thus implying that Class L areas will allow protection over other uses. Therefore, in Class L areas protection may at times be paramount and a proposed project can be rejected because it unduly impairs resources.

This conclusion is further supported by the language in the Plan regarding areas of critical environmental concern (ACEC). Glamis notes that such areas are not areas in which no development can occur. Id. (citing CDCA Plan, Chapter 3, at p. 124). However, that argument again fails to acknowledge the remainder of the paragraph, which states:

> Quite often development, when wisely planned and properly managed, will take place in these areas *if the basic intent ofprotection of historic, cultural, scenic, or natural values is assured.*

CDCA Plan, Chapter 3, at p. 124 (emphasis added). The emphasized language shows further that the CDCA Plan preserves BLM's authority to protect such values. There is no indication in the California Desert Plan itself, or in its formulation, that the Plan's framers intended to modify or relax the standards of existing law or regulations. General statements in the Plan should not be interpreted to place a fundamental limit on the authority of the Department to take all steps necessary to prevent undue impairment of CDCA resources.

"Undue impairment," as explained above, must mean something more than the prudent operator standard currently in the BLM definition of "unnecessary or undue degradation," but it cannot mean so much as vesting the Secretary with authority to prohibit all hardrock mining in the CDCA. Plainly the "undue impairment" standard would permit BLM to impose reasonable mitigation measures on a proposed plan of operations that threatens "undue" harm to cultural, historic or other important resources in the CDCA. Moreover, the reasonableness of those mitigation measures ought not to be judged by whether they make the particular operation uneconomic at current market prices for the mineral commodity proposed to be mined. Beyond that, the "undue impairment" standard might also permit denial of a plan of operations if the

impairment of other resources is particularly "undue," and no reasonable measures are available to mitigate that harm. As stated above, the CDCA Plan clearly appears to contemplate such a result.

VI. Conclusion

Whether the BLM may deny the Glamis plan approval under section 601(f) depends upon the particular facts, including the significance of the resources to be protected. The Advisory Council on Historic Preservation has found that the mitigation measures proposed by the company do not prevent destruction of the area's important cultural, historic and scientific values.[21] Thus, the ultimate question is what "undue impairment" may mean in the context of a mining proposal that would have this effect.

BLM is now in the process of compliance with the National Environmental Policy Act (NEPA) on Glamis's proposed plan of operations; a draft environmental impact statement was issued in November of 1997. That process is well-suited to ventilate the issues necessary to reach a decision on whether to approve the plan of operations. See Kendall's Concerned Area Residents, 129 IBLA 130 (1994) (reversing BLM's approval of a mine plan on the ground, inter alia, that the NEPA documents did not contain a discussion adequate to support a finding of no "unnecessary or undue degradation"). The Advisory Council has weighed in with its view that mitigation measures are unavailable to avoid great harm to the cultural resources of the area.[22]

The ultimate responsibility for making the decision on "undue impairment" is the BLM's. It must consider the Executive Order, the FLPMA standard, and the advice of the Advisory Council in deciding how to protect the CDCA values and resources from "undue" impairment. This is a difficult task, made more difficult by the impossibility of assigning monetary value to something as abstract as a cultural or historic resource. In the end, what is determined to be "undue" is

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[21]The Advisory Council noted that Glamis had engaged in "laudable" efforts to minimize the impacts of its operation, including some redesign and reconfiguration. The company had indicated a willingness to go further, and to consider backfilling two of the three large open pits, establishing a cultural land bank, and taking other measures. The Advisory Council concluded that these efforts, while praiseworthy, "do little to reduce the devastating impacts on the historic properties and their environment and fall short of compensating for the loss of the traditional religious and cultural values of the ATCC."

[22]As Glamis points out in its letter, the Section 106 process is not intended to impose substantive obligations on BLM. We agree. BLM can, however, consider the recommendations of the Advisory Council in making its own decisions regarding whether to approve or disapprove the proposed mining operation, and whether or not it could cause "undue impairment" of CDCA resources.

founded on the nature of the particular resources at stake and the individual project proposal. If the BLM agrees with the Advisory Council, it has, in our view, the authority to deny approval of the plan of operations.

This Opinion was prepared with the substantial assistance of Elizabeth Rodke of the Division of General Law, Lisa Hemmer (formerly with the Division of Mineral Resources), Karen Hawbecker, and Joel Yudson of the Division of Mineral Resources, Mary Anne Kenworthy of the Division of Indian Affairs, John Payne, Office of the Regional Solicitor, Sacramento, California, Kay Henry, Associate Solicitor for Mineral Resources, Peter Schaumberg, Deputy Associate Solicitor for Mineral Resources and Liz Birnbaum, Special Assistant to the Solicitor.

I approve:

Secretary of the Interior

1/3/2000

DATE