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Indian Tribe Steps into Clash Over Mine

By Mike McKee

The Quechan Indians weren't content letting the State Department go it alone in defending an environmentally sensitive and culturally significant area of deserts and canyons in a remote southeastern corner of California.

After all, the 3,000-member tribe has occupied a 45,000-acre reservation in that part of the state and neighboring Arizona for more than 120 years, and claims a much larger area - up to 880 square miles - as its ancestral home of more than 7,000 years.

Tribal leaders insisted on stepping into an international arbitration fight between the U.S. and a Canadian company over California's right to block the development of an open-pit gold mine near the Indian Pass Wilderness in Imperial County.

Still, it was somewhat of a surprise last month when the three arbiters hearing the case granted the Quechan Nation the right to file what was essentially an amicus curiae brief siding with the State Department.

Even the California attorney general's office hasn't been allowed to participate because British Columbia's Glamis Gold Ltd. filed the case under terms of the North American Free Trade Agreement that require the dispute to be resolved by an international arbitration panel. The suit names the federal government as a defendant, even though California's environmental laws are at issue.

The Quechan's 15-page brief fills the void left by the AG's absence by providing a local perspective on the sacred significance of the tribe's ancestral lands - home to prayer circles, ceremonial sites, burial shrines, ancient petroglyphs and the 130-mile-long "Trail of Dreams" that connects Spirit Mountain in the north with Pilot Knob near the Mexican border.

"Issues of sacred places are so important to the Quechan that only they can speak to them," Courtney Coyle, a La Jolla lawyer who represents the tribe, said in a telephone interview. "It's about their ability to protect and preserve certain sacred places and environmentally preserved sites."

Todd Weiler, a Calgary, Alberta-based expert on international trade and investment law who co-authored the Quechan's brief, said the document is the first amicus support provided by any Native American tribe in an international economic law dispute - be it before NAFTA or the World Trade Organization.

“The Quechan Nation’s participation in this NAFTA proceeding,” he said by e-mail, “is very significant - both for my clients and for the system itself, which needs to permit voices such as theirs to be heard if it is to retain legitimacy as an international vehicle for the settlement of economic disputes.”

In its suit, Glamis is seeking \$50 million in damages from the federal government, claiming that California essentially took its property in 2003 when state legislators enacted tough mining reclamation laws that made it financially impossible for the company to proceed with its mine. The laws required surface mines to be backfilled as part of reclamation efforts and included provisions to protect Native American sacred sites from environmental degradation.

Rather than sue California in state courts, Glamis filed under NAFTA’s Chapter 11 provision, forcing the State Department to defend California before a three-person arbitration panel. Although most panels comprise citizens of different countries, the Glamis arbiters are all Americans - Michael Young, president of the University of Utah; David Caron, a professor at Boalt Hall School of Law; and Donald Morgan, a retired Cleary Gottlieb Steen & Hamilton partner.

The panels are controversial in some circles because they meet in secret, are not bound by precedent, issue rulings that cannot be appealed and have the power to overrule American courts.

California AG Bill Lockyer celebrated in early August when one of the panels - in a case defended by the State Department - ruled against a Canadian corporation that had challenged a state environmental law that banned MTBE, a gasoline additive and suspected carcinogen. The company had sought \$1 billion in damages.

In their brief in the Glamis case, the Quechan Indians contend that the state had every right to enact stringent mining laws, especially to safeguard against mines such as Glamis’.

“The mine’s deepest pit, at about 850 feet deep, would never be backfilled,” Coyle wrote in the tribe’s brief. “New mountains created by the waste rock, up to 30 stories high, would forever alter the landscape and visual quality of the valley, and compete with natural landforms. The operation would have also consumed up to 389 million gallons of water per year from the pristine desert groundwater aquifer.”

Mike Jackson, president of the Quechan Nation, said in a telephone interview that he looked at the tribe’s participation in the case as a way of saving its legacy.

“We’re a proactive tribe,” he said, “and we’re not going to let someone come in just because they are greedy for money and destroy our history. At some point, they are going learn what ‘no’ means.”

Neither the State Department nor the California AG's office offered comment about the tribe's participation.

But attorneys for Glamis attacked the Quechan's brief, challenging "a number of statements of fact and law."

In an opposition brief, partner Alan Gourley, of Washington, D.C.'s Crowell & Moring, criticized the tribe's claim to a "vast and ill-defined land area" that encompasses "well over a million acres" in California, Arizona and Mexico. He also cited a report by the Bureau of Land Management that found no evidence that the Indian Pass area is used by contemporary Native Americans.

Gourley also noted that Glamis isn't seeking approval of its mining plans or elimination of the California laws, but rather "just compensation for its significant financial losses stemming from the expropriation of its valuable gold-mining property."

In its court papers, however, the Quechan said a ruling favoring Glamis could have broader consequences.

"A decision requiring the United States to compensate [Glamis]," the brief states, "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."

Coyle said that the tribe's brief was "like putting down a marker" that indigenous people need to have a say in land-use decisions, especially when they affect sacred sites.

"They're equivalent to your church, your temple, your mosque or your holy land," she said. "They're also equivalent to your history books or to the stories and songs and mythologies that all cultures have.

"That's not just their written history," Coyle said, "but a manifestation of their sacred place."