

DECISION ON REQUESTS FOR PRODUCTION OF DOCUMENTS AND CHALLENGES TO ASSERTIONS OF PRIVILEGE

April 21, 2006

Glamis Gold, Ltd., Claimant

v.

The United States of America, Respondent

An Arbitration Under Chapter 11 of the North American Free Trade Agreement (NAFTA), in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, and administered by the International Centre for Settlement of Investment Disputes (ICSID)

Michael K. Young, President

David D. Caron, Arbitrator

Kenneth D. Hubbard, Arbitrator

I. Procedural Background to this Decision

1. On May 31, 2005, the Tribunal issued Procedural Order No. 2 denying the separation of jurisdictional issues from the merits of the case. The Tribunal did so, in part, because it concluded that bifurcation was unlikely to increase the efficiency of the proceedings and would require the Tribunal to be immediately confronted with various issues going to the merits of the case.
2. On October 3, 2005, a hearing was conducted before the Tribunal in Washington, D.C., at which the Parties presented their views on their requests for production of documents and the withholding of documents by each party on the grounds of privilege or materiality. At this time, each Party explained its objections to the withholding of categories of documents claimed to be privileged by the other party, and provided legal and factual support for its own documents withheld from production.
3. On November 17, 2005, the Tribunal issued its Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege ("November 17 Decision"). The November 17 Decision explained the privilege laws and theories that the Tribunal determined were applicable to this arbitration. In addition, it outlined procedures by which the Parties were to explain their assertions of privilege and challenge those of the other party. These procedures included the eventual possibility of *in camera* review of the documents should the Parties be

unable to resolve outstanding document production disputes.¹ Included with these procedures was a timetable specifying the dates upon which each of the procedures was to be completed. This timetable was intentionally drawn up with short time periods so as to preserve the possibility of the Tribunal holding a hearing in this matter before the end of 2006. Although both Parties worked in good faith to meet the Tribunal's deadlines, they also had difficulty in meeting this aggressive timetable. In an effort to satisfy the requirements and deadlines outlined by the Tribunal in its November 17, 2005 Decision, the parties provided each other and the Tribunal with numerous amended privilege logs, clarifications of objections to claims of privilege, and further explanation in support of assertions of privilege, during the period of December 1, 2005 to January 26, 2006.

4. On January 31, 2006, the Tribunal issued Procedural Order No. 8, outlining the steps it considered necessary to complete this process of asserting and challenging claims of privilege. First, it requested that Respondent provide any renewed challenges to Claimant's assertions of privilege by February 8, 2006. From the Claimant, the Tribunal requested a document-by-document explanation of the challenges that the Claimant had argued generally in its letter of January 16, 2006. This explanation was to be submitted by February 15, 2006. The Tribunal then requested, from both Parties, that they provide any further argument on the production issues that remained outstanding no later than March 1, 2006. The Tribunal explained that, if its review of the privilege logs and corresponding challenges was insufficient to enable the Tribunal to adequately determine the validity of all assertions of privilege, it would return to the Parties to discuss the process to be taken to complete this determination. Finally, the Tribunal determined that the schedule had to be extended to accommodate these additional production procedures and it provided an amended arbitral schedule.
5. Pursuant to Procedural Order No. 8, Respondent renewed its challenges with respect to six documents withheld by Claimant on grounds of the attorney-client and work product privileges on February 8, 2006.

¹ Given the numerous complications raised with an *in camera* review, this possible final step in the procedures was suspended temporarily by the Tribunal in its December 16, 2006 letter to the Parties, until such time as the Tribunal could meet as a whole (with replacement arbitrator, Kenneth D. Hubbard) to discuss this issue in greater depth.

6. Also in accordance with Procedural Order No. 8, Claimant submitted its renewed challenges to Respondent's claims of privilege with respect to 169 documents on February 15, 2006.
7. On March 1, 2006, both Parties provided additional argument on production issues, as requested by the Tribunal. Respondent submitted its response to Claimant's February 15, 2006 challenges to Respondent's documents withheld on privilege grounds. In addition, Respondent requested the Tribunal to compel production of six disputed documents withheld by Claimant as Claimant had not yet responded to Respondent's February 8, 2006 renewal of its challenges to these documents. Claimant submitted further argument in support of its position that the deliberative process privilege does not protect the documents withheld by Respondent. Claimant additionally responded to Respondent's challenges to the six documents withheld by Claimant that remain in dispute.

II. Decisions Regarding the Parties' Challenges to Assertions of Privileges

8. Prior to proceeding with its analysis and decisions with respect to the specific documents withheld and the challenges to their withholding, the Tribunal wishes to note three aspects of this Decision:
 - i. First, the organization of the following sections, sometimes by document and sometimes by argument, was introduced by Claimant in its February 15, 2006 submission and followed by Respondent in its March 1, 2006 response. The Tribunal uses this organization as well for the ease of the parties.
 - ii. Second, the Tribunal notes that it found some discrepancies in the privilege logs provided in that some of the descriptions do not match between the logs provided by Respondent and those summarized by Claimant. As Respondent usually responded to Claimant's arguments without citing specific document log numbers, the Tribunal has utilized the list of documents that Claimant asserts correspond to each argument, but requests that the parties please notify the Tribunal as soon as possible if they note any remaining discrepancies. In addition, in the case of Section D where the most discrepancies lie, the Tribunal requests an updated chart from Claimant listing the documents still under dispute and the corresponding document numbers from Respondent's logs.
 - iii. Third, where the analysis of an asserted privilege requires the Tribunal to balance Claimant's need for the documents against Respondent's interest in maintenance of the privilege, the Tribunal in several instances has deferred that decision until a later date. The Tribunal wishes to be clear as to the limits

of these deferrals. In the Tribunal's view, the phase of this proceeding concerned with party driven requests for production of documents is closed. In deferring any particular decision on such requests, the Tribunal defers its decision only as to the particular document or documents requested. The decision of the Tribunal to defer some decisions until a later time is driven by two factors. The starting point for the Tribunal is that it should not override privileges unnecessarily. Simultaneously, the question of Claimant's need for a particular document cannot be assessed with accuracy at this early point in the arbitration. This is particularly the case given the fact that Claimant in many instances has other documents, or entirely different means of proof, available to it to establish a proposition. In deferring a decision, the Tribunal anticipates that such decision will not be made until, or following, the hearing on the merits of the claim. The Tribunal acknowledges that any later decision to order production would result in a limited extension of the proceedings.

Section A: Decisions with respect to Documents Withheld by the State of California

Group 1: Bill Analyses of Senate Bill 22

9. Claimant argues that, with respect to ten analyses of Senate Bill 22 (SB 22) at issue in this section,² the deliberative process privilege should not apply and if it does, it should be outweighed by Claimant's compelling need for the documents' release. Specifically, Claimant alleges that the nine documents claimed by Respondent as protected under California Government Code §6254(l), an absolute privilege, are not subject to this privilege as this code protects only against "open inspection" and not litigation requests. Therefore, Claimant argues that these documents are protected, if at all, only under the qualified "official information privilege." Claimant then asserts that both the official information and deliberative process privileges, should they apply, are overridden by Claimant's great need for the documents. Claimant alleges that the content of the documents makes clear that the documents reveal California's discriminatory intent in enacting legislation to expropriate Claimant's property by making its mining claims worthless. Additionally, Claimant points to the release of similar documents regarding Senate Bill 1828 that were produced as proof that California does not have a general rule against the public release of this type of document.³
10. Claimant additionally argues that the deliberative process privilege does not protect these documents as the very decision-making process is at issue in this

² California Log Nos. 161, 173, 203, 204, 205, 206, 207, 209, 210, and 211.

³ See Claimant's February 15, 2006 letter to the Tribunal, Tab A at pages 1-2.

- arbitration.⁴ Claimant asserts that “where the decision-making process itself is the subject of litigation, the deliberative process privilege may not be raised as a bar against disclosure of critical information.”⁵ In addition, Claimant argues that Respondent’s interest in protection of its deliberative process is further weakened by a general failure to provide a document-by-document sufficient description of the specific harm that would result from disclosure.⁶
11. Respondent replies that California Government Code §6254(l) absolutely protects the ten bill analyses in question. Respondent argues that these confidential inter- and intra-agency analyses are protected under this code because a request for documents from California, a non-party in this arbitration, is more akin to a public records request than a third party subpoena in litigation. In addition, Respondent asserts that the documents are also protected under the deliberative process privilege as they are both pre-decisional and deliberative. Respondent argues that Claimant’s need does not outweigh Respondent’s interest in protection as the information sought is otherwise available from public sources and Claimant’s need is based solely on speculation. Finally, Respondent contends that the deliberative process privilege requires a document-by-document weighing of interests for determinations of production and thus the release of some bill analyses does not urge the release of all others.⁷
 12. The Tribunal is hesitant to delve into and decide upon the intricacies of local state law in an international arbitration. The Parties, however, have urged the Tribunal to look to California law, and have presented their arguments with reference to that law. The Tribunal thus inquires into the law of California on the question of privilege, not because the Tribunal believes it necessarily to be the applicable law, but rather because the Parties direct the Tribunal to it.
 13. After analysis of California Government Code §6254(l) and relevant case law, the Tribunal finds that §6254(l) does not protect the particular documents in question. In a similar situation in which a California agency was not a party to the litigation, but was very involved in the facts of the dispute, a California Court of Appeals held that the information was critical to a party to the litigation and thus §6254(l) did not protect the agency’s records.⁸ The Tribunal finds that the rights of Claimant (in effect a litigant here) are affected by the documents requested and, in addition, the State of California has been similarly involved intimately in

⁴ See Claimant’s March 1, 2006 letter to the Tribunal.

⁵ Quoting *Burka v. New York City Transit Auth.*, 110 F.R.D. 660, 667 (S.D.N.Y. 1986).

⁶ See Claimant’s March 1, 2006 letter to the Tribunal at pages 2-5.

⁷ See Respondent’s March 1, 2006 letter to the Tribunal at pages 3-5.

⁸ See *Marylander v. Superior Court*, 81 Cal.App.4th 1119, 1125 (2000).

the events that culminated in this dispute. Therefore, the Tribunal finds that the absolute protection of California Government Code §6254(1) does not protect the documents at issues.

14. The Tribunal turns then to the other privileges asserted by Respondent over these documents, namely California's official information privilege and the deliberative process privilege. As the two are similar, the Tribunal thinks it appropriate to apply the principles of the deliberative process privilege to the analysis of both privileges. The Tribunal recognizes that "[t]he deliberative process privilege is a qualified one. A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure."⁹ In this situation, although the Tribunal recognizes the assertion of and interests in the deliberative process privilege, it finds the statement of Claimant's need, particularly given the apparent absence of other documents or other means of proof available to the Claimant, to be sufficiently great to override those interests. Therefore, the Tribunal requests Respondent to produce the ten documents at issue, at its earliest opportunity.

Group 2: Government Log No. 105

15. Claimant believes that Government Log No. 105 was logged in response to Claimant's request for documents acknowledging that the State Mining and Geology Board (SMGB) had been advised by counsel that the regulatory measure it was considering did not constitute a legal taking. Claimant argues that the attorney-client privilege asserted by Respondent was waived with respect to this document—and any other confidential communications on this subject matter between the Board and counsel—as a statement was allegedly made by the SMGB in the Executive Officer's Report of March 13, 2005 Hearing that it had been advised by counsel that the proposed regulatory action would not constitute a taking. Claimant contends that the public disclosure of the legal conclusion of counsel constitutes a waiver of the underlying legal analysis and advice.¹⁰
16. Respondent argues that the document in question is not actually responsive to Claimant's request for documents acknowledging the SMGB's advice from counsel on whether the measure was a taking or not and that there are in fact no documents responsive to this request. In addition, Respondent states that members of the SMGB never saw the disputed document nor did it form the basis for any statements regarding the takings issue. Finally, Respondent argues that a single extrajudicial statement concerning legal advice does not inject that advice

⁹ *Federal Trade Commission v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

¹⁰ See Claimant's February 15, 2006 letter to the Tribunal, Tab A at pages 3-4.

as an issue into the case and thus does not constitute waiver of the attorney-client privilege.¹¹

17. The Tribunal acknowledges Respondent's assertion that the documentary evidence that Claimant seeks does not in fact exist. Independent of the document's existence, the Tribunal notes that the attorney-client privilege is an absolute one. Moreover, as regards Claimant's argument that the privilege was waived, the Tribunal understands that subject matter waiver is intended to prevent a privilege-holder's selective disclosure of documents during litigation. However, a mere "extrajudicial disclosure of an attorney-client communication—one not subsequently used by the client in a judicial proceeding to his adversary's prejudice—does not waive the privilege as to the undisclosed portions of the communication."¹² Thus, the Tribunal does not find subject matter waiver in this situation and deems this document protected by the attorney-client privilege.

Group 3: Emails among California Government Attorneys

18. Claimant believes the three emails in question (California Log Nos. 18, 24 and 129) are continuations of an email string between Jeff Shellito, a Legislative Consultant for the California Senate Environmental Quality Committee, and Rick Thalhammer, Deputy Attorney General, in which Mr. Shellito writes that he thought he was working with the Resources Agency/Department of Conservation on an "informal and collegial basis." Claimant argues that such an informal process should not qualify as protected governmental deliberations. In addition, with respect to California Log No. 129, Claimant again raises the argument that the deliberative process privilege should not protect this document as the integrity of the deliberative process is at issue and Claimant has failed to provide a sufficient description of the specific harm that would result from disclosure.¹³ With respect to the assertion of the work product privilege, Claimant argues that the documents were not written in anticipation of litigation and, if the privilege does apply, it should be outweighed by Claimant's need to present "the true regulatory and legislative history of the laws and regulations that led to Respondent's expropriation of Claimant's property." Finally, Claimant asserts that the attorney-client privilege also fails to protect these emails because confidential facts were not communicated and the request for legal advice came

¹¹ See Respondent's March 1, 2006 letter to the Tribunal at page 6.

¹² *In re von Bulow*, 828 F.2d 94, 102 (2d Cir. 1987).

¹³ See para. 10 *supra*.

from a Senate staff member and there is no attorney-client relationship between the California Senate and the Department of Justice.¹⁴

19. Respondent clarifies the nature of the documents in question, stating that California Log Nos. 18 and 24 are emails between attorneys of the California Department of Justice and the Resources Agency and are not at all related to the email string cited by Claimant. Respondent asserts that California Log No. 129 is also unrelated to the cited email string and does not involve Senate staff members making a request for legal advice from a California executive agency. Further, Respondent states that its privilege log descriptions comply with the Tribunal standards for asserting both the attorney-client and work product privileges. In addition, it argues that Claimant's attempt to locate corroboration of allegations of discriminatory intent is insufficient to outweigh the work product privilege.¹⁵
20. The Tribunal notes Respondent's clarification of the content of the disputed emails and, at this point, is not prepared to compel their production. Should Claimant wish to make further arguments seeking the production of these emails based on these fact patterns, the Tribunal is willing to consider them.

Group 4: Facsimile Cover Memorandum dated December 2, 2002

21. Claimant challenges the assertions of the attorney-client and work product privileges to California Log No. 51.¹⁶ Claimant believes that SB 22 was not drafted until after Governor Davis vetoed SB 1828 on September 30, 2002, and therefore asks whether the document actually relates to a fax from Senator Burton's staff requesting advice on whether the two potential amendments to SB 482 "would hold up to blocking the Glamis Mine."¹⁷ As Claimant believes that the request for legal advice actually came from Senator Burton's staff, it argues that there is no proper attorney-client relationship and so assertions of the attorney-client privilege fail. With respect to the assertions of the work product privilege, Claimant argues that they must also fail "given the clear discriminatory intent of the actions reflected."¹⁸
22. Respondent replies with a correction with respect to the descriptions of both documents in question. Both documents, Respondent explains, were incorrectly

¹⁴ See Claimant's February 15, 2006 letter to the Tribunal, Tab A at pages 6-7.

¹⁵ See Respondent's March 1, 2006 letter to the Tribunal at pages 7-8.

¹⁶ Claimant also seeks clarification of California Log No. 74, an email string regarding SB 22, dated July 15, 2002, which purports to discuss SB 22 as early as July 2002.

¹⁷ Claimant's February 15, 2006 letter to the Tribunal, Attachment A-11.

¹⁸ See Claimant's February 15, 2006 letter to the Tribunal, Tab A at pages 7-8.

logged and should read “SB 1828”, not “SB 22”. In addition, Respondent asserts that neither document relates to the fax from Senator Burton’s office. Moreover, because both documents are communications between Deputies Attorney General, Respondent asserts that they are protected under the attorney-client privilege. Finally, Respondent argues that mere speculation of “discriminatory intent” is insufficient to outweigh the work product privilege.¹⁹

23. The Tribunal notes Respondent’s clarification of the subject matter of the disputed documents and, at this point, is not prepared to compel their production. Should Claimant wish to make further arguments seeking the production of these documents based on these fact patterns, the Tribunal is willing to consider them.

Group 5: January 2002 Advisory Memoranda

24. Claimant contends the memoranda in question (California Log Nos. 150 and 156) were prepared by Robert Joehnck, staff attorney for the Department of Conservation, in January 2002, a quiet period in which California was supposedly not considering the Imperial Project, but was awaiting a decision from the federal government. Because of the timing of the memoranda, Claimant argues that there is no indication that anyone sought Mr. Joehnck’s advice and litigation could not have been anticipated if California was not reviewing the Imperial Project under state law. In addition, with respect to California Log No. 150, Claimant again raises the argument that the deliberative process privilege should not protect this document as the integrity of the deliberative process is at issue and Claimant has failed to provide a sufficient description of the specific harm that would result from disclosure.²⁰
25. Respondent argues that it was not a “quiet period” as the California Department of Conservation (DOC), including the Office of Mine Reclamation and the SMGB, has statewide responsibility for the Surface Mining and Reclamation Act, and is a “responsible agency” for the California Environmental Quality Act concerning proposed surface mining operations. In this capacity, Respondent explains, it is involved in many stages with proposed surface mining projects being reviewed by local government agencies, which is what occurred in this case. Furthermore, Respondent states that it is not uncommon for the DOC to advise their client agencies regarding proposals that come before the DOC for regulatory review or comment. With respect to the attorney-client privilege, Respondent argues that it applies as the documents are confidential legal

¹⁹ See Respondent’s March 1, 2006 letter to the Tribunal at pages 8-9.

²⁰ See Claimant’s February 15, 2006 letter to the Tribunal, Tab A at page 8 and para. 10 *supra*.

memoranda from an attorney to his clients. In addition, Respondent argues that the work product privilege applies as the DOC accurately anticipated a lawsuit.²¹

26. The Tribunal finds that Respondent has stated sufficient facts to establish that the attorney-client privilege protects both documents, at which point the burden shifts to the Claimant to assert that the privilege does not in fact apply. The Tribunal determines that this burden has not been met and the documents are thus deemed protected.

Group 6: Draft Gubernatorial Proclamations and Public Outreach Strategies

27. Claimant first argues that the attorney-client and work product privileges do not protect three documents (California Log Nos. 13, 14 and 107), concerning a proposed proclamation by the California Governor convening the Legislature in an extraordinary session to consider mining legislation, because Respondent has failed to describe a confidential communication or a proper anticipation of litigation, or to assert that the lawyers involved were not acting as policymakers. Second, Claimant argues that the deliberative process privilege does not protect six documents (California Log Nos. 162, 192, 193, 194, 197 and 208) addressing the Governor's "public outreach strategies" in "determining a course of action related to the pending backfilling requirements" because the Governor was not deliberating SB 22 as it was drafted at his direction. In addition, with respect to these latter six documents, Claimant again raises the argument that the deliberative process privilege should not protect these documents as the integrity of the deliberative process is at issue and Claimant has failed to provide sufficient descriptions of the specific harm that would result from disclosure.²² Finally, Claimant contends that, if the privilege does apply, it is outweighed by Claimant's need for evidence of "California's specific intent to block the Imperial Project by whatever means necessary."²³

28. Respondent argues that the attorney-client and work product privileges do protect the first three documents as they were prepared by attorneys in their capacity as attorneys providing legal advice with respect to the Governor's proclamation and were prepared in anticipation of litigation. With respect to the latter six documents, Respondent contends that both California Government Code §6254(1) and the deliberative process privilege protect internal briefing documents and communications with the Governor's office. These latter privileges are not outweighed, Respondent argues, because Claimant has no need for the

²¹ See Respondent's March 1, 2006 letter to the Tribunal at pages 9-10.

²² See para. 10 *supra*.

²³ See Claimant's February 15, 2006 letter to the Tribunal, Tab A at pages 9-10.

documents: the purpose and intent of SB 22 can be gleaned from publicly available legislative history, which California has already produced, and from the Governor's final proclamation.²⁴

29. With respect to the first three documents relating to gubernatorial proclamations, the Tribunal finds that Respondent has stated sufficient facts to establish that the attorney-client privilege protects the documents, at which point the burden shifts to the Claimant to assert that the privilege does not in fact apply. The Tribunal determines that this burden has not been met and the documents are thus deemed protected.
30. With respect to the latter six documents relating to public outreach strategies, the Tribunal recognizes the qualified nature of the deliberative process privilege and that the interests in protection can be outweighed by a sufficient statement of need from the challenger. The Tribunal views Claimant's argument that a challenge to the integrity of the decision-making process vitiates any assertions of the deliberative process privilege as an extreme variation of the generally applicable analysis of whether need outweighs interest in protection. The question of Claimant's need, however, cannot be decided at this early point in the arbitration. The Tribunal therefore cannot compel production of these documents at this time, a holding that is demanded by the fact that the Tribunal does not override privilege unnecessarily and will not order production without restriction. If, at the point at which the Tribunal begins to make determinations on the merits of the claims, however, it becomes apparent that a particular decision is essential to such determinations and other documents, witnesses or evidence lead the Tribunal to believe that the documents currently requested may assist the Tribunal in such a decision, the Tribunal will revisit the requests for production of these particular documents.

²⁴ See Respondent's March 1, 2006 letter to the Tribunal at pages 10-11.

*Section B: Decisions with respect to Documents Withheld by the Advisory Council on Historic Preservation*²⁵

Issue 1: Does the Deliberative Process Privilege Apply When the Integrity of the Deliberative Process Itself is Challenged?

31. With respect to all 54 documents at issue in this section,²⁶ Claimant again raises the argument that the deliberative process privilege should not protect these documents as the integrity of the deliberative process is at issue and Claimant has failed to provide sufficient descriptions of the specific harm that would result from disclosure.²⁷ Specifically, it argues that the ACHP's review was flawed, if not predetermined because Mr. Stanfill, a "lead contact" staff member stated in an email that he did "not foresee any situation wherein [he] would recommend a MOA short of moving the project to a wholly ... different location."²⁸ Claimant asserts that, as the ACHP's review and comments—which allegedly provided the factual basis for the Interior Secretary to deny the Imperial Project—have direct bearing on its claims, it is entitled to these documents.²⁹
32. Respondent argues that Mr. Stanfill was not in the position of a decision-maker, but was an initial, ground-level contact person handling the Imperial Project and thus his statement, even accepting Claimant's characterization, does not put the deliberative process in question. In addition, Respondent asserts, Claimant has mischaracterized the documents it cites to illustrate bias and baseless allegations of bias are not sufficient to compel production.³⁰
33. As discussed *supra*, the Tribunal views Claimant's argument that a challenge to the integrity of the decision-making process vitiates any assertions of the deliberative process privilege as an extreme variation of the generally applicable analysis of whether need outweighs interest in protection. The question of Claimant's need, however, cannot be decided at this early point in the arbitration. The Tribunal therefore cannot compel production of these documents as this time, a holding that is demanded by the fact that the Tribunal does not override

²⁵ In this section, Claimant seeks 54 documents from the ACHP withheld on deliberative process privilege grounds. This section was presented in the form of arguments that apply to various segments of the 54 documents, and so the Tribunal has followed this format in its decision.

²⁶ ACHP Log Nos. 1, 2, 3, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 67, and 58.

²⁷ See para. 10 *supra*.

²⁸ See Claimant's February 15, 2006 letter to the Tribunal, Tab B at page 1, and Attachment B-2 of same.

²⁹ See *id.*, Tab B at pages 1-2.

³⁰ See Respondent's March 1, 2006 letter to the Tribunal at pages 12-13.

privilege unnecessarily and will not order production without restriction. If, at the point at which the Tribunal begins to make determinations on the merits of the claims, however, it becomes apparent that a particular decision is essential to such determinations and other documents, witnesses or evidence lead the Tribunal to believe that the documents currently requested may assist the Tribunal in such a decision, the Tribunal will revisit the requests for production of these particular documents. Specifically, the Tribunal is not persuaded by Mr. Stanfill's statement alone that the ACHP's deliberative process was predetermined. As other evidence is presented, especially evidence concerning the actual mining site or the ACHP's treatment of like cases, the Tribunal will revisit this challenge and reexamine Claimant's need.

Issue 2: Are the Documents at Issue Temporally Beyond the Scope of the Deliberative Process Privilege?

34. Claimant argues that three of the ACHP documents (Government Log Nos. 19, 57 and 58) are not protected by the deliberative process privilege because of their timing. The first email (Log. No. 19) was written in May 1998, three months *prior* to the BLM office formally inviting the ACHP to comment, and thus Claimant argues cannot be part of the government's deliberations. The other two documents (Log Nos. 57 and 58) were written six days and three years *after* the rendering of the ACHP's opinion on the Imperial Project and thus Claimant asserts are not pre-decisional.³¹
35. Respondent first corrects the privilege log description of Log No. 19, which it says was misdated: the correct date of the email should be May 3, 1999 (not 1998). With respect to the latter documents, Respondent argues the ACHP's formal opinion is not the only "decision" that the ACHP made with respect to the Imperial Project. Log No. 57 contains staff opinion and analysis regarding the proposed media release of the opinion and is both pre-decisional and deliberative. Log No. 58 contains deliberations of what action the ACHP should take in light of Secretary Norton's reversal of Former Secretary Babbitt's denial and, Respondent argues, is both pre-decisional and deliberative.³²
36. The Tribunal denies the challenges as to the timeliness of the assertions of privilege with respect to Government Log Nos. 19, 57 and 58. As these documents are allegedly protected by the deliberative process privilege and the Tribunal has determined that it cannot address the necessary issue of Claimant's need at this early point in the arbitration, the ultimate determination as to the

³¹ See Claimant's February 15, 2006 letter to the Tribunal, Tab B at pages 2-3.

³² See Respondent's March 1, 2006 letter to the Tribunal at page 13.

applicability of the privilege is deferred until such time as it becomes apparent to the Tribunal, through other documents, witnesses or evidence, that these documents are appropriate for production as a part of a decision necessary to the determination of the claims' merits.

Issue 3: Do the Disputed Documents Contain Only Administrative Facts and Thus Are Not Protected by the Deliberative Process Privilege?

37. Claimant argues that eleven documents³³ appear to only discuss administrative facts (timelines and ministerial procedures) which should not be protected by the deliberative process privilege.³⁴
38. Respondent responds that the word "step" in a privilege log description does not necessarily imply a purely procedural action and the "next steps" listed are actually substantive policy decisions, which it claims is evident from the log language.³⁵
39. The Tribunal denies this challenge based on the alleged administrative nature of the documents. The Tribunal finds that, if the documents contain information that moves beyond administrative process, they would be protected by the deliberative process privilege and, if they are merely procedural in nature, Claimant would have less need for them. As these documents are allegedly protected by the deliberative process privilege and the Tribunal has determined that it cannot address the necessary issue of Claimant's need at this early point in the arbitration, the ultimate determination as to the applicability of the privilege is deferred until such time as it becomes apparent to the Tribunal, through other documents, witnesses or evidence, that these documents are appropriate for production as a part of a decision necessary to the determination of the claims' merits.

Issue 4: Does Claimant's Need for Documents Relating Impressions on the Imperial Project Outweigh Respondent's Interest in Protection?

40. With respect to twenty-one of the ACHP's withheld documents,³⁶ Claimant argues that the qualified deliberative process privilege must be outweighed by its own need for these documents that it believes are likely to reveal the adequacy of the ACHP's review process, as well as reflect any prejudices. Claimant alleges

³³ Government Log No. 2, 12, 15, 16, 17, 18, 20, 21, 22, 23, and 31.

³⁴ See Claimant's February 15, 2006 letter to the Tribunal, Tab B at page 3.

³⁵ See Respondent's March 1, 2006 letter to the Tribunal at page 14.

³⁶ Government Log Nos. 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 20, 24, 25, 26, 28, 29, 30, 31, 50, 52 and 53.

that these documents are necessary to show how the Section 106 process was applied to defeat Claimant's reasonable expectations, based on existing law and practice, that the Imperial Project would be approved. Claimant further argues that there is no compelling interest for Respondent in keeping these documents secret as: (1) the actions discussed took place in 1999 and thus there is no risk of premature disclosure; (2) production in this arbitration is non-public; and (3) disclosure is unlikely to influence future ACHP deliberations as the ACHP does not issue binding decisions on consulting agencies.³⁷

41. Respondent counters that, again, Claimant is relying on unsupported allegations to argue that the ACHP's review was predetermined. Respondent additionally argues that it has demonstrated sufficient compelling interest in the documents' secrecy. Respondent asserts that even Claimant allegedly admits the documents "reflect true deliberations over the ACHP's final decision."³⁸ Respondent argues that these are the very type of documents that the deliberative process privilege seeks to protect so that third parties do not construe preliminary discussion of persons who are not decision-makers as part of a final decision. Respondent additionally argues that premature disclosure is not its only concern: post-decision disclosure can confuse the issues and mislead the public by dissemination of documents suggesting reasons and rationales for a course of action that were not in fact the ultimate reasons. Respondent claims that it must maintain relations with a diverse group of entities that are common to ACHP cases and releasing these documents may chill future advice out of fear of disturbing these relations. Finally, Respondent asserts that this arbitration is very public, with online submissions of information, a public hearing, and several parties already showing interest in the proceedings.³⁹
42. The Tribunal finds that Claimant has not presently shown a sufficient likelihood that these documents will present necessary evidence for its claims. As these documents are allegedly protected by the deliberative process privilege and the Tribunal has determined that it cannot address the necessary issues of Claimant's need at this early point in the arbitration, the ultimate determination as to the applicability of the privilege is deferred until such time as it becomes apparent to the Tribunal, through other documents, witnesses or evidence, that these documents are appropriate for production as a part of a decision necessary to the determination of the claims' merits.

³⁷ See Claimant's February 15, 2006 letter to the Tribunal, Tab B at page 4.

³⁸ See Respondent's March 1, 2006 letter to the Tribunal at page 14, *quoting* Claimant's February 15, 2006 letter to the Tribunal, Tab B at page 4.

³⁹ See *id.* at pages 14-15.

Issue 5: Does Claimant's Need for Documents Pre-Dating the ACHP's Formal Comment Outweigh Respondent's Interest in Protection?

43. Claimant alleges, with respect to twenty-four of the original fifty-four challenged documents,⁴⁰ that its need for opinions and draft versions of the ACHP's formal comments to the Interior Secretary in October 1999 outweigh Respondent's interest in their secrecy. Claimant alleges that Mr. Fowler of the ACHP and Solicitor Leshy met shortly before the submission of the ACHP's final comment and that the ACHP's formal comment mirrors Leshy's novel legal standard, proving that the ACHP and the Solicitor were collaborating. Claimant argues that it therefore needs these documents to develop the record on the extent of the collaboration during the development of Leshy's Legal Opinion and this need outweighs Respondent's interests in secrecy.⁴¹
44. Respondent argues that Claimant's allegations of collaboration are not based in evidence and are false. It is common, Respondent alleges, for the ACHP, during its Section 106 review, to confer with the agency that raised the issue (as well as the permit applicant, Native American tribes, etc.) to understand the agency's structure and legal framework so that the ACHP's advice can be informed and effective. Following the meeting with Solicitor Leshy, Respondent points out that ACHP Executive Director John Fowler described the procedures to follow: "We agreed that the best way to go now was for the Council process to take its course." Respondent concludes with the assertion that no member of the Department of Interior was privy to the ACHP's internal deliberations regarding the Imperial Project and Respondent has already produced to Claimant sufficient documents to elucidate the procedures followed with respect to the ACHP's Section 106 review.⁴²
45. The Tribunal finds that Claimant has not presently shown a sufficient likelihood that these documents will present necessary evidence for its claims. As these documents are allegedly protected by the deliberative process privilege and the Tribunal has determined that it cannot address the necessary issues of Claimant's need at this early point in the arbitration, the ultimate determination as to the applicability of the privilege is deferred until such time as it becomes apparent to the Tribunal, through other documents, witnesses or evidence, that these documents are appropriate for production as a part of a decision necessary to the determination of the claims' merits.

⁴⁰ Government Log Nos. 1, 3, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 55 and 56.

⁴¹ See Claimant's February 15, 2006 letter to the Tribunal, Tab B at page 5.

⁴² See Respondent's March 1, 2006 letter to the Tribunal at page 16.

Section C: Decisions with respect to Documents Relating to the Mineral Report and Valid Existing Rights Determination

46. With respect to the eight challenged documents related to the draft Bureau of Land Management (BLM) Mineral Report for the Imperial Project and other communications concerning the valid existing rights determination,⁴³ Claimant challenges withholding on the basis that its need for the documents outweighs Respondent's interest in the protection of its deliberative process. Specifically, Claimant argues that the validity determination began in 1998, when such a determination was a prerequisite for approving a plan of operations in an area being withdrawn from mineral entry (by long-standing practice, if not explicit regulation). It claims that the mineral report was purposely not finalized, however, during the 1998-2001 period because the Department of Interior knew the claims to be valid and therefore intentionally delayed the completion of the report. Claimant thus contends that the documents are very important to its claims under NAFTA and its need for them outweighs any interest Respondent has in the protection of its deliberative process. In addition, Claimant again raises the argument that the deliberative process privilege should not protect these documents as the integrity of the deliberative process is at issue and Claimant has failed to provide sufficient descriptions of the specific harm that would result from disclosure.⁴⁴ Finally, with respect to documents 7 and 8 (Government log Nos. 75 and 76), Claimant asserts that the documents contain mere factual assessments and thus should be produced.⁴⁵
47. Respondent argues that Claimant's statement of need depends upon the assumption that its plan would have been approved if the validity determination had been completed before the Solicitor began work on the M-Opinion. As this assumption is incorrect, Respondent asserts, Claimant cannot argue a great need for the validity determination documents. Respondent claims that at no time was the BLM's processing of Claimant's plan of operations stalled or suspended; Respondent claims that Claimant has misinterpreted the documents it cites to find delay. Respondent further contends that if there was a delay it was immaterial because, during the period of 1998 to 2000, preparations of a mineral report and validity determination were not prerequisites for the approval of Claimant's plan of operations. Respondent disputes Claimant's assertion that the 2001 Regulations require a mineral report prior to approving a plan of operations and contends that there is no long-standing practice with such a requirement either. Respondent explains that a mineral examination report is necessary only with

⁴³ Government Log Nos. 4, 134, 29, B00162, 105, 102, 75 and 76.

⁴⁴ See para. 10 *supra*.

⁴⁵ See Claimant's February 15, 2006 letter to the Tribunal, Tab C.

mineral claims that lie on lands already withdrawn from mineral entry; BLM retains discretion over when to conduct such exams on lands that have been temporarily segregated from mineral entry. Finally, with respect to documents 7 and 8, Respondent argues that the documents were in fact deliberative as the determination of which variables to employ for a cash flow analysis is discretionary.⁴⁶

48. Without determining the precise contours of the deliberative process privilege, the Tribunal is nevertheless mindful and respectful of the Government's need for the free and open exchange of communications. The Tribunal therefore believes that when the privilege is asserted, it should not be overridden lightly. At the same time, the Tribunal is cognizant that fairness to the party whose interest is affected and who is therefore challenging the assertion of privilege is also important. Balancing these interests, the Tribunal holds that there must be a sufficient enough showing of need to ensure that the governmental process is protected. The Tribunal has not found a sufficient statement of need in the arguments presented at this point, but as the proceedings develop and evidence and witnesses are presented that show these documents to be both relevant and necessary, the Tribunal will reconsider the challenges to assertions of the deliberative process privilege over the documents in this section.

*Section D: Decisions with respect to Documents Relating to the Development of Solicitor Leshy's M-Opinion*⁴⁷

Issue 1: Was an Appropriate Attorney-Client Relationship Present and, If the Privilege Does Apply, did Respondent Waive it by Selective Production?

49. Claimant first argues that interim drafts of communications that are ultimately not intended to be confidential are not protected by the attorney-client privilege. Second, Claimant asserts that Respondent's release of several key documents—including the client's initial request for legal advice, communications relating to the development of a strategy to provide the requested advice, and memoranda both in furtherance of that advice and conveying the final legal advice—amount to waiver of the attorney-client privilege with respect to “the entire spectrum of subject matter relating to the Leshy Opinion, including BLM's authority under the existing mining laws and regulations to deny approval of a Plan of Operation that

⁴⁶ See Respondent's March 1, 2006 letter to the Tribunal at pages 17-20.

⁴⁷ Claimant seeks 80 documents: 35 are preliminary drafts of the now-rescinded Legal Opinion of Solicitor Leshy (Group 1); 9 relate to comments on those drafts (Group 2); and 36 relate to the genesis of the development of the Legal Opinion and Leshy's interpretation of the “unnecessary and undue degradation standard” (Group 3). Again, the structure of this section is by argument.

conformed with the law and provided the mitigation that was reasonably attainable.”⁴⁸

50. Respondent responds that interim drafts are indeed protected under the attorney-client privilege as otherwise all drafts of court briefs and communications would not be protected. Secondly, Respondent argues that it has not waived the attorney-client privilege by the production of eleven documents that Claimant alleges are privileged. Seven of the documents, Respondent contends, are not in fact privileged and that the amount of information released is similar to that released in an adequate description of privilege in a privilege log. The other four documents Respondent acknowledges to be privileged, but asserts that they were inadvertently produced, which does not amount to waiver, and especially not to subject matter waiver.⁴⁹
51. The Tribunal is assured that a proper attorney-client relationship did exist at the times of the communications and thus the privilege would ordinarily apply. Whether such privilege was waived by the inadvertent release of several documents must be determined by examining Respondent’s actions surrounding the release. The Tribunal notes that a U.S. judicial decision lists five factors to consider in determining whether an inadvertent production should amount to waiver: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving the party of its error.⁵⁰ The Tribunal finds these five factors to reflect considerations generally applicable to the analysis of waiver of privilege on the grounds of partial disclosure.
52. Applying these factors, the Tribunal finds the following. First, the Tribunal recognizes the great care with which Respondent conducted its document production, not only in the logging of the numerous privileged documents, but also in the production of thousands of pages of non-protected documents. Second, the number of privileged documents produced (four) is small in comparison to the overall production by Respondent. Third, the Respondent’s partial disclosure does not appear to be particularly extensive. Fourth, although Respondent has done little to promptly request the return of the documents or take other measures to rectify its apparently inadvertent disclosure, the Tribunal understands that, in a complex arbitration with large scale document production, a

⁴⁸ See Claimant’s February 15, 2006 letter to the Tribunal, Tab D at pages 1-4.

⁴⁹ See Respondent’s March 1, 2006 letter to the Tribunal at pages 20-22.

⁵⁰ *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 208 F.R.D. 109, 118 (D.N.J. 2002) (citations omitted).

party may only become aware of an inadvertent disclosure after such is pointed out or made use of by the opposing party. Therefore, the Tribunal does not find this single factor dispositive. Fifth, the Tribunal finds that there are no overriding interests of justice that would compel it to not relieve Respondent of its error. Therefore, the Tribunal finds that the documents claimed as protected by the attorney-client privilege in this section D are indeed so protected.⁵¹ As the attorney-client privilege is an absolute privilege, no further challenge may be made to the withholding of these documents in this proceeding.

Issue 2: Has Respondent Waived the Work Product Privilege?

53. Claimant argues that Solicitor's Leshy's Opinion was not created in anticipation of litigation, but to "establish a new discretionary denial authority over all proposed mining on western federal lands" and these documents would have been created even absent anticipation of litigation. Further, Claimant asserts that if the work product privilege does apply, it has been waived as the documents do not pertain to either a party's litigation strategies or trial preparations for the present litigation. Finally, Claimant argues that the work product privilege, if applicable, is outweighed by Claimant's need because it is the only entity to have its "multi-million dollar mining project delayed for years and then denied based on the Leshy Opinion."⁵²
54. Respondent contends that, prior to the Solicitor beginning work on the M-Opinion, attorneys at the Solicitor's Office were aware of the possibility of lawsuits as several parties, including Claimant, the Quechan Tribe, and environmental organizations had all expressed strong and continued interest in BLM's handling of the Imperial Project plan of operations. In fact, Respondent alleges, attorneys at the Solicitor's Office were "acutely aware" that, regardless of the outcome, the Department's decision would be challenged in a lawsuit. In addition, Respondent argues that Claimant has failed to establish a sufficient need for the documents as whatever harm Claimant alleges would come from the final opinion itself, not any draft rationale.⁵³
55. The Tribunal defers its judgment on the applicability of the work product privilege to the disputed documents until such time as it may revisit Claimant's request for production as described in paragraph 58.

⁵¹ As mentioned, the Tribunal discovered numerous discrepancies in Claimant's summary logs and especially in Section D. Therefore, the Tribunal addresses the argument in general and to which documents the argument actually applies will be determined upon further clarification of the privilege logs.

⁵² See Claimant's February 15, 2006 letter to the Tribunal, Tab D at pages 5-6.

⁵³ See Respondent's March 1, 2006 letter to the Tribunal at page 23.

Issue 3: Does Claimant's Need for these Documents Outweigh Respondent's Interests under the Deliberative Process Privilege?

56. Finally, Claimant argues that its need for these documents outweighs Respondent's interests in secrecy because Solicitor Leshy's Opinion allegedly provided the basis for the denial of the Imperial Project and is necessary for Claimant to demonstrate the rationale behind the development of the Opinion, as well as the "radical change in the legal standards it effected." Respondent's interests, Claimant adds, are diminished by the later reversal of this Opinion. In addition, with respect to all but one of the documents in this section (supposedly Document No. 35, Government Log No. 423), Claimant again raises the argument that the deliberative process privilege should not protect these documents as the integrity of the deliberative process is at issue and Claimant has failed to provide a sufficient description of the specific harm that would result from disclosure.⁵⁴
57. Respondent responds that Claimant's stated need is insufficient to outweigh Respondent's own interests in secrecy. Any alleged "radical change" in legal standards, Respondent argues, can be ascertained from examining the M-Opinion itself, without the need to look at interim analyses and communications of Department attorneys.⁵⁵
58. Without determining the precise contours of the deliberative process privilege, the Tribunal is nevertheless mindful and respectful of the Government's need for the free and open exchange of communications. The Tribunal therefore believes that when the privilege is asserted, it should not be overridden lightly. At the same time, the Tribunal is cognizant that fairness to the party whose interest is affected and who is therefore challenging the assertion of privilege is also important. Balancing these interests, the Tribunal holds that there must be a sufficient enough showing of need to ensure that the governmental process is protected. The Tribunal has not found a sufficient statement of need in the arguments presented at this point, but as the proceedings develop and evidence and witnesses are presented that show these documents to be both relevant and necessary, the Tribunal will reconsider the challenges to assertions of the deliberative process privilege over the documents in this section that are challenged under this privilege and were not deemed protected by the attorney-client privilege above.

Decisions with Respect to Documents Withheld by Claimant on Grounds of the Attorney-Client and Work Product Privileges

⁵⁴ See Claimant's February 15, 2006 letter to the Tribunal, Tab D at page 6 and para. 10 *supra*.

⁵⁵ See Respondent's March 1, 2006 letter to the Tribunal at page 23.

59. Respondent renewed its challenges to Claimant's claims of privilege with respect to six documents.⁵⁶ Claimant produced two documents, leaving four in contention. Respondent challenges Document 3 (Claimant's Log No. 430) on the grounds that the description provided does not indicate that the document was created because of anticipated litigation, a requirement of the work product privilege. Documents 4, 5 and 6 (Claimant's Log Nos. 434, 509 and 510) are challenged on the grounds that Claimant's privilege log does not indicate that attorneys were involved in the communications or that the documents were prepared in anticipation of litigation.
60. Claimant produced two documents in response to Respondent's challenges, and provided further clarification of the nature and content of the four disputed documents.⁵⁷ For each of the remaining four documents, it explained the involvement of attorneys in the communication and that each was prepared in anticipation of potential or actual litigation.
61. With respect to the four documents remaining at issue, the Tribunal believes that, based on the further clarifications provided by Claimant, the attorney-client and/or work product privileges do indeed protect these documents. Therefore, the challenges to the assertions of privilege with respect to these documents are denied. If, however, Respondent wishes to make additional arguments based on these further explanations of the documents, the Tribunal is willing to hear such arguments.

⁵⁶ See Respondent's February 8, 2006 letter to the Tribunal.

⁵⁷ See Claimant's March 1, 2006 letter to the Tribunal at pages 5-7.

III. Conclusion

62. In summation, the Tribunal as detailed above:

- a. requests Respondent to produce California Log Nos. 161, 173, 203, 204, 205, 206, 207, 209, 210 and 211 (Section A, Group 1) as soon as possible;
- b. determines that California Log No. 105 (Section A, Group 2) is protected by the attorney-client privilege;
- c. denies Claimant's request to compel the production of California Log Nos. 18, 24, 129, 51 and 74 (Section A, Groups 3 and 4), but is willing to consider further argument from Claimant based upon the factual clarifications provided by Respondent;
- d. determines that California Log Nos. 150 and 156 (Section A, Group 5) are protected by the attorney-client privilege;
- e. determines that California Log Nos. 13, 14, and 107 (Section A, Group 6) are protected by the attorney-client privilege;
- f. defers determination on the assertions of the deliberative process privilege to California Log Nos. 162, 192, 193, 194, 197 and 208 (Section A, Group 6) until such time as it becomes apparent to the Tribunal that the circumstances of this case indicate a need for the documents sufficient to justify an order for their production;
- g. defers determination on the assertions of the deliberative process privilege to all documents in Section B until such time as it becomes apparent to the Tribunal that the circumstances of this case indicate a need for the documents sufficient to justify an order for their production;
- h. defers determination on the assertions of the deliberative process privilege to all documents in Section C until such time as it becomes apparent to the Tribunal that the circumstances of this case indicate a need for the documents sufficient to justify an order for their production;
- i. determines that all documents listed as protected by the attorney-client privilege in Section D are indeed absolutely protected under that privilege and thus may not be further challenged in this proceeding;

- j. defers determination on documents in Section D withheld on grounds of the work product privilege (and not otherwise protected by the attorney-client privilege as indicated above);
 - k. defers determination on all documents listed in Section D as withheld on grounds of the deliberative process privilege (and not otherwise protected by the attorney-client privilege as indicated above) until such time as it becomes apparent to the Tribunal that the circumstances of this case indicate a need for the documents sufficient to justify an order for their production; and
 - l. denies Respondent's challenges to Claimant's assertions of the attorney-client and work product privileges over Claimant Log Nos. 430, 434, 509 and 510, though it will consider additional arguments over the disputed documents should Respondent wish to submit such based on Claimant's clarified explanations of the documents.
63. The Tribunal acknowledges that the Claimant is scheduled to file its memorial on May 1, 2006, and that Respondent is to file its counter-memorial on September 7, 2006, and the Tribunal maintains these dates. However, given the closeness of time between these filing dates and the Tribunal's decision and the fact that Respondent will now be producing ten documents analyzing California Senate Bill 22, the Tribunal authorizes Claimant to file a supplemental memorandum to its memorial focusing on arguments related solely to issues raised by the documents just produced and cross-referencing back to the original memorial. This supplemental memorandum must be submitted within ten days of the receipt by Claimant of the ten documents from Respondent.

Signed April 21, 2006,

David D. Caron
Member

Michael K. Young
President

Kenneth D. Hubbard
Member