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Second Expert Report of  
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March 31, 2016

English Translation

BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES

**Bear Creek Mining Corporation**  
*Claimant*

*and*

**The Republic of Peru**  
*Respondent*

ICSID Case No. ARB/14/21

**REPLY BY PERUVIAN MINING LAW EXPERT**

**LUIS RODRIGUEZ-MARIATEGUI CANNY**

**MARCH 31, 2016**

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## **I. INTRODUCTION, CONFIRMATION OF CONCLUSIONS AND QUALIFICATIONS**

1. The Republic of Peru (Peru), through its attorneys, has asked me to expand my Report of October 6, 2015 (the Report) and respond to the arguments put forward by Bear Creek Mining Corporation (Bear Creek) in its Reply to the expert opinions and statements made by some experts and opinions attached thereto in the ICSID Arbitration Case No. ARB/14/21 between Bear Creek and the Republic of Peru (the Arbitration).

2. As such, I am in a position to confirm the general opinions and conclusions I stated in my Report, specifically that:

- a. Mineral resources are the Property of the State and are exploited by private parties through the concession system. A mining concession grants its holder the exclusive right to explore for and produce the mineral resources in question, always with the limitations established therein and subject to first meeting the requirements for obtaining the other necessary authorizations. In practical terms, the holder of a mining concession does not automatically acquire the right to explore or exploit its mining concession until it meets the additional requirements that allow it to engage in said mining activities.
- b. Authorization to engage in exploration and exploitation activities is subject to obtaining an environmental certification, which will depend on the estimated impact of the mine and the condition of the area that will be impacted. At the time when the environmental certifications for exploration and exploitation at the Santa Ana project were applied for, they required the express decision of the authority before such activities could commence.
- c. Obtaining the proper surface rights for the purpose of using the surface of the land was a mandatory requirement that had to be met prior to initiating exploration. Before beginning any construction work on mineral production and treatment facilities, land use rights to the entire surface area where the various components of the project will be built must first be formally obtained. The lack of surface rights prevents a significant number of authorizations from being approved. As far as I have been able to determine, Bear Creek never obtained the surface rights for construction or mineral production at the Santa Ana project.
- d. According to the information provided by Bear Creek, the land on which the Santa Ana site is located is owned by three communities (Concepción de Ingenio, Ancomarca, and Challacollo) and the Cónдор de Ancocahua area (which is splitting off from the Challacollo community) and the Huacullani Neighborhood Council. Moreover, there are no less than 94 possessors of the 351 hectares

comprising the Santa Ana project site. Surface rights to all these lands had to be obtained, and the negotiations with them were in their initial stages when its Environmental Impact Assessment (EIA) was submitted for approval. Bear Creek has submitted a document that seems to show that it has negotiated an agreement with the Concepción de Ingenio Community for purchasing part of their land, but said document does not show that this agreement ever took effect. What is clear is that, based on Bear Creek's own statements, it had not reached any agreement with any of the other owners or possessors of the other surface rights that it needed in order to apply for other construction permits.

- e. Before it could start construction on the mineral exploration and treatment facilities, it was required to have a previously and expressly approved environmental study. In the case of the Santa Ana Project, the required environmental study is the Environmental Impact Assessment. Without an approved EIA, no construction could take place at the Santa Ana project. Upon reviewing the document containing the EIA, the Ministry of Energy and Mines (MINEM) had 157 comments. For its part, the Ministry of Agriculture (MINAM) had an additional 39 comments. And as part of the citizen participation process, the population submitted to the MINEM four documents outlining their own concerns. Bear Creek had to respond to 196 comments by the sectoral authorities (MINEM and MINAM) in order for its EIA to be approved. After reviewing the answers provided by Bear Creek in response to said comments given before a notary, I think some of them were still unanswered.
  - f. According to the information on the Santa Ana project components and processes as set forth in the EIA that was submitted for purposes of obtaining the authority's approval for the Santa Ana project, the number of outstanding authorizations that had to be obtained before Bear Creek could begin construction—and then before it could operate the mine, plant and other complementary facilities— was considerable, and in more than a few cases obtaining them was a long and drawn-out process. Under no circumstances could it be considered that the approval of these authorizations would be automatic. Given that Bear Creek had not received approval for its EIA, had not acquired the necessary surface rights and still needed additional permits before it could start construction on the Santa Ana project facilities, the situation was such that Bear Creek would be unable to meet the deadlines it had set for itself for the construction and startup of mining operations.
  - g. Before an EIA can be assessed, the citizen participation process must be completed. Bear Creek submitted its Citizen Participation Plan (PPC) to the authority for approval. The authority's approval of the PPC is not a statement of approval of Bear Creek's actions in its relationships with the communities in its area of influence, nor does it reflect the absence of potential social conflicts in the area.
3. Specifically, for this reply report (the Reply), Peru has requested my legal opinion regarding (i) the procedures for private parties to gain access to mineral resources present in

Peruvian territory, touching on the mechanisms through which Bear Creek obtained mineral rights in the border area, (ii) the requirement of obtaining an environmental certification and certain other permits and rights before initiating the mining activity Bear Creek had planned for Santa Ana, (iii) the steps that Bear Creek had taken and those that still needed to be taken before it could build and operate the Santa Ana project, and (iv) the laws regarding citizen participation in relation to the exploitation of mineral resources.

4. This Reply is based on the following: the claimant's Memorial filed in the Arbitration Proceeding by Bear Creek, Bear Creek's Reply to the arguments Peru set forth in its Counter Memorial, the Expert Opinion of Dr. Hans Flury, the Reply testimony of the engineer Mr. Elsiario Antunez de Mayolo and certain other documents Bear Creek has offered as evidence, plus additional information received from the attorneys for Peru, or that I have been able to obtain from public sources related to the Arbitration Proceeding that I found useful for this Reply. I have also consulted legislative, case law and legal scholarship sources that I consider to be applicable and useful for this Reply. The Reply is based on my more than 25 years of experience in mining, mining practices, and regulations in Peru.

5. I am an attorney—a partner at Hernández & Cía Abogados since 2007—and I graduated from the Pontifical Catholic University of Peru (1987). I have completed “Introduction to Mining” studies offered by the Peruvian Institute of Mining Engineers (1998). I have served as President of the National Institute of Mining, Petroleum, and Energy Law (1998-1999) and I am the Past-President of the Institute of Mining and Energy Studies. I have been elected as the Director of the Mining, Petroleum, and Energy Society for 13 consecutive years, and I have also served as President of the Legal Affairs Committee and the Mining-Law Committee of the same organization.

6. I have lectured at events and authored publications on mining, environmental, contractual, public records-related, financial, and other topics, both in Peru and abroad, and participated ad-honorem in the drafting of laws related to the mining sector. I serve as an independent member of the board of directors of Peruvian and foreign mining companies with interests in Peru. The description of my qualifications was included in the Report, and I am repeating them in this Reply.

7. This Reply will be structured as follows: Section II will discuss mining concessions in Peru and the rights inherent to the same, including the limitations imposed on them, as well as the mechanisms through which foreigners can acquire mineral rights in border areas. Section III will describe the steps that must be taken to obtain the necessary authorizations to initiate exploration activities in mining concessions and initiate preparatory and construction work on the necessary facilities for the exploitation of mineral resources at the Santa Ana project, and commence extraction activities. Section IV will analyze the citizen participation plan as part of the EIA approval process and as a document that generates obligations for Bear Creek, independently of any of the other permits that it must obtain from the authorities.

## **II. THE PROCEDURES FOR PRIVATE PARTIES TO GAIN ACCESS MINERAL RESOURCES IN PERUVIAN TERRITORY**

8. In this section, I will explain the nature and limitations of mining concessions, and whether or not it is true that the rights obtained by the holder of a mining concession—simply by virtue of having obtained the concession—entitles the holder of a concession to commence mining activity in the concession area. I will also describe the scope of the irrevocable status mining concessions have under Peruvian law. Lastly, I will describe the procedures through which foreigners may obtain rights in the border area.

**A. THE SCOPE AND LIMITATIONS OF MINING CONCESSIONS IN PERU**

9. Dr. Hans Flury describes mining concessions in Peru as the vehicles for obtaining and exercising substantive rights to mineral resources within the area for which the concession is granted.<sup>1</sup> Although Dr. Flury has correctly quoted the provision of mining law, the truth is that merely being granted a mining concession is not sufficient to entitle the concession holder to immediately and automatically exercise the various rights that he notes may be exercised. In fact, in practice, the title to a mining concession does not give the holder the right to explore the area (much less develop and exploit it).

10. As I stated in the Report, mineral resources are recognized as natural resources and they are the Property of the State when in their natural state.<sup>2</sup> Private parties can exploit natural resources in the manner provided by law for each resource.<sup>3</sup> The proceeds from said exploitation are the property of the concession holder.<sup>4</sup>

11. In the case of mineral resources specifically, they are exploited by private parties through the concession system.<sup>5</sup> Mineral resources, in their natural state, are the property of the Peruvian State regardless of whether the surface of the land is owned by the State or a private

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<sup>1</sup> See Expert Opinion of Hans A. Flury, January 5, 2016 (“Expert Opinion of Hans Flury”), paras. 13-16.

<sup>2</sup> Constitution of Peru of 1993, December 29, 1993 (“Constitution of Peru”), Art. 66 [Exhibit R-001]. “Article 66: Natural resources, both renewable and non-renewable, are the property of the State. The State is sovereign over their exploitation”; Organic Law for the Sustainable Use of Natural Resources, Law 26821, June 25, 1997 (“LOASRN”), Arts. 3, 4 [Exhibit R-142]. “Article 4: Natural resources, both renewable and non-renewable, maintained at their source, are the Property of the State (...)” “Article 3: The following shall be considered natural resources (...): f. Minerals (...)”

<sup>3</sup> LOASRN, Art. 19 [Exhibit R-142]. “Article 19: The right to sustainably exploit natural resources is granted to private parties in the manner provided by the law for each resource (...)”

<sup>4</sup> LOASRN, Art. 4 [Exhibit R-142]. “Article 4: (...) The fruits and products of the natural resources obtained in the manner set forth in this Law are the property of those to whom the rights to them have been granted.”

<sup>5</sup> Compiled Text of Perú’s General Mining Law, Supreme Decree No. 014-92-EM, June 3, 1992 (“LGM”), Art. II [Exhibit R-008]. “Article II: (...) Mineral resources are exploited via a public-private joint enterprise in the form of a concession.”

party.<sup>6</sup> A mining concession grants its holder the exclusive right to explore for and produce the mineral resources in question,<sup>7</sup> with the limitations established therein, and provided that the concession holder first obtains all the permits and licenses required to begin the exploration and/or exploitation of the mine.<sup>8</sup>

12. In other words, the mining concession grants its holder the exclusive right to begin the process of obtaining the permits and licenses to engage in mining exploration and exploitation. The concession, by itself, does not grant the right to explore or exploit the natural resource. The titles to the mining concessions that were granted in 2006 when the mining concessions for the Santa Ana mining project were granted<sup>9</sup> contained express provisions indicating that “in order to begin mining exploration or exploitation activities, the legal and regulatory requirements must first be met and the required authorizations must be obtained to this end.”<sup>10</sup> The title also contained other specific obligations of an environmental nature or

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<sup>6</sup> LGM, Art. 9 [Exhibit R-008]. “Article 9: (...) A mining concession is a distinct and separate estate from the surface of the land where it is located. (...)”; Civil Code of Perú, July 25, 1984 (“Civil Code”), Art. 954 [Exhibit R-033].” “Article 954: Ownership of the land includes the subsurface, and the subsurface, (...). Ownership of the subsurface does not include natural resources, deposits, or Archeological remains, or any other assets governed by special laws.”

<sup>7</sup> LGM, Art. 9 [Exhibit R-008]. Article 9: “A mining concession grants its holder the right to explore and exploit the mineral resources for which the concession was granted (...).”

<sup>8</sup> LOASRN, Art. 23 [Exhibit R-142]. “Article 23: A concession, approved by special laws, grants the concession holder the right to the sustainable use of the natural resource for which the concession was granted, under the conditions and with the limitations established in the respective title (...).”

<sup>9</sup> Not all of the mining concession titles involved in the Santa Ana project have the same language, but all of them contain provisions that require the holder to adhere to the laws in effect, including accepting environmental obligations, acquiring surface rights, and obtaining additional permits.

<sup>10</sup> Resolution Granting Mining Concessions, Presidential Resolution No. 2868-2007-INGEMMET/PCD/PM, December 14, 2007, Art. 2 [Exhibit R-143] which grants a mining concession in Mining Concession Application Karina 5. “Article 2: Once granted, under no circumstances does a mining concession grant authorization to conduct mining activities in areas where it is prohibited by law, regardless of whether or not such areas are expressly stated or listed in this resolution. In addition, it is hereby established that in order to initiate mining exploration or exploitation activities, it is mandatory for concession holders to first meet all requirements and obtain whatever authorizations the laws and regulations require for the purpose. Article 8 of Directorial Resolution Granting KARINA 1 Mining Concession to Jenny Villavicencio, Directorial Resolution No. 1856-2006-INACC/J, April 28, 2006, granting title to the mining concession in Mining Concession Application Karina 1 [Exhibit R-276] and Article 8 of Directorial Resolution Granting KARINA 9A Mining Concession to Jenny Villavicencio, Directorial Resolution No. 2459-2006-INACC/J, June 13, 2006 granting title to the mining concession in Mining Concession

involving the acquisition of surface rights. A mining concession grants the concession holder the exclusive right to use and enjoy the natural resource for which the concession was granted, which it can only do after it meets all the other legal obligations.<sup>11</sup> In other words, until the holder of a mining concession meets the other requirements the law establishes for exploring or exploiting any deposit that may exist in the area for which the concession was granted, it cannot make use of the mineral resources. After obtaining the title to the mining concession, it must apply for and obtain a series of permits, authorizations, licenses, certifications and registrations before it can initiate any mining activity.

13. Mining concessions are granted to private parties via an ordinary titling process, in which the first applicant to apply for a given area shall have the exclusive right to be granted the concession, after completing the whole procedure. Concessions may be the object of disposal; concessions, the disposal thereof and associated rights in *rem* must be recorded in the Registry.<sup>12</sup>

14. Bear Creek and Dr. Flury refer to mining concessions as irrevocable.<sup>13</sup> Although this statement may be true, it is also incomplete. The LOASRN expressly provides that mining concessions are irrevocable insofar as the holder of the concession meets the obligations imposed on it by the law. Thus, the truth of this statement cannot be taken to be absolute. All mining

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Application Karina 9a [Exhibit R-277].” “Article 8: The holder of the mining concession granted hereby is subject to the rights and obligations set forth in the Consolidated Text of the General Mining Law approved by Supreme Decree No. 014-92-EM, and its Regulations.”

<sup>11</sup> LGM, Art. 127 [Exhibit R-008]. “Article 127: Via the title to the concession, the State grants the concessionaire the exclusive right to engage in the activities inherent to the concession, within a duly circumscribed area, in addition to all other rights granted to the concessionaire by this Law, without prejudice to the obligations that correspond to it.”

<sup>12</sup> LOASRN, Art. 23 [Exhibit R-142]. “Article 23: (...) Concessions are recordable intangible assets. They may be the object of disposal, mortgage, assignment, and actions to recover property, in accordance with the special laws. (...) The concession, its disposal, and establishment of rights in *rem* in relation to it, must be recorded in the appropriate registry.”

<sup>13</sup> Claimant’s Reply on the Merits and Counter-Memorial on Jurisdiction, January 8, 2016 (“Claimant’s Reply”), paras. 237, 322; Expert Opinion of Hans Flury, para. 14.

concessions can be revoked if the holder fails to meet the obligations imposed on it as a requirement for maintaining the concessions in effect.

15. First, even though it is not expressly provided by mining law as grounds for termination of a mining concession, the fact that under Article 71 of the Constitution, any rights acquired in violation of the constitution automatically revert to the State, ought to be sufficient to infer that the concession could be lost.

16. Secondly, the Organic Law for the Sustainable Use of Natural Resources (“LOASRN”) of 1997 provides that concessions are irrevocable to the extent that the concessionaires meet the obligations the law requires them to meet in order to maintain the concession in effect.<sup>14</sup> The identical provision is found in the LGM of 1992.<sup>15</sup> The LOASRN itself requires concessionaires to make the payments required by the law to maintain their concessions in effect.<sup>16</sup> One way mining concessions are extinguished under the Consolidated Text of the General Mining Law (LGM) is by forfeiture in the event the concessionaire fails to meet any of the obligations it must meet to maintain the concession in effect. For example, the concessionaire forfeits its concession if it fails to pay the annual mining concession fee for two years, or fails to pay, for two years, the penalties due for failing to meet minimum annual

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<sup>14</sup> LOASRN, Art. 23 [Exhibit R-142]. “Article 23: (...) Concessions may be granted for a fixed or indefinite term. They are irrevocable, as long as the concession holder meets the obligations required under this Law or any special laws for maintaining the concession in effect.”

<sup>15</sup> LGM, Art. 10 [Exhibit R-008]. “Article 10: (...) Concessions are irrevocable, as long as the concession holder meets the obligations required under this Law for maintaining the concession in effect.”

<sup>16</sup> LOASRN, Art. 29 [Exhibit R-142]. “Article 29: The conditions for the sustainable use of natural resources by the holder of a right of use, without prejudice to the provisions of the applicable special laws, are as follows: (...) d) Make the required monetary payment, in accordance with the modalities established by the special laws. e) Stay current with the payment of mining concession fees, as defined by applicable laws.”

investment or minimum annual production targets.<sup>17</sup> Once said forfeiture is declared and recorded, the concession reverts to the State.<sup>18</sup>

17. On November 6, 1991, the Law on the Promotion of Investment in Mining (LPIM) was passed via Legislative Decree No. 708, introducing modifications to the mining law that had been passed by Legislative Decree No. 109 then in effect.<sup>19</sup> The structural changes contained in this LPIM led to the promulgation, via Supreme Decree No. 018-92-EM, of what is known as the Consolidated Text (TUO) of the General Mining Law, which combined the two legislative decrees.

18. The important changes made by the LPIM included: (i) the unification of the rights under mining concessions to engage in exploration and exploitation under a single mining concession; (ii) the division of areas for which mining concessions could be requested into a grid of contiguous squares throughout Peruvian territory; (iii) the introduction of the first environmental mining regulations per se; (iv) the right to freely commercialize the minerals extracted by concessionaires; and (v) mining investment guarantees and security.<sup>20</sup>

19. It is within this regulatory framework of the Consolidated Text (TUO) of the General Mining Law that mining concessions are defined, in the sense that “they grant the concession holder the right to explore for and exploit the mineral resources in question, that are

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<sup>17</sup> LGM, Art. 59 [Exhibit R-008]. “Article 59: Failure to pay the Mining Concession Fee, or Penalty, as applicable, in a timely manner for two (2) consecutive years shall result in the forfeiture of claims, mining concession applications, and mining concessions, as well as beneficiation, general labor and mine transport concessions. If payment is missed for one year, payment status may be regularized with the payment and crediting of the current year, within the time frame provided by Article 39 herein. In any event, the payment made shall be applied to the previous year's outstanding balance (...).”

<sup>18</sup> LOASRN, Art. 30 [Exhibit R-142]. “(...) Forfeiture results in the reversion of the concession to the State, as of the moment the cancellation of the corresponding title is recorded.

<sup>19</sup> Legislative Decree No. 109, June 13, 1998 [Exhibit R-275].

<sup>20</sup> Such as the opportunity to sign tax, exchange rate, and administrative stabilization agreements in certain cases, payment of income tax on distributed profits only (although this was ultimately never applied), income tax deductions for any investments made in public services, accelerated depreciation of certain assets, the option to keep accounts in foreign currency.

within a solid form of undefined depth, bounded by vertical planes corresponding to the sides of a square, rectangle, or closed polygon, the vertices of which match coordinates in the Universal Transverse Mercator (UTM) coordinate system...,”<sup>21</sup> just as Dr. Flury states in his Expert Opinion.<sup>22</sup>

20. However, subsequent laws, like those discussed below, added more requirements, in addition to merely obtaining the mining concession that must be met before exploration and/or exploitation can begin:

- a. The Organic Law for the Sustainable Use of Natural Resources (Law No. 26821 of June 25, 1997), which clarified certain details with regard to the rights and obligations related to concessions for natural resources;
- b. The General Law on the Environment (Law No. 28611 of October 13, 2005), which incorporated many environmental clarifications, obligations and responsibilities applicable to the use of natural resources;
- c. The Framework Law of the National Environmental Management System (Law No. 28245 of June 4, 2004), which established the duties and jurisdiction of the environmental authorities;
- d. The National Environmental Impact Assessment Law (Law No. 27446 of April 20, 2001), which defined the cases in which environmental instruments would need to be submitted and the category of the same in each case;
- e. Law on Private Investment in the Development of Economic Activities on Lands of the National Territory and of the Peasant and Native Communities (Law No. 26505 of July 14, 1995), which required mining concession holders to reach express formal agreements with the owners of the surface rights to the land above their installations;
- f. The Water Resources Law (Law No. 29338 of March 23, 2009), which regulated the water rights and their order of priority, in addition to the discharge, treatment and reuse of waste water;
- g. The Law Granting Right of Consultation to Indigenous or Native Peoples, under International Labor Organization (ILO) Convention 169 (Law No. 29785 of September 6, 2011), which required authorities and investors to conduct prior consultation processes with certain indigenous communities;

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<sup>21</sup> LGM, Art. 9 [Exhibit R-008].

<sup>22</sup> Expert Opinion of Hans Flury, para. 13.

- h. The Archaeological Research Regulations (Supreme Resolution No. 004-2000-ED of January 24, 2000), which established the necessary procedures and studies that must be conducted before beginning any work that could impact archaeological remains;
- i. The Environmental Regulations for Mining Exploration Activities (Supreme Decree No. 038-98-EM of November 25, 1998), which imposed environmental obligations on mining exploration activities;
- j. The Regulation on Citizen Participation via Public Hearings in the Approval of Environmental Impact Assessments (Ministerial Resolution No. 335-96-SG of July 25, 1996), which included detailed procedures on how to conduct the citizen participation process as part of the evaluation of environmental impact studies for mining projects.

21. Thus, as a result of laws passed after the promulgation of the Consolidated Text (TUO) of the General Mining Law, it became clear that the mining concession in and of itself was not sufficient to allow mining exploration and/or exploitation activities to immediately and automatically begin as soon as it was granted. This title, in practice, became merely a transferable exclusive right to engage in mining activity in the area specified in the concession, as provided by Article 127 of the LGM.<sup>23</sup> Until the concessionaire fulfills the other legal obligations and obtains all the additional permits the law requires, it shall only have the right to (i) apply for the remaining authorizations that would allow it to begin exploring for and/or exploiting the resources; (ii) sell its title, and (iii) prevent third parties from acquiring any right to the mineral resources in the concession area.

**B. MECHANISMS BY WHICH FOREIGNERS CAN ACQUIRE MINERAL RIGHTS IN BORDER AREAS**

22. The Peruvian Constitution bars foreigners from acquiring or possessing—in any form, directly or indirectly—mines within 50 kilometers from the borders, unless they obtain an

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<sup>23</sup> LGM, Art. 127 [Exhibit R-008]. “Article 127: Via the title to the concession, the State grants the concessionaire the exclusive right to engage in the activities inherent to the concession, within a duly circumscribed area, in addition to all other rights granted to the concessionaire by this Law, without prejudice to the obligations that correspond to it.”

express declaration of public necessity.<sup>24</sup> Although the Constitution does not state that the declaration of public necessity must occur before the right is acquired, that must be understood as the underlying intent of the constitutional provision, since the penalty for violation is forfeiting the right to the State, as the act was null and void by virtue of the fact that the right was acquired by an ineligible person. The text of Article 71 of the Peruvian Constitution is a near replica of Article 126 of the Constitution of 1979, which was developed by Article 13 of Legislative Decree No. 757.<sup>25</sup> The former barred foreigners from acquiring certain assets within 50 kilometers of the borders, while the latter specified that the authorization to do so must be obtained prior to acquiring said assets. Nothing in the language or the spirit of Article 71 of the current Constitution conflicts with the essence of Article 126 of the Constitution of 1979, and nothing in Article 13 of Legislative Decree No. 757 goes beyond what Article 71 provides. Consequently, it is correct to conclude that the declaration of public necessity that would authorize a foreigner to acquire mineral rights in a border area must occur prior to the act of acquiring them. Similarly, in order for foreigners to be granted mining concessions for border

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<sup>24</sup> Constitution of Peru, Art. 71 [Exhibit R-001]. “Article 71 With regard to property, aliens, whether natural or artificial persons, are in the same situation as Peruvians, and under no circumstances may they invoke diplomatic immunity or protection. However, within a distance of fifty kilometers from the borders, aliens may not acquire or possess, directly or indirectly under any title, mines, land, woods, water, fuel or energy sources, whether it be individually or in partnership, under penalty of losing that so acquired right to the State. This restriction may be waived in case of public necessity expressly determined by an executive decree approved by the Council of Ministers in accordance with the law..”

<sup>25</sup> Law to Encourage Private Investment, Legislative Decree No. 757, November 13, 1991, Art. 13 [Exhibit R-099] “Article 13: Pursuant to the provisions of the final paragraph of Article 126 of the Constitution, private investment, both domestic and foreign, in existing or future productive activities in the country's border areas, are declared to be a public necessity. Consequently, natural persons and legal entities may acquire concessions and rights to minerals, land, forests, waters, fuels, energy sources and other resources necessary for the development of their productive activities within fifty kilometers of the national borders, with the prior authorization granted via supreme decree approved by the Minister serving as President of the Council of Ministers and the Minister of the Corresponding Sector. Said supreme decree may establish conditions to which the acquisition or exploitation shall be subject.

The competent sectoral authorities shall grant concessions and other forms of authorization to exploit natural resources located within fifty kilometer of the national borders to natural persons or legal entities who apply for them, provided they are in compliance with all applicable legal provisions and upon verification that the supreme resolution described in the preceding paragraph has been issued.”

areas, mining regulations—specifically Article 14B of the Mining Procedures Regulation—require an approved declaration of public necessity as a prerequisite for admissibility.

23. Despite the fact that Dr. Flury correctly states that Bear Creek could directly apply for a mining concession for the Santa Ana project area (which would require the areas to be freely available—as in fact they were), Bear Creek states that if it had done so it would have run the risk of alerting the mining community of the existence of a prospective area and attract the interest of competitors.<sup>26</sup> Even if this latter assertion were correct (and I do not doubt that this could be a matter of general concern), in this case Bear Creek had no reason to be worried.

24. We must bear in mind that once a mining concession application has been filed, the requested area is reserved for the applicant until the end of the ordinary titling process. This is expressly provided by Article 120 of the LGM which establishes that the competent authority must cancel any application that entirely covers the same area as a previous application.<sup>27</sup>

25. In any event, Bear Creek's rights to the requested area in the border area would have been protected while the declaration of public necessity was being processed. Moreover, the Mining Proceedings Regulation requires the competent authority to declare inadmissible any mining concession applications for areas previously covered by an expired mining concession application or mining concession, until said areas had been published as claimable; and adds that any such new applications would be shelved and would not even be reusable as the basis for a subsequent application.<sup>28</sup> This means that even if a third party had tried to obtain the mineral

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<sup>26</sup> Claimant's Reply, para. 25; Expert Opinion of Hans Flury, paras. 42, 46-47.

<sup>27</sup> LGM, Art. 120 [Exhibit R-008]. “Article 120: In the event that the existence of applications or mining concessions for the same grid square, or group of squares, is discovered, the Head of the Office of Mining Concessions, within seven days of the filing of the new application, shall cancel the latter or order the new claimant to reduce its requested area to a free square or group of squares.”

<sup>28</sup> Regulation on Mining Proceedings, Supreme Decree No. 018-92-EM, September 7, 1992 (“Regulation on Mining Proceedings”) Art. 14B [Exhibit R-155]. “Article 14B: The following mining concession applications shall be declared inadmissible (...) and definitively shelved without constituting any basis for or right to file any subsequent

rights to the areas Bear Creek has applied for—as Bear Creek feared<sup>29</sup>—any such applications would have been rejected and not even considered any basis for any future application, and Bear Creek's rights would not have been placed at risk (unless Bear Creek itself expressly abandoned them). It is therefore clear that Bear Creek's exclusive right to the areas would have been protected while the declaration of public necessity was being processed.

26. Bear Creek is not disputing the legal viability of directly filing the applications for mining concessions for the available areas, it merely argues that doing so would have been more risky, which has been disproved.<sup>30</sup> Bear Creek indeed could have filed the applications for mining concessions for the available areas of the Santa Ana project, noting that given the fact it is a foreign company and the requested areas are located in a border area, it would have to obtain the declaration of public necessity before the titling process. In my opinion, the argument put forward by Dr. Flury and Bear Creek that the entity in charge of the mining concession titling process would be obligated to declare the application inadmissible seven (7) months after the request for a declaration of public necessity was filed, is not sustainable.<sup>31</sup>

27. Any mining concession applications for available areas in the border area that Bear Creek filed could not have been denied or rejected or declared inadmissible, if Bear Creek reported its foreign status and applied for the declaration of public necessity. The decision would have been up to Bear Creek—and solely at Bear Creek's discretion—if after six months the public necessity had not yet been declared as to whether to continue the process or assume

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application: (...) f. Applications that fail to comply with the provisions of Articles 65 and 68 of the Law.” LGM, Art. 65 [Exhibit R-008]. “Article 65: Areas corresponding to expired, abandoned, null and void, renounced concessions or concession applications, and those that were rejected when filed, may not be applied for until they are published as claimable.”

<sup>29</sup> Claimant's Reply, paras. 24-25.

<sup>30</sup> Claimant's Reply, para. 25.

<sup>31</sup> Expert Opinion of Hans Flury, paras. 42-47.

that the request had been denied. Article 14B of the Mining Procedures Regulation (added to the Regulation by Supreme Decree No. 084-2007-EM of December 20, 2007), provides that applications for mining concessions in border areas filed by foreigners shall be declared inadmissible under the following two circumstances: (i) in the event the request for declaration of public necessity has been expressly denied; or (ii) no approval has been received six months after a request for declaration of public necessity was filed, and the applicant invokes negative administrative silence and is granted the corresponding declaration of denial.<sup>32</sup> The language of Article 14B of the Mining Procedures Regulation on this point is identical to that of the former Article 14 of the regulation, as approved by Supreme Decree No. 044-2001-EM of July 20, 2001.<sup>33</sup> In other words, in the second case, in order for a mining concession application to be declared inadmissible, it is not sufficient for six months to have elapsed since the request for declaration of public necessity was filed. The applicant itself must also voluntarily and expressly elect to have its application denied.

28. This was confirmed by the resolution adopted on September 5, 2003 by the General Directorate of Mining Concessions—which was the entity in charge of titling mining concessions, issued in response to Report No. 6788-2003-INACC-DGCM-UL of August 21,

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<sup>32</sup> Regulation on Mining Proceedings, Art. 14B [Exhibit R-155]. “Article 14B: The following mining concession applications shall be declared inadmissible (...) and definitively shelved without constituting any basis for or right to file any subsequent application: (...) g. Applications filed by foreigners for border areas whose requests have been expressly denied, or those filed by applicants who, six (6) months after filing said requests, invoke negative administrative silence and consider their request denied and settled.”

<sup>33</sup> Supreme Decree No. 044-2001-EM, June 21, 2001, Art. 1 [Exhibit R-278]. “Article 1: Replace the text of the third paragraph of Article 14 of the Mining Procedures Regulation, approved by Supreme Decree No. 018-92-EM, with the following: “Mining concession applications in which the grid square or group of grid squares have been incorrectly identified due to an error in the UTM coordinates, those in which one side of a square does not adjoin with the others in the group of squares requested, or those that exceed the maximum area established by the Law, areas that are applied for without complying with Articles 65 and 68 of the Law, those applied for by foreigners in border areas whose requests are expressly denied or those filed by applicants who, six (6) months after filing said requests, invoke negative administrative silence and consider their request denied and settled, and those applications for mining concessions filed for Areas where Mining Claims are Not Admissible, shall not be entered into the grid system or will be removed from it, as applicable, and shall be declared inadmissible by the Office of Mining Concessions and shelved.”

2003, when it states that “the processing of a mining concession application will end with a declaration of inadmissibility when the area requested is within 50 kilometers of the border and the request is expressly denied, or the applicant invokes negative administrative silence.”<sup>34</sup> In this case, it is at the private party's discretion—in other words Bear Creek's—to decide whether or not to invoke negative administrative silence or keep its application open and continue to await the decision of the Council of Ministers.

29. Clearly, had Bear Creek followed the procedure provided to it by the mining law for filing applications in the border area, it would have been able without risking anything to obtain the title to the concessions for the Santa Ana project directly and without resorting to subterfuge, after the declaration of public necessity was obtained. First of all, as I have explained, it was entirely Bear Creek's decision as to whether or not to consider its application to have been denied. It is not an obligation on the part of the administration, but rather left to the private party's discretion, to consider its request to have been denied, in the application of an express rule. A request for a declaration of public necessity could remain open for an undefined period of time in the event the private party elects to do nothing, in other words, elects not to invoke negative administrative silence. Neither the public entity (unless it expressly denies the request for declaration of public necessity) or any third party would be able to do anything to affect the application for the mining concession or Bear Creek's exclusive rights to the requested area. And secondly, because keeping the mining concession application titling process hanging is not something the administration would voluntarily do, but is rather something that arises from

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<sup>34</sup> Report No. 6788-2003-INACC-DGCM-UL, August 21, 2003 [Exhibit R-279].

the Mining Proceedings Regulation;<sup>35</sup> for which reason the law would have to be changed in order for the authority to do otherwise.

30. Bear Creek implies that the process was vulnerable to being changed so as to require the authority to declare the titling process inadmissible.<sup>36</sup> This is baseless speculation. Article 14B was added to the Mining Proceedings Regulation in late 2007 containing the same wording with regard to the grounds for inadmissibility that had existed since July 20, 2001, and there was no reason to believe that this would very soon change. Moreover, from June of 2001 to date, the wording of this rule had not changed in any way.

31. Moreover, even if we were to admit that the expiration of the deadline would require the authority to issue a decision—either on its own initiative or at the request of a third party—the truth is that had this happened, the private party could have filed a motion for reconsideration of the inadmissibility, which would extend the deadline substantially. The Mining Council usually rules on motions for reconsideration within several months, and during that time the inadmissibility decision is not final and thus the area covered by the concession application remains covered by the applicant's application and is not free for the claiming.

32. The above paragraphs are applicable to cases in which the area of interest are available, either because (i) there is no titled mining concession or a mining concession application being processed, or (ii) it is not in an area that has been designated as an Areas where Mining Claims or Applications for Concession are Not Admissible, or (iii) there are no expired mineral rights that have not yet been published as freely available. The case of the Santa Ana project met

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<sup>35</sup> Regulation on Mining Proceedings, Art. 14B [Exhibit R-155]. “Article 14B: The following mining concession applications shall be declared inadmissible (...) and definitively shelved without constituting any basis for or right to file any subsequent application: (...) g. Applications filed by foreigners for border areas whose requests have been expressly denied, or those filed by applicants who, six (6) months after filing said requests, invoke negative administrative silence and consider their request denied and settled.

<sup>36</sup> Claimant's Reply, para. 25.

the first of the criteria listed above, and there have been cases in which mining concessions have been titled to foreigners in border areas in the same situation, under this procedural mechanism.

33. Bear Creek argues that option agreements are a common instrument used to secure the title to concession areas near the border.<sup>37</sup> For this to be the case, it would have to involve an area that was already titled, and a third party. When an area of interest is not freely available—which was not the case in the Santa Ana project—foreigners have certain contractual mechanisms available to them through which they can gain access to mineral rights in border areas. For example, they can sign a binding commitment to contract that would require the holder of the mineral rights to sign an agreement to convey the mineral rights when the declaration of public necessity is obtained, or a mining option agreement conditional upon constitutional requirements being met. In such a scenario, Bear Creek's statement would be correct, since an option agreement would grant it a right to an area that had already been granted by the State. It could be debatable whether the mining option agreement signed by Bear Creek and Jenny Karina Villavicencio Gardini was appropriate given that the areas were freely available before Jenny Karina Villavicencio Gardini submitted concession applications for them.

34. But this is not the same situation as I see in this case, because the area near the border was not occupied, but rather was freely available until Jenny Karina Villavicencio, as instructed by Bear Creek, applied for and was granted the concessions. In this situation, an option agreement should not have been resorted to since there was no preexisting application or concession for the area. Bearing in mind that Bear Creek acknowledges that it prospected the area and induced Jenny Karina Villavicencio Gardini to apply for it on behalf of Bear Creek and then sign an option agreement with her, in my opinion a contractual mechanism was not the proper

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<sup>37</sup> Claimant's Reply, para. 28.

mechanism, given that there were regulated, direct, safe and proven mechanisms available to foreigners to gain access to available border areas.

35. Neither is Bear Creek's statement correct that the recording of the option agreement confirmed the constitutionality of the rights contained in said instrument.<sup>38</sup> As I mentioned in my Report,<sup>39</sup> Article 2011 of the Civil Code enshrines the principle of legality that is applicable to public records law, under which recorders assess the legality of the documents to be recorded, the capacity of the grantors and the validity of the transaction, based on the contents of the documents themselves, any previously recorded related documents, and other public record entries. Thus, the validity of the transaction assessed by the recorder must be subject to what can be determined based on the instrument presented for recording, and any previously recorded related documents both in the registry entry on which the transaction must be noted, and any other related preexisting records. In other words, it is a comprehensive evaluation of whether the instruments presented for recording (and related background documents) are eligible for recording, and not a complete evaluation of the transaction and everything that has or has not been submitted for determination of validity by the registry recorder. Thus, it cannot be asserted that the recording of an option agreement constituted confirmation of its validity under Peruvian law, as argued in paragraph 33 of the Claimant's Memorial in this case.<sup>40</sup>

36. The Registry Tribunal of the National Superintendence of Public Registries (“SUNARP”) has established that “the determination of eligibility for recording must exclusively address the documents presented for recording the transaction, and recorders are not responsible for conducting any investigations of a personal nature or that are outside the scope of the

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<sup>38</sup> Claimant's Reply, para. 23.

<sup>39</sup> First Report by Luis Rodríguez-Mariátegui Canny, October 6, 2015 (“First Rodríguez Report”) paras. 18-24 [Exhibit REX-003].

<sup>40</sup> Claimant's Memorial, May 29, 2015 (“Claimant's Memorial”), para. 33.

registry.”<sup>41</sup> As I quoted in my first Report, Álvaro Delgado Scheelje states that registration “gives rise to a relative presumption of accuracy in the sense that the content of the registrations correspond to reality outside of the scope of the registry.”<sup>42</sup> SUNARP had no authority to investigate the factual circumstances surrounding the option agreement it was evaluating for recording, such as for example any extra-contractual relationship between Bear Creek and Jenny Karina Villavicencio Gardini that might be relevant when analyzing the legality and constitutionality of the option agreement. SUNARP had the obligation to determine the validity of the title based solely on the document presented by the applicant and any related preexisting recorded instruments. In other words, it was not authorized to exceed the scope of the public registry.

37. As I asserted in my first report, the Registry Tribunal lacks the power to create substantive rights.<sup>43</sup> Consequently, the validity of a transaction, or lack thereof, is determined based on whether or not it meets the particular validity requirements established for it; the registry neither grants nor confirms its validity. Article 46 of the General Regulation on Public Registries specifically provides that “registration does not validate transactions that are void or voidable pursuant to rules in force.”<sup>44</sup> For this reason, Luis Diez-Picazo stresses that “registration is not capable of magically rendering valid that which is null and void.”<sup>45</sup> I repeat that the Registry

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<sup>41</sup> Resolution No. 024-98-ORLC/TR, quoted by Luis García García *Principle of Application and Legality*, THE CIVIL CODE WITH COMMENTARIES (excerpts), Volume X, p. 403 [Exhibit R-149].

<sup>42</sup> Delgado Scheelje, Alvaro, *Working Towards the Reform of Civil Code’s Book IX on the Public Registry*, IUS VERITAS JOURNAL, Volume 21, p. 84 [Exhibit R-148].

<sup>43</sup> First Rodríguez Report, paras. 18-19 [Exhibit REX-003].

<sup>44</sup> Unified Text of the General Rules of the Public Registry, Resolution of the National Superintendent of the Public Registry No. 079-2004-SUNARP/SN, March 21, 2005 (“General Regulation on Public Registries”), Art. 46 [Exhibit R-146]. “Article 46: A registry entry necessarily indicates the legal transaction directly or immediately giving rise to the registered right, which must be identified in the corresponding instrument. Registration does not validate transactions that are void or voidable pursuant to rules in force.”

<sup>45</sup> Diez-Picazo, Luis, FOUNDATIONS OF CIVIL PROPERTY LAW, Vol. 3, p. 429 [Exhibit R-150].

Tribunal cannot create rights that could have a defect that could challenge the validity of the recorded transactions.

38. I therefore reiterate the assertion I made in my first Report,<sup>46</sup> in the sense that the recording of the option agreement between Bear Creek and Jenny Karina Villavicencio Gardini on the public record of mining concessions in the Santa Ana project does not imply that said agreement is necessarily valid or that the validity of the agreement has been confirmed by the Registry Tribunal.

39. Lastly, and once again reiterating what I asserted in my first Report, contrary to what Bear Creek argues, the publication in the “El Peruano” Official Gazette of November 7, 2005 of Resolution 193-2005-SUNARP-TR-A which decided Bear Creek's appeal of the registry Comment to the preemptive annotation of its option agreement it had requested, is not binding, nor does it constitute binding precedent for similar cases. This Resolution does not meet any of the requirements under the SUNARP Law or the General Regulation on Public Registries that would have to be met in order for it to be considered binding or constitute binding precedent. In other words, had SUNARP wanted the resolution it published in the “El Peruano” Official Gazette to constitute binding precedent, it would have had to have met all of the following requirements: (i) it must be a decision handed down by the Registry Tribunal sitting en banc, (ii) the Registry Tribunal must have been convened to sit en banc for this specific purpose, (iii) the opinion to be adopted must have been issued in prior Registry Tribunal resolutions, and (iv) it must have been published in the “El Peruano” Official Gazette by resolution of the President of

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<sup>46</sup> First Rodríguez Report, paras. 27-31 [Exhibit REX-003].

the Registry Tribunal.<sup>47</sup> I repeat that none of these four criteria were met in the case of the publication of Resolution 193-2005-SUNARP-TR-A of November 7, 2005.

40. Based on the foregoing, I find no valid basis for Bear Creek's argument that SUNARP accorded validity to the option agreement.<sup>48</sup> The registration merely confirms that the option agreement met the legal requirements for recording on the record of each of the mineral rights, based on the content of the option agreement and previously recorded related instruments. If the option agreement contained defects that rendered it null and void, or violated the Constitution, this would be a matter to be decided by legal or administrative proceedings outside of the scope of the registry.

41. Bear Creek argues that there are precedents known to the Peruvian authorities in which foreigners acquired interests in border areas prior to the declaration of public necessity, using structures similar to the one Bear Creek used.<sup>49</sup> According to the Claimant, the State was aware of the presence of foreigners in these operations, and approved the declarations of public necessity anyway. It questions why these declarations have not yet been contested by the authorities.<sup>50</sup> However, there are certain differences between these cases and the case of Bear Creek's acquisition of the Santa Ana project mining concessions. Most importantly, even if these cases were comparable to Bear Creek, the errors the State would presumably have committed in said cases could not constitute a source of law and would not validate Bear Creek's actions.

42. Bear Creek fails to mention that it was the convergence of two factors that gave rise to the invalidation of the declaration of public necessity issued for the Santa Ana project by

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<sup>47</sup> General Regulation on Public Registries, Art. 148 [Exhibit R-146].

<sup>48</sup> Claimant's Reply, para. 23; Claimant's Memorial, para. 33.

<sup>49</sup> See Claimant's Reply, paras. 44-65.

<sup>50</sup> See Claimant's Reply, para. 46.

the Peruvian authorities for in 2011: a) a constitutional violation; and b) a serious social upheaval situation. Bear Creek fails to mention this second factor in its comparative analysis, and it is not present in any of the other cases it cites.

43. Bear Creek cites four examples: the declarations of public necessity issued via (i) Supreme Decree No. 024-2008-DE;<sup>51</sup> (ii) Supreme Decree No. 021-2003-EM;<sup>52</sup> (iii) Supreme Decree No. 041-94-EM;<sup>53</sup> and (iv) Supreme Decree No. 013-97-EM.<sup>54</sup> None of these examples is entirely comparable to Bear Creek's case.

44. First example: Supreme Decree No. 024-2008-DE, issued on December 27, 2008, granted a declaration of public necessity that authorized the consortium called Xiamen Zijin Tongguan Investment and Development Co. Ltd (“Zijin”) to acquire an interest in 35 concessions in the “Rio Blanco” mining project located in a border area.<sup>55</sup> According to Bear Creek, Zijin allegedly acquired the 35 concessions when it acquired the shares of Monterrico Metals Plc (a Cayman Islands company—“Monterrico”), which controls Minera Majaz S.A. (holder of 8 concessions) and the Mayari S.A.C mining company (holder of 27 concessions).<sup>56</sup> The Claimant argues that Zijin acquired control of Monterrico before obtaining a declaration of public necessity, a fact of which government officials were allegedly fully aware before they issued the supreme decree.<sup>57</sup> This case is not comparable to Bear Creek's.

45. First of all, this case involves the acquisition of concessions that had already been titled to a Peruvian company before Zijin entered the picture. I have no evidence that this

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<sup>51</sup> See Claimant's Reply, paras. 47-53.

<sup>52</sup> See Claimant's Reply, paras. 54-59.

<sup>53</sup> See Claimant's Reply, paras. 60-61.

<sup>54</sup> See Claimant's Reply, paras. 62-64.

<sup>55</sup> See Supreme Decree No. 024-2008-DE, December 27, 2008 [Exhibit C-0204].

<sup>56</sup> See Claimant's Reply, para. 48.

<sup>57</sup> See Claimant's Reply, paras. 49-50.

Peruvian company, when it acquired the mining concessions, was acting as an intermediary to purchase the concessions on behalf of Zijin, as occurred in the case of Bear Creek.

46. Secondly, in describing the facts, Bear Creek leaves out other details regarding Zijin's operations, particularly the fact that these concessions already had a declaration of public necessity granted by Supreme Decree in 2003 for the foreign shareholders of Monterrico that indirectly controlled the mining concessions at that time. According to Zijin's description in its request for a declaration of public necessity, Zijin acquired control of Monterrico (a British company). Monterrico controls Copper Corp Limited (a Cayman Islands company) which in turn controls Rio Blanco Copper Limited (a Cayman Islands company). Rio Banco Copper Limited controls the mining company Minera Majaz S.A (holder of 8 mining concessions).<sup>58</sup> Rio Blanco Copper Limited acquired its interest in Minera Majaz S.A. (the Peruvian company that held mining concessions in a border area) on July 9, 2003, after the operation was authorized by Supreme Decree No. 023-2003-EM, issued on June 26, 2003.<sup>59</sup> In addition, Monterrico acquired control of the mining company Compañía Minera Mayari S.A.C. (holder of 27 mining concessions). The Ministry of Energy and Mines had already issued a declaration of public necessity for 20 of these 27 mining concessions located in border areas in order to allow a foreign company to acquire them (Newmont Peru Limited, Peru Branch)— Supreme Decree No. 022-2003-EM of June 27, 2003.<sup>60</sup> Thus, unlike in Bear Creek's case, in this case the authorization was already in place for foreign shareholders to possess concessions connected to the Río Blanco project.

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<sup>58</sup> See Copy of the file with the administrative procedure which led to Supreme Decree No. 024-2008-DE, p. 005 (Exhibit C-0209).

<sup>59</sup> See Copy of the file with the administrative procedure which led to Supreme Decree No. 024-2008-DE, pp. 005, 068 [Exhibit C-0209]; see also Supreme Decree No. 023-2003-EM, June 26, 2003 [Exhibit R-280].

<sup>60</sup> See Supreme Decree No. 022-2003-EM, June 27, 2003 [Exhibit R-281].

47. Although these previously issued declarations were not applicable to Zijin, they did indicate that the Peruvian State had expressed its interest in allowing said border area to be developed, and as such had declared that the acquisition of said mining concessions by a foreign company was a public necessity, which would mean -in principle- that it had no objection to said development being realized by foreign companies. Contrast this with the case of Bear Creek, in which the State had not granted any approval for the presence of foreigners in that border area.

48. Thirdly, the nature of the operation is not comparable to the Santa Ana project. Zijin acquired the shares of Monterrico via a forced sale,<sup>61</sup> which was not the case in Santa Ana, in which Bear Creek used an intermediary to apply for available areas and later acquire the mining concessions. Moreover, it is my understanding that the purchase of the shares of Monterrico also involved the acquisition of other mining projects in Peru, such as Maramiña, Antayamarca, Pico Machay, etc. that could potentially benefit the country in the future. In conclusion, I do not feel that the Zijin case is comparable to the case of Bear Creek.

49. Second example: Supreme Decree 021-2003-EM issued on June 26, 2003, authorizing IMP Perú SAC (“IMP”) to acquire 7 concessions in the border area. In this case, according to Bear Creek, Mrs. Catalina Tomatis Chiappe (a Peruvian attorney) acquired mining concessions in a border area that she later transferred to IMP (a company controlled by foreigners) before the latter had obtained a declaration of public necessity.<sup>62</sup> According to Bear Creek, it is clear that Mrs. Tomatis acted on behalf of IMP by virtue of an agreement with the company applying for the mineral rights in the border area, and its shareholders.<sup>63</sup>

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<sup>61</sup> See Monterrico Metals Plc Annual Report 2007, p. 1 [Exhibit C-0205].

<sup>62</sup> See Claimant's Reply, para. 55.

<sup>63</sup> See Claimant's Reply, para. 56.

50. However, once again, Bear Creek is assuming that the government officials who approved the declaration of public necessity were familiar with all the details of the relationship and agreements between Mrs. Tomatis and IMP. Based on the documentation furnished by the claimant, it does not seem clear to me that the officials in charge of processing the mining concession application would have known that Mrs. Tomatis was a legal representative of IMP at the time the authorization to acquire the concessions was granted. The documents submitted by the Claimant that I have reviewed do not show that Mrs. Tomatis was necessarily colluding with IMP. This information was not contained in the mining concession application file, and as such I do not consider it to be reasonable to conclude that Ministry of Energy and Mines officials would have had to be aware of it or had reviewed it prior to approving the application, or the declaration of public necessity itself. In addition, I find no evidence that shows there was an employer-employee relationship between Mrs. Tomatis and IMP such as Bear Creek acknowledges existed between it and Jenny Karina Villavicencio Gardini. As such, IMP's case is also not comparable to Bear Creek's case.

51. Regarding the IMP concessions, it is noteworthy that years later, all of them were forfeited due to failure to pay mining concession fees.<sup>64</sup> If the State wished to take any action against these concessions it would no longer be able to do so.

52. Third example: Supreme Decree 041-94-EM, of October 6, 1994, authorized Colorobbia Holding SPA (a foreign company—"Colorobbia") to acquire shares in the Peruvian mining company Compañía Minera Ubinas S.A., which held 3 mining concessions in a border

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<sup>64</sup> See INGEMET Unique File for mining concession "Don José" No. 01-01751-00 [Exhibit C-0212]; INGEMET Unique Files for mining concessions "Don Miguel Alberto" No. 01-00059-01 [Exhibit C-0216]; Presidential Resolution Declaring Mining Concession Expired, Presidential Resolution No. 132-2014-INGEMME/PCD, October 22, 2014, p. 17 [Exhibit R-282].

area.<sup>65</sup> According to Bear Creek, the Colorobbia transaction was similar to Bear Creeks, in that a shareholder and director of CMU, Hugo Forno, acquired the mining concessions from their former holder in December of 1990. According to Bear Creek, it is likely that Mr. Forno was acting on behalf of CMU, to which he transferred the concessions, after Colorobbia obtained the declaration of public necessity.<sup>66</sup>

53. This case is also not comparable to Bear Creek's. First, Mr. Forno acquired concessions that were already titled, a relevant fact that is different from the case of Bear Creek, who filed an application for a mining concession for freely available areas through an intermediary who was one of its employees. There was no possibility for Mr. Forno to apply for concessions for the border areas he was interested in, but CMU could have acquired the concessions directly, by means of a valid contractual mechanism with the previous holder. Secondly, based on the information I have reviewed, Bear Creek has not shown that there was any agreement between CMU and Mr. Forno for the concessions to be acquired on behalf of the latter. In Bear Creek's case, the Claimant itself has admitted that it instructed Jenny Karina Villavicencio Gardini to apply for the concessions in the border area, to mitigate the alleged risk of losing the concessions in the event they were not granted to it. Thirdly, I note that Bear Creek has also not established that the State had any knowledge of the alleged indirect acquisition of the concessions through Mr. Forno. The documentation submitted by Bear Creek as alleged evidence of the State's knowledge would not have been submitted as part of the process of obtaining a declaration of public necessity.<sup>67</sup> As such, this information would not necessarily have to have been evaluated by the competent authorities.

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<sup>65</sup> See Supreme Decree No. 041-94-EM, October 6, 1994 [Exhibit C-0217].

<sup>66</sup> See Claimant's Reply, para. 60.

<sup>67</sup> See Claimant's Reply, para. 60.

54. Lastly, in relation to this case it is noteworthy that some time later, these concessions were also forfeited due to failure to pay the corresponding mining concession fees,<sup>68</sup> and as such at this point it is not possible to take any action on them.

55. Fourth example: Supreme Decree 013-97-EM of July 16, 1997 which authorized Rio Blanco Exploration LLC (“Rio Blanco”) to acquire the shares of the mining company Empresa Minera Coripacha S.A., (“EMC”) which held 18 concessions in a border area.<sup>69</sup> Between 1993 and 1995, EMC (whose shareholders included attorneys from the law firm of Rubio, Leguía & Normand (“Rubio Law Firm”)) acquired the mining concessions.<sup>70</sup> According to Bear Creek, as of 1994, four foreigners, who allegedly had ties to the foreign company Rio Blanco, appeared as representatives of EMC.<sup>71</sup> Bear Creek simply concludes—in my opinion, hastily—that the attorneys for the law firm drafted the applications for the mining concessions, given that they had ties to Rio Blanco.<sup>72</sup>

56. The documentation submitted by Bear Creek is, however, insufficient basis for concluding with any certainty that: (i) the attorneys with the Rubio Law Firm had a prior agreement with Rio Blanco to acquire the concessions; and (ii) State officials were fully aware of the alleged relationship between Rio Blanco and the attorneys with the Rubio Law Firm.<sup>73</sup> Once again, there is insufficient information to compare this case with that of Bear Creek.

57. In conclusion, the examples presented by Bear Creek, in which foreigners allegedly used structures similar to that used by Bear Creek and were not penalized by the State,

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<sup>68</sup> See Mojica 1 No. 01-02296, p. 62 [Exhibit C-0224].

<sup>69</sup> See Decree Regulating Law No. 26737, Supreme Decree No. 013-97-EM, July 17, 1997 [Exhibit R-283].

<sup>70</sup> See Claimant's Reply, paras. 62-63.

<sup>71</sup> See Claimant's Reply, paras. 62-63.

<sup>72</sup> See Claimant's Reply, paras. 62-63.

<sup>73</sup> See Claimant's Reply, para. 64; Public Registry File No. 03026941 [Exhibit C-0229].

do not lead us to the conclusion that that Bear Creek acted appropriately. As I have explained, none of these examples is comparable to Bear Creek's situation in relation to the Santa Ana project. In addition, the fact that the State failed to impose any penalties in said cases, in no way validates Bear Creek's actions.

58. In contrast to the examples presented by Bear Creek, there are also other cases in which foreign companies acted appropriately. In other words, they did not acquire mining concessions in border areas indirectly before obtaining the declaration of public necessity, and acquired the concessions (directly or indirectly) only after they had the authorization required under Article 71 of the Constitution. These cases are, moreover, comparable to the Santa Ana project concessions, because they involve areas that had not been applied for or titled. In these cases, the foreigners acted appropriately, unlike Bear Creek, and directly filed their applications for mining concessions. Due to the fact that they required a declaration of public necessity, the INGEMMET (formerly known as the INACC-National Institute of Concessions and Mining Cadaster) suspended the titling process and reserved the concessions for the foreign applicants while they obtained the declaration of public necessity. Once the INACC (or the INGEMMET in certain cases) learned that the supreme decrees declaring public necessity had been issued, it proceeded to complete the processing of the mining concession applications and granted the title to the mining concessions to the applicant companies. These examples show that the risk Bear Creek was afraid of was nonexistent, and that there are many cases in circumstances similar to that of Bear Creek in which the foreigners did not feel the need to act via an intermediary to follow the ordinary titling procedure for mining concessions in border areas. It is worth noting that in some of the examples I discuss below, the applications for mining concessions were filed before the Mining Regulation was modified (by Supreme Decree Nos. 044-2001-EM and 084-

2007-EM) which included the provision that expressly allows foreigners to file applications for mining concessions in areas that have not been applied for or titled in border areas, and provided that such applications would be put on hold pending the issuance of the declaration of public necessity.<sup>74</sup>

59. The following table shows seven cases in which foreign companies acted correctly:

| COMPANY  | CONCESSION    | REQUEST CONCESSION | REQUEST S.D. | ISSUANCE S.D. | MINING CONCESSION |
|--|---------------|--------------------|--------------|---------------|-------------------|
| Compañía Minera LJB Normandy S.A<br><br>(D.S. No. 017-2002-EM <sup>75</sup> )                                | Laumache 1    | 30-Jan-01          | 26-Sep-01    | 3-May-02      | 10-Jul-02         |
|  | Laumache 2    | 30-Jan-01          | 26-Sep-01    | 3-May-02      | 10-Jul-02         |
|  | Laumache 3    | 29-May-01          | 26-Sep-01    | 3-May-02      | 10-Jul-02         |
|  | Laumache 4    | 29-May-01          | 26-Sep-01    | 3-May-02      | 5-Jul-02          |
|  | Laumache 5    | 29-May-01          | 26-Sep-01    | 3-May-02      | 10-Jul-02         |
|  | Laumache 6    | 29-May-01          | 26-Sep-01    | 3-May-02      | 12-Apr-04         |
|  | Laumache 7    | 29-May-01          | 26-Sep-01    | 3-May-02      | 12-Apr-04         |
| Newmont Perú Ltd. Suc. Perú<br><br>(D.S. No. 014-2005-EM <sup>76</sup> / D.S No. 040-2007-EM <sup>77</sup> ) | Ayahuanca 417 | 5-May-03           | 18-Aug-03    | 22-Apr-05     | 15-Jul-05         |
|  | Ayahuanca 418 | 5-May-03           | 18-Aug-03    | 22-Apr-05     | 28-Jun-05         |
|  | Ayahuanca 419 | 5-May-03           | 18-Aug-03    | 22-Apr-05     | 18-Jul-05         |
|  | Ayahuanca 420 | 5-May-03           | 18-Aug-03    | 22-Apr-05     | 12-Jul-05         |
|  | Ayahuanca 478 | 3-Jan-06           | 02-Mar-06    | 19-Jul-07     | 7-Mar-08          |
|  | Ayahuanca 479 | 3-Jan-06           | 02-Mar-06    | 19-Jul-07     | 7-Mar-08          |
|  | Ayahuanca 480 | 3-Jan-06           | 02-Mar-06    | 19-Jul-07     | 12-May-08         |
| Newcrest Resources Inc. -  | Quilavira 1   | 29-Sep-06          | 15-Nov-06    | 14-Jun-08     | 20-Oct-08         |
|  | Quilavira 2   | 29-Sep-06          | 15-Nov-06    | 14-Jun-08     | 19-Nov-08         |

<sup>74</sup> See Supreme Decree No. 044-2001-EM, July 21, 2001 [Exhibit R-278]; Supreme Decree No. 084-2007-EM, of December 19, 2007 [Exhibit R-284].

<sup>75</sup> See Laumache 1 Mining Title File (Excerpts) [Exhibit R-241]; Laumache 2 Mining Title File (Excerpts) [Exhibit R-242]; Laumache 3 Mining Title File (Excerpts) (extracts) [Exhibit R-243]; Laumache 4 Mining Title File (Excerpts) [Exhibit R-244]; Laumache 5 Mining Title File (Excerpts) [Exhibit R-245]; Laumache 6 Mining Title File (Excerpts) [Exhibit R-246]; Laumache 7 Mining Title File (Excerpts) [Exhibit R-247].

<sup>76</sup> See Ayahuaca 417 Mining Title File (Excerpts) [Exhibit R-248]; See Ayahuaca 418 Mining Title File (Excerpts) [Exhibit R-249]; See Ayahuaca 419 Mining Title File (Excerpts) [Exhibit R-250]; See Ayahuaca 420 Mining Title File (Excerpts) [Exhibit R-251].

<sup>77</sup> See Ayahuaca 478 Mining Title File (Excerpts) [Exhibit R-252]; See Ayahuaca 479 Mining Title File (Excerpts) [Exhibit R-253]; See Ayahuaca 480 Mining Title File (Excerpts) [Exhibit R-254]; See Ayahuaca 481 Mining Title File (Excerpts) [Exhibit R-255].

|   |             |           |           |           |                   |
|---|-------------|-----------|-----------|-----------|-------------------|
| Suc Perú<br>(D.S. No. 032-2008-EM <sup>78</sup> )   | Quilavira 3 | 29-Sep-06 | 15-Nov-06 | 14-Jun-08 | 20-Oct-08         |
|   | Quilavira 4 | 12-Dec-06 | 15-Nov-06 | 14-Jun-08 | 19-Nov-08         |
|   | Quilavira 5 | 12-Dec-06 | 15-Nov-06 | 14-Jun-08 | 18-Dec-08         |
|   | Quilavira 6 | 12-Dec-06 | 15-Nov-06 | 14-Jun-08 | 16-Mar-09         |
| Minera Goldfields<br>Perú S.A.<br>(D.S.No. 012-2009-EM <sup>79</sup> )                    | Jaruma 1    | 27-May-08 | 07-Jul-08 | 13-Feb-09 | 17-Aug-09         |
|   | Jaruma 2    | 27-May-08 | 07-Jul-08 | 13-Feb-09 | 11-Jan-11         |
|   | Jaruma 3    | 27-May-08 | 07-Jul-08 | 13-Feb-09 | N/A <sup>80</sup> |
|   | Jaruma 4    | 27-May-08 | 07-Jul-08 | 13-Feb-09 | N/A <sup>81</sup> |
|   | Jaruma 5    | 19-Jun-08 | 07-Jul-08 | 13-Feb-09 | N/A <sup>82</sup> |
| Energy Resources<br>& Electrical<br>Power S.A.C.<br>(D.S. No. 085-2009-EM <sup>83</sup> ) | Laksmi VI   | 24-Apr-09 | 16-Jul-09 | 4-Dec-09  | 18-Jan-10         |
| Solex del Perú<br>S.A.C.<br>(D.S. No. 063-2008-EM <sup>84</sup> )                         | Angostura   | 17-May-06 | 23-Mar-07 | 25-Dec-08 | 16-Mar-11         |
|   | Pucará      | 17-May-06 | 23-Mar-07 | 25-Dec-08 | 16-Oct-09         |

<sup>78</sup> See Quilavira 1 Mining Title File (Excerpts) [Exhibit R-256]; Quilavira 2 Mining Title File (Excerpts) [Exhibit R-257]; Quilavira 3 Mining Title File (Excerpts) [Exhibit R-258]; Quilavira 4 Mining Title File (Excerpts) [Exhibit R-259]; Quilavira 5 Mining Title File (Excerpts) [Exhibit R-260]; Quilavira 6 Mining Title File (Excerpts) [Exhibit R-261].

<sup>79</sup> See Jaruma 1 Mining Title File (Excerpts) [Exhibit R-262]; Jaruma 2 Mining Title File (Excerpts) [Exhibit R-263]; Jaruma 3 Mining Title File (Excerpts) [Exhibit R-264]; Jaruma 4 Mining Title File (Excerpts) [Exhibit R-265]; Jaruma 5 Mining Title File (Excerpts) [Exhibit R-266].

<sup>80</sup> The mining title for the Jaruma 3 concession was not granted as it was located in protected areas. See Jaruma 3 Mining Title File (Excerpts) [Exhibit R-264].

<sup>81</sup> The mining title for the Jaruma 4 concession was not granted as it was located in protected areas. See Jaruma 4 Mining Title File (Excerpts) [Exhibit R-265].

<sup>82</sup> The mining title for the Jaruma 5 concession was not granted as it was located in protected areas. See Jaruma 5 Mining Title File (Excerpts) [Exhibit R-266].

<sup>83</sup> See Laksmi VI Mining Title File (Excerpts) [Exhibit R-267].

<sup>84</sup> See Angostura Mining Title File (Excerpts) [Exhibit R-268]; See Pucará Mining Title File (Excerpts) [Exhibit R-269].

|  |              |           |           |           |           |
|--|--------------|-----------|-----------|-----------|-----------|
| Empresa Minera<br>Los Quenuales<br>S.A.<br><br>(D.S. No. 013-<br>2009-EM <sup>85</sup> ) | Yauliyacu 42 | 29-Aug-07 | 12-Nov-07 | 13-Feb-09 | 25-Feb-11 |
|--|--------------|-----------|-----------|-----------|-----------|

60. As the table shows, in all these cases, the foreign companies first filed the applications for mining concessions, and then requested the required declaration of public necessity. After the declaration of public necessity was issued, the process of obtaining the mining titles resumed. In some of these cases, the declaration of public necessity was published nearly two years after the request was filed, and long after the application for the mining concession was submitted. However, despite this long waiting period, the applicant maintained its priority with regard to the area requested-- no third party interfered with its rights--and the company was able to acquire the concessions in its areas of interest in a legal and transparent way. Thus, it is clear that the alleged risk Bear Creek wished to avoid is baseless. Bear Creek ought to have filed applications for mining concessions for the Santa Ana project directly, without making use of an intermediary in an attempt to get around Article 71 of the Constitution.

**III. THE MANDATORY REQUIREMENT OF HAVING AN ENVIRONMENTAL CERTIFICATION AND OBTAINING CERTAIN OTHER PERMITS AND RIGHTS BEFORE INITIATING ANY MINING ACTIVITY**

**A. THE DISCRETIONARY POWER OF THE AUTHORITIES DURING THE PERMIT APPLICATION EVALUATION PHASE**

61. In reference to my Report, in paragraph 92 of his Report, Dr. Flury mentions that all the permits I discuss involve formal procedures with detailed requirements, and that provided all the requirements are met, the permits should necessarily be granted. Dr. Flury misinterprets my assertion.

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<sup>85</sup> See Yauliyacu 42 Mining Title File (Excerpts) [Exhibit R-270].

62. Naturally, Peruvian law is designed to allow private citizens some degree of predictability with regard to the evaluation and approval of their transactions, and the authorities are not allowed to impose more requirements than the law requires. However, this must basically be understood to mean that the authorities cannot request the submission of documents that are not required by the law or regulations, and they must reasonably adhere to established time frames at each stage of proceedings. This conclusion cannot be extended to the evaluation of applications in which the opinion of an evaluator necessarily plays a role, with the subjectivity this involves. Thus, strict compliance with all the formal requirements for admissibility of each application or merely ensuring that studies contain all the information requested in the applicable terms of reference, is not sufficient. The government's duty goes beyond this, and it is required to evaluate and assess the substantive compliance of each application—based on the rules of good faith and reasonability—and as such it cannot be asserted that there is no margin for subjectivity and professional opinion.

63. By way of example, for the approval of Environmental Impact Assessments, the General Law on the Environment requires that they contain “a description of the proposed activity and the foreseeable direct or indirect effects of said activity on the physical and social environment, over the short and long term, and a technical evaluation of said effects. They must include the steps necessary to avoid or reduce any damage to tolerable levels...”<sup>86</sup> Clearly, the law allows for a wide margin of subjectivity and opinion on the part of both the consultants in charge of drafting the assessment and the government officials in charge of evaluating it. The

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<sup>86</sup> General Law on the Environment, Law No. 28611, October 13, 2005 (“General Law on the Environment”), Art. 25 [Exhibit R-285]. “Article 25: On Environmental Impact Assessments: Environmental Impact Assessments - EIA, are environmental management tools that contain a description of the proposed activity and the foreseeable direct or indirect effects of said activity on the physical and social environment, over the short and long term, and a technical evaluation of said effects. They must include the steps necessary to avoid or reduce any damage to tolerable levels, and shall include a brief summary of the assessment for publication purposes. The mining law sets for the other content requirements for EIA.”

criteria for the government are especially rigid, since Peruvian environmental law is guided, among other things, by the principles of prevention and precaution. These principles not only require that priority be given to the prevention of any negative impact, but even require the consideration of measures that could be taken against potential impacts even when there is no absolute certainty that they will occur. Consequently, it cannot be asserted, as Bear Creek does, that they had the certainty that the EIA would be approved; the MINEM did legally have a margin of discretion in evaluating the EIA for the Santa Ana project.

64. Bear Creek questions how there would be any margin for discretion in relation to a mining plan, since it is a technical instrument in relation to which there are defined parameters for government officials' decisions.<sup>87</sup> I am not attempting to question the particular merits of any mining plan Bear Creek could have prepared for Santa Ana. But I am in a position to state that, as is the case with any mining plan, the authority would not merely have verified that the document met the requirement of including all the parameters listed in the annex to the corresponding regulation. On the contrary, it would have to consider the potential risks of each of the operating processes based on its own criteria, as required by Article 34 of the Mining Occupational Health and Safety Regulations and Other Complementary Measures.<sup>88</sup> The same level of discretion applies for the necessary water rights, for which the National Water Authority (ANA) must decide which uses take priority in the event of restrictions at the source, and for Archeological matters, in which the Ministry of Culture must determine whether the

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<sup>87</sup> Claimant's Reply, para. 171.

<sup>88</sup> Regulation on the Security and Occupational Health and Other Complementary Measures on Mining Activities, Supreme Decree No. 055-2010-EM, August 21, 2010 ("Mining Health and Safety Regulation"), Art. 34 [Exhibit R-156]. "Article 34: The mining plan must take into account the potential risks involved in each of the operating processes, including drilling, blasting, loading, transporting, crushing, transport via conveyor belt, road maintenance, etc. The mining plan must be updated annually in accordance with the minimum parameters set forth in Annex No. 16 to these regulations (...)."

Archeological potential of the area has been sufficiently determined to warrant the issuance of a Certificate of Non-existence of Archeological Remains (CIRA).

**B. EVALUATION OF ENVIRONMENTAL ASSESSMENTS FOR THE EXPLORATION PHASE**

65. As I outlined in my first Report, Bear Creek acquired the mineral rights on December 3, 2007 and according to the Environmental Impact Assessment, it initiated its exploratory activity in 2007. In its Memorial, Bear Creek mentioned that by that time it had completed its preliminary exploration and since the results of the drilling had been promising, as of that time it intensified its exploratory efforts until June 17, 2010.<sup>89</sup> On June 9, 2006, Jenny Karina Villavicencio Gardini requested the approval of an Affidavit for the exploration of the Santa Ana project in the Karina 9A concession, which was granted via D.R. 256-2006-MEM/AAM of July 11, 2006<sup>90</sup> (subsequently modified and expanded on December 11, 2006 via D.R. 489-2006-MEM/AAM).<sup>91</sup> Later, on January 30, 2007, Jenny Karina Villavicencio Gardini filed a request for approval of an Environmental Assessment for 20 diamond core drill holes on 20 platforms in the Karina 9A mining concession, with an area to be disturbed of 913.79 square meters, which was approved by D.R. 269-2007-MEM/AAM of September 4, 2007 for a period of 7 months as of receipt of notice of the authority's resolution.<sup>92</sup> On April 3, 2008, Bear Creek -as the new holder of the Santa Ana Project mining concessions—requested the modification of the Environmental Assessment that had been approved for Jenny Karina Villavicencio Gardini, to include explorations in the Karina 1 mining concession, increase the number of drilling platforms by 80 (for a total of 100 platforms) within an area measuring 3,423.15 square meters,

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<sup>89</sup> Claimant's Memorial, para. 44.

<sup>90</sup> Directorial Resolution No. 256-2006-MEM/AAM, July 11, 2006, [Exhibit R-034].

<sup>91</sup> Directorial Resolution No. 489-2006-MEM/AAM, December 11, 2006 [Exhibit R-174].

<sup>92</sup> Directorial Resolution No. 269-2007-MEM/AAM, September 4, 2007 [Exhibit R-035].

which was approved for a period of 10 months as of receipt of notice of D.R. 216-2008-MEM/AAM of September 5, 2008.<sup>93</sup> Lastly, Bear Creek requested two additional modifications to the Environmental Assessment, on March 13, 2009 (for 12 months) and on March 16, 2010 (for 8 months) to expand the number of platforms by 140 and 115, respectively (for a total of 350 platforms), which were approved by D.R. 310-2009-MEM/AAM of October 6, 2009<sup>94</sup> and D.R. 280-2010-MEM/AAM of September 8, 2010.<sup>95</sup> The latter two modifications were processed in accordance with the regulations as modified on April 1, 2008.<sup>96</sup>

66. The explorations carried out by Jenny Karina Villavicencio Gardini and the first exploration carried out by Bear Creek were governed by the parameters set forth in the 1998 Exploration Regulations (modified by S.D. 014-2007-EM).<sup>97</sup> Under these Regulations, exploration activities that result in dumping, that require the disposal of waste, that have the potential to damage the environment in the area, must have the prior authorization of the competent environmental authority. To obtain said approval, applicants must submit an affidavit certifying that the number of drilling platforms to be built will not exceed 20, and the area impacted will not exceed 10 hectares. In the event any of these limits are exceeded (or tunnels longer than 50 meters are built), an Environmental Assessment would have to be submitted instead of an Affidavit.<sup>98</sup> Environmental Assessments would need to be published so that

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<sup>93</sup> Directorial Resolution No. 216-2008-MEM/AAM, September 5, 2008 [Exhibit R-036].

<sup>94</sup> Directorial Resolution No. 301-2009-MEM/AAM, October 6, 2009 [Exhibit R-037].

<sup>95</sup> Directorial Resolution 280-2010-MEM/AAM, September 8, 2010 [Exhibit R-038].

<sup>96</sup> Regulation on the Environmental Aspects of Mining Exploration, Supreme Decree No. 038-98-EM, November 25, 1998 (“1998 Exploration Regulation”) [Exhibit R-151].

<sup>97</sup> 1998 Exploration Regulation, Art. 4 [Exhibit R-151]. “Article 4: In order to qualify and approve exploration projects, the projects are divided into categories, which are defined according to the intensity of the activity and the area directly affected by their execution. (...)”

<sup>98</sup> 1998 Exploration Regulation, Arts. 4-6 (as amended by Article 1 of Supreme Decree No. 014-2007-EM, published on March 10, 2007) [Exhibit R-151]. “Article 4: In order to qualify and approve exploration projects, the projects are divided into categories, which are defined according to the intensity of the activity and the area directly

interested parties could comment. In all cases, the prior agreement of the owners of the surface rights would be required. As of April 1, 2008, the 1998 Exploration Regulations were modified by S.D. 020-2008-EM.<sup>99</sup> Maintaining the same parameters, exploration projects that formerly required an Affidavit would now be required to submit an Environmental Impact Statement for approval, and those that formerly required an Environmental Assessment would now be required to submit a Semi-Detailed Environmental Impact Assessment.

67. The foregoing shows that Bear Creek conducted at least two exploration campaigns: one beginning in December of 2007, and the other that ended in June, 2010. It began these explorations in the name of Jenny Karina Villavicencio Gardini in 2006, and when Bear Creek became the holder of the concessions, it took her place in the exploration authorization procedures as of April 2008.

68. All of the foregoing leads me to believe that the initial exploration work at the Santa Ana project was conducted by Bear Creek directly, and that Jenny Karina Villavicencio

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affected by their execution: Category A: Mineral exploration activities that slightly alter the surface, geological and geophysical studies, topographic surveys, and the collection of small amounts of surface rock and mineral samples using instruments or equipment that can be transported over the surface without causing greater changes than are generally caused by ordinary use by persons not related to exploration. The exploration activities covered by this category do not require authorization from the Ministry of Energy and Mines. Category B: Exploration activities that result in dumping, that require the disposal of waste, that could damage the environment in the area, and where the disturbed area is an area in which the number of drilling platforms to be built, access between them, and auxiliary installations do not exceed 20, provided it does not exceed a total of 10 hectares. This includes exploration activities in which tunnels measuring less than 50 meters in length are built. The file submitted by the concessionaire of the mining activity must be an affidavit and will be governed by Article 5 of these Regulations. It will be submitted to the automatic approval procedure pursuant to which the Office of Mining Environmental Affairs (DGAAM) will issue an environmental feasibility certificate within five calendar days after the date of submission. The affidavit will be subject to subsequent audit. Category C: Exploration activities that are more complex than those indicated in Category B in which the area actually disturbed is an area required for the construction of more than 20 drilling platforms, access to between them, and auxiliary installations, which in total exceeds 10 hectares. This includes exploration activities in which tunnels measuring more than 50 meters in length are built. The exploration activities pertaining to this category are subject to the prior evaluation procedure set forth in Article 6 of these Regulations.”

<sup>99</sup> Regulation on the Environmental Aspects of Mining Exploration, Supreme Decree No. 020-2008-EM, April 1, 2008, Art. 7 [Exhibit R-152]. “Article 7: 7.1: Concessionaires shall have the following instruments prior to commencing with mineral exploration activities: a) The corresponding approved environmental assessment in accordance with these regulations. b) The licenses, permits, and authorizations required by applicable law according to the nature and location of the activities to be carried out. c) The right to use the surface of the land corresponding to the area where mineral exploration activities are to be carried out in accordance with applicable law. (...)”

Gardini acted only as instructed by Bear Creek, and her role was to process the paperwork for the exploration permits in her name. As I explained in my first Report,<sup>100</sup> the option agreement between Bear Creek and Jenny Karina Villavicencio Gardini was to grant Bear Creek the temporary, exclusive, unconditional, and irrevocable right to acquire the mining concessions comprising the Santa Ana project. Bear Creek had the option to choose whether or not to exercise the option and Jenny Karina Villavicencio Gardini could only accept Bear Creek's decision.<sup>101</sup>

69. The option agreement did not give Bear Creek the right to engage in exploration at the Santa Ana project mining concessions. Any exploration conducted at the concessions would have to be conducted directly by the concessionaire, Jenny Karina Villavicencio Gardini.<sup>102</sup> Said option agreement did not provide for, or prevent Jenny Karina Villavicencio Gardini from engaging in mining activities at the concessions while the option agreement with Bear Creek was in effect, although this is the concession holder's inherent right (and even its obligation). However, the language of the agreement would indicate that the intent was not for Jenny Karina Villavicencio Gardini to engage in them, since it does not include the customary conditions, and only provides for reimbursing the concessionaire for the cost of maintaining the mineral rights. In other words, despite the fact that the option agreement entitled Bear Creek to decide whether or not to acquire the Santa Ana project mining concessions (the sole requirement

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<sup>100</sup> First Rodríguez Report, para. 34 [Exhibit REX-003].

<sup>101</sup> LGM, Art. 165 [Exhibit R-008]. “Article 165: Under an option agreement, the holder of a concession unconditionally and irrevocably agrees to execute a definitive contract at a future date, provided the option holder exercises its right to execute said contract, within the specified time frame. The option agreement must set forth all the elements and conditions of the definitive agreement, and the parties may agree that the option may be exercised by either party without distinction. Mining option agreements may be signed for a period not to exceed five years, as of the signing date.”

<sup>102</sup> We must bear in mind that when the option agreement was signed in 2004, the applications for mining concessions filed by Jenny Karina Villavicencio Gardini in the Santa Ana project area had not yet been titled, and consequently, at that time neither Jenny Karina Villavicencio Gardini nor Bear Creek could legally engage in exploration activities.

being that it communicate its decision during the period while the option remained in effect), the option agreement contained no provision for how the exploration (or exploitation) rights to the concessions would be exercised during that same period. Given that the title to a mining concession gives the title holder the right to explore, assuming all the other required permits are obtained, and this right was not contractually transferred to Bear Creek, the only person who could legally engage in exploration activities during the option period (beginning in 2006 when she was granted the concessions) was Jenny Karina Villavicencio Gardini.

70. In my experience, this is unusual. Option agreements are not usually signed without also signing a parallel mining assignment agreement. If the exploration and exploitation rights are not transferred to the option holder, the option holder should at least take care to establish under what conditions the mining activities reserved to the holder of the concession will be realized, such as: the type of exploration work to be done, a control or limit on allowable extractions, the environmental conditions for the work, relations with the community and the authorities, the requirement to obtain the necessary permits, the expenses to be incurred, the use of any surface rights acquired for mining work, the reimbursement of certain exploration expenses, the preservation of core samples, the removal of any equipment or materials brought in, periodic reports on activities, etc.

71. Normally, the holder of a mining concession and an option holder will agree upon conditions such as the above when signing an option agreement when it is not accompanied by a mining assignment. In this way the contingencies that would be assumed if the option is exercised can be eliminated—or attenuated. The fact that Bear Creek did not take any such precautions in this agreement, allowing Jenny Karina Villavicencio Gardini free rein to engage in mining activities, could reasonably be interpreted to mean it had ample confidence in its control

of the concession holder's activities, and that it believed it would ultimately achieve its purpose of profiting from its explorations likely due to the ample confidence it had in Jenny Karina Villavicencio. In fact the initial exploration permits were applied for by Jenny Karina Villavicencio Gardini, clearly on behalf of Bear Creek, and it could be said that the explorations were likewise conducted by Bear Creek.

72. Bear Creek even acknowledges that it induced Jenny Karina Villavicencio Gardini to apply for the mineral rights in the Santa Ana project,<sup>103</sup> and to subsequently conduct explorations on behalf of Bear Creek. All of the foregoing leads me to the conclusion that the *de facto* holder of the Santa Ana project mining concessions was Bear Creek from the start.

73. Once again, I must emphasize that Jenny Karina Villavicencio Gardini was legally bound by the option agreement with Bear Creek to transfer the Santa Ana project mineral rights, provided Bear Creek communicated to her its decision to exercise the option. And I add that this obligation existed since before the time said mineral rights were titled and exploration activities were permitted there. In other words, in practice, and since before the Santa Ana project mineral rights were titled, Jenny Karina Villavicencio Gardini had no possibility of using said mineral rights without Bear Creek's intervention (at least not until the option expired.) The option agreement set the option period at 5 years, which is the maximum allowable period under Peruvian mining law.

**C. EVALUATION OF THE ENVIRONMENTAL IMPACT ASSESSMENT FOR THE EXPLOITATION PHASE**

74. Bear Creek asserts that by June of 2010 it had already completed the preliminary exploration phase at Santa Ana and was preparing to begin preparing, developing and building

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<sup>103</sup> Claimant's Memorial, para. 25.

the mine and the other project facilities.<sup>104</sup> In my first Report, I provided a detailed explanation of the additional requirements Bear Creek was required to meet in order to progress to this stage, including the need to submit a detailed environmental impact assessment for approval.<sup>105</sup>

Peruvian environmental law is very clear in the sense that construction work cannot commence at a mining project without an Environmental Certification;<sup>106</sup> in the case of the Santa Ana project, the Environmental Certification is obtained with the approval of the detailed environmental impact assessment. With regard to the environmental impact assessment, Bear Creek argues that the approval of the Executive Summary of the EIA was an important milestone in its overall approval process.<sup>107</sup>

75. Based on the opinion of Engineer Elsiario Antunez de Mayolo, Bear Creek adds that if the EIA had contained errors or was incomplete, the authority would not have approved the Executive Summary of the EIA.<sup>108</sup> Bear Creek overestimates the effects and consequences of the approval of the Executive Summary. The approval of the Executive Summary, which in accordance with legal time frames must occur within 7 business days of its submission, is an indication that the application is complete; in other words, it has met the requirement of addressing the questions contained in the Terms of Reference that are pre-approved for the

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<sup>104</sup> Claimant's Memorial, para. 44.

<sup>105</sup> First Rodríguez Report, para. 40 [Exhibit REX-003].

<sup>106</sup> Law on the Environmental Impact Study National System, Law No. 27446, April 20, 2001, Arts. 2 and 3 (modified by Legislative Decree No. 1078 of June 28, 2008) [Exhibit R-286]. “Article 2: All the national, regional and local policies, plans and programs that have significant environmental implications; and public, private or mixed capital investment projects, involving activities, constructions, works and other commercial or service activities that may cause significant negative environmental impacts, pursuant to the Regulations of this Law are within the scope of application of this law.” “Article 3. None of the projects, or their related services and commercial activities referred to in article 2 may start, and no national, sectoral, regional or local authority may approve, authorize, permit, concede or grant them, without first obtaining the environmental certificate contained in the Resolution issued by the respective competent authority.”

<sup>107</sup> Claimant's Reply, paras. 83-85.

<sup>108</sup> Claimant's Reply, paras. 84-85; Reply Statement of Elsiario Antunez de Mayolo, January 8, 2016 (“Second Witness Statement of Antunez de Mayolo”), para. 21.

mining industry and has adhered to the structure of the same.<sup>109</sup> Under no circumstances can the approval of the Executive Summary communicate any decision with regard to the absence of errors in the instrument, much less that Bear Creek's approach in addressing certain environmental problems in the project had adequately resolved them. When Official Letter 021-2011/MEM-AAM approving the Executive Summary of the EIA was issued on January 7, 2011, its first paragraph literally stated:

“It is my pleasure to apprise you of the fact that my office has performed the initial evaluation of the Executive Summary and of the Citizen Participation Plan of the EIA for the Santa Ana mining project, and after reviewing the reference documents and coordinating with your representative; I am informing you of our approval of these documents.”<sup>110</sup>

76. In other words, although the approval of the Executive Summary is a milestone in the EIA approval process, what the MINEM's preliminary approval really means is that the Executive Summary meets the requirements for being made public, and for the authority to begin evaluating the EIA. The General Law on the Environment expressly sets forth the scope of the executive summary of the environmental impact assessment when it says that such assessments must include a “brief summary of the study for purposes of publication.”<sup>111</sup> In other words, the law establishes that the primary purpose of the executive summary is to make the contents of the

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<sup>109</sup> Law on the Environmental Impact Study National System, Law No. 27446, April 20, 2001, Art. 10 (modified by Legislative Decree No. 1078 of June 28, 2008) [Exhibit R-286]. “Article 10: “10.1. In accordance with the provisions set forth in the Regulations to this Law and with the terms of reference approved in each case, the environmental impact assessments and, as the case may be, the other environmental management instruments, shall contain [...].”

<sup>110</sup> MINEM Resolution No. 021-2011/MEM-AAM, January 7, 2011, para. 1 [Exhibit C-0073].

<sup>111</sup> General Law on the Environment, Art. 25 [Exhibit R-285]. “Article 25: On Environmental Impact Assessments: Environmental Impact Assessments—EIA, are environmental management tools that contain a description of the proposed activity and the foreseeable direct or indirect effects of said activity on the physical and social environment, over the short and long term, and a technical evaluation of said effects. They must include the steps necessary to avoid or reduce any damage to tolerable levels, and shall include a brief summary of the assessment for publication purposes. The mining law sets for the other content requirements for EIA.”

EIA public in the most accessible way possible; the scope of this approval cannot be extended to mean that the environmental impact control or mitigation measures contained in said instrument are in accordance with environmental law and the reality of the ecosystem. This is particularly clear if we also take into account the limited time frame —just 7 business days—that the authority had to issue its decision with regard to the Executive Summary.

77. In my first Report, I noted that when Bear Creek submitted its EIA for evaluation, the General Directorate of Environmental Mining Affairs of the Ministry of Energy and Mines (DGAAM)<sup>112</sup> and the General Directorate of Environmental Affairs of the Ministry of Agriculture (MINAG) had approximately 200 Comments to the document.<sup>113</sup> I also pointed out that certain specific Comments could be difficult to resolve within the time frames provided by environmental regulations. Bear Creek responded in its Counter Memorial that the number of Comments did not mean that the EIA was deficient in any way, since sometimes various different interest groups repeat the same concerns, and this raises the number of Comments. Bear Creek is looking at the comment in the wrong way.

78. In my opinion, the difficulty in resolving the Comments does not hinge so much on the number of Comments as it does on the nature of some of them, as I explained in my first Report. It is not unusual for a large number of Comments to be formulated. I should point out that of the 157 Comments formulated by the DGAAM to the EIA contained in Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD,<sup>114</sup> 154 correspond to the environmental mining authority. Only two of them (numbers 155 and 156) relate to the citizen participation

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<sup>112</sup> The DGAAM was the entity in charge of evaluating environmental impact studies for the construction of mining operations. As of December 28, 2015, these duties were assigned to the National Environmental Certification Service (SENACE) by Ministerial Resolution No. 328-2015-MINAM of November 25, 2015.

<sup>113</sup> First Rodríguez Report, paras. 45-46 [Exhibit REX-003].

<sup>114</sup> DGAAM's Observations to Bear Creek's EIA for Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD, April 19, 2011 [Exhibit R-040].

process, and one of them even refers to documents with regard to which there is more than one Comment. Comment 157 (misnumbered as 156) is a reference to other Comments formulated by the General Directorate of Environmental Affairs of the Ministry of Agriculture. Thus, Bear Creek's argument to the effect that the high number of Comments is due to the same concerns being repeatedly raised by third parties is incorrect in this case.<sup>115</sup> It cannot be asserted that the number of Comments is due to the same Comments being repeated by various different groups of people because the vast majority of the Comments were formulated by DGAAM and MINAG professionals.

79. I understand that the document containing the responses to the Comments to the EIA was not filed with the DGAMM for its evaluation, but rather deposited before a notary.<sup>116</sup> Said deposit has no effect with regard to the competent authorities and merely serves to prove that on the date it was deposited, said document existed. Only the competent authority has the authority to determine whether the Comments have been adequately resolved in a timely manner. In my first report and in the paragraphs below, I go into greater detail regarding potential Comments to the EIA that in my experience may be difficult to adequately resolve in a timely manner.

80. The Comments to the EIA about which I expressed some level of concern in my first Report, all related to matters that could involve significant changes to the project as it was conceived, the need to prepare additional studies that could involve a certain amount of complexity and/or significant depth, the obligation to gather field data over long periods, among others, some of which would have been difficult to resolve within the 30 business days, (to which a one-time extension of an additional 30 business days could be granted) provided by

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<sup>115</sup> Claimant's Reply, para. 157; Expert Opinion of Hans Flury, paras. 84.

<sup>116</sup> Claimant's Reply, para. 159; Second Witness Statement of Antunez de Mayolo, para. 35.

Article 52 of the Regulations to the National Environmental Impact Assessment Law of September 25, 2009.<sup>117</sup> Bear Creek was granted 60 business days from the start to resolve the Comments to the EIA, which was not unusual, despite the fact that the applicable rule expressly establishes that these responses must be presented within 30 business days (with a potential one-time 30-day extension upon justified request).

81. I note that a large number of the Comments regarding which I expressed some degree of concern in my first Report have not warranted any comment on the part of Bear Creek. I am referring specifically to the DGAAM's Comments 78, 28, 53, 154, 37, 21, 27, 101 and MINAG's Comments 17, 22, and 25.

82. Following the same order as I used in my first Report, in which I grouped the Comments according to their nature, I can state the following with regard to these Comments,

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<sup>117</sup> Regulation of the Law on the National System for Environmental Impact Studies, Supreme Decree No. 019-2009-MINAM, September 25, 2009 (“Regulation on the SEIA Law”), Art. 52 [Exhibit R-039]. “Article 52: The evaluation process for the EIA-sd [semi-detailed] shall be conducted within ninety (90) business days of the day after the application for Environmental Certification is received; this includes up to forty (40) business days for review and evaluation; up to thirty (30) business days for the applicant to resolve Comments; and up to twenty (20) business days for the authority to issue the respective Resolution. The detailed EIA evaluation process shall take place within one hundred twenty (120) business days beginning on the day following submission of the Application for Environmental Certification; it shall include up to seventy (70) business days for the evaluation; up to thirty (30) business days for the applicant to resolve Comments; and up to twenty (20) business days for the authority to issue the respective Resolution. If the Comments formulated to the proponent of the project that is the subject of the EIA-sd [semi-detailed] or EIA-d [detailed] are not entirely resolved for justifiable reasons, the competent Authority, at the party's request, may grant a one-time extension of up to twenty (20) additional business days in which to complete the process, counted as of the day after the end of the original period, in which to resolve the corresponding Comments. Depending on whether or not the issues have been resolved, the competent authority shall issue the corresponding environmental certification if applicable, or it shall declare the application denied, bringing an end to the administrative proceeding. Public meetings and other community participation mechanisms are subject to the same periods provided for reviewing and evaluating the Environmental Impact Assessment, as provided by sectoral, regional, or local laws, supplemented by Supreme Decree No. 002-2009-MINAM, the Regulation on Transparency, Access to Public Environmental Information and Citizen Consultation and Participation on Environmental Matters. In the event a prior technical opinion from other authorities is required, it must be formulated within forty (40) business days for the EIA-sd, which includes up to thirty (30) business days for the evaluation and up to ten (10) business days for evaluating whether Comments have been resolved. For the EIA-d, such technical opinions must be formulated within fifty (50) business days, which includes up to forty (40) business days for the evaluation and up to ten (10) business days for evaluating whether Comments have been resolved; the calculation of these periods must not affect the total time period allotted for the review and evaluation of the respective file. The periods indicated in this article for evaluating semi-detailed EIAs and detailed EIAs may be extended by the proper authorities by no more than thirty (30) business days on only one occasion, for documented technical reasons submitted by the concessionaire based on the needs and characteristics of each case.”

which I believe were likely not sufficiently resolved in the response that was deposited with a notary.

83. DGAAM Comment 34 involves the presentation of an additional study at the level of a feasibility study.<sup>118</sup> In relation to the stability of the soil, the authority expresses concern regarding the measures to be taken to prevent rocks from breaking off and falling from the upper parts of the ravines, taking into account that Bear Creek had mentioned that there is evidence of such events having occurred in the project area. The authority requests that the measures to be adopted be supported by a document at the level of a feasibility study. In its response, Bear Creek's only answer to this was that there is no possibility for the recognized slides and rockfalls to move any further.<sup>119</sup> This brief explanation is not accompanied by any supporting documentation, despite the fact that documentation at the level of a feasibility study was requested. In paragraph 162 of its Counter Memorial, Bear Creek indicates that the authority merely asked it for certain specific clarifications regarding the practical and viable measures that would be taken, and that these be clarified in the response to the Comments. None of these assertions is true: the authority asked it to “specify what technical measures, at the feasibility level, will be taken to prevent rocks from breaking off and falling from the upper parts of the ravines” and not just that it clarify the measures to be adopted, but Bear Creek did not specify the technical measures at the feasibility level, much less clarified what those measures would be. This Comment cannot be considered resolved.

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<sup>118</sup> Although there is no legal definition of what a feasibility study consists of, certain parameters are provided in other mining rules—Article 19 of Supreme Decree No. 024-93-EM— and land use rules—Article 19 of Supreme Decree No. 013-2010-AG—which indicate that that the degree of detail is high, somewhere between a pre-feasibility study and a detailed engineering study. For example, detailed environmental impact assessments must be prepared at the level of a feasibility study, under Article 48 of the Regulations to Law No. 27446, approved by S.D. No. 019-2009-MINAM. *See* Regulation on the SEIA Law, Art. 48 [Exhibit R-039].

<sup>119</sup> Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011 (“Bear Creek's Response to Observations”), pp. 84-85 [Exhibit R-184].

84. Comment 78 to the EIA is in relation to the soil characterization studies and the authority questions why only 13 test pits were dug for an area of 3,914.18 hectares, asking for a justification for the low density or number of test pits, supported by an evaluation at the feasibility level. In response Bear Creek indicated that the sampling point locations were selected based on the litho-geomorphologic features and physiographic units with an emphasis on the project site. However, Bear Creek presents no evaluation, despite acknowledging in the EIA that only 9 of the 13 test pits are located in the area of the project site. The argument used by Bear Creek to resolve this Comment is that when it ordered the soil study in August of 2009, the Soil Survey Execution Regulation (Supreme Decree No. 013-2010-AG of November 19, 2010) had not yet been issued. This argument is meritless, since the authority that evaluated the EIA did not intend to invoke this Regulation; it was merely asking for a justification of the low sample density. If it had intended to use this Regulation, it would not have requested an evaluation at the feasibility level, but rather at the execution level, which is what is required of those that serve as support for environmental impact assessments. Moreover, had it intended to apply said Regulation, the soil study would have had to have the prior approval of the Ministry of Agriculture, something that was not requested of Bear Creek. Bear Creek makes no reference to this Comment in its Counter Memorial, despite the fact that I raised my concern in my first Report.

85. Comment 28 formulated by DGAAM requests the placement of ground water monitoring points in representative locations, for which purpose simulations must be run of the route and final destination of the contaminants produced by mine operations. Bear Creek responds that it will monitor groundwater on a quarterly basis and if it detects concentrations that exceed the standards it will take remediation action. The Comment is aimed at having additional

monitoring points placed precisely in order to avoid the concentrations of contaminants along the route shown by a predictive simulation of contaminant flow. Bear Creek indicates in its response that it ran these simulations and attaches a diagram showing the placement of the new monitoring points. Although this first part of the Comment could be considered resolved, it must be made clear that the purpose of monitoring is prevention, not remediation, as Bear Creek suggests for the open pit groundwater. For this reason, this Comment cannot be considered to have been fully resolved. Nor does Bear Creek mention this objection in its Counter Memorial, despite the fact that I raised my concern in my first Report.

86. Comment 53 refers to data collected at sampling points on the catching of fish during the dry and rainy seasons, and required Bear Creek to provide explanations for the lack of information at certain individual stations. Bear Creek partially resolved this Comment, but it has not provided a response to two points: Sampling point No. 15 for the dry season and Monitoring point No. 5 for the rainy season. Bear Creek makes no mention of this objection in its Reply, despite the fact that I raised my concern in my first Report.

87. In Comment No. 154, the evaluating authority requests records for two consecutive years on the physical-chemical parameters of the bodies of water used as the baseline for the EIA. The baseline studies are particularly important because they establish the existing environmental status and natural processes prior to the intervention or the implementation of the infrastructure planned for the project.<sup>120</sup> It also serves as a way to evaluate the environmental standards in the proposed impact area (basically the environmental quality standards) and determine whether it can withstand the implementation of the proposed investment project. Bear Creek merely states it does not have them because there have been no

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<sup>120</sup> Regulation on the SEIA Law, Annex I [Exhibit R-039]: “Appendix I –Definitions: Baseline: Current status of the area of action, before a project is implemented. This includes the detailed description of the socio-economic attributes or characteristics of the project site, including any natural hazards that could affect project viability.

significant changes in the activities, and it will collect the data during the construction and operation phases. In other words, Bear Creek acknowledges that it does not have enough time to take seasonal samples which is exactly what it is being asked to do. Nor does Bear Creek mention this objection in its Counter Memorial, despite the fact that I raised my concern in my first Report.

88. Bear Creek asserts that since the ANA issued a favorable opinion of the EIA, there must not be any problems in relation to the water resource. This would apply to Comments 23, 24, 90, 99, 111, and 141 to the EIA.

89. However, it is important to clarify the difference between the jurisdiction of the DGAAM and the role played by the ANA in the EIA evaluation process. The DGAAM reviews and evaluates the EIA to determine the potential negative environmental impact and what plans are in place to mitigate the effects of the investment project. The ANA, on the other hand, pursuant to the Water Resources Law, is responsible for evaluating whether or not there is sufficient water supply to authorize the use of the reserves present in each basin for mining or industrial applications, bearing in mind that these productive uses come last in the order of preference (and within the category of productive uses, mining and industry come behind agriculture, aquaculture and fishery activities).<sup>121</sup>

90. Environmental and water laws require a favorable technical opinion from the ANA to be included with all environmental impact assessments that in any way involve the water resource, and that is the reason why the ANA's opinion is essential, but given the legal framework, we must bear in mind that the ANA 's technical opinion is primarily related to the

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<sup>121</sup> Regulations of the Law on Water Resources, Supreme Decree No. 01-2010-AG, March 23, 2010, Art. 62 [Exhibit R-165]. “Article 62: 62.1 The order of preference for granting water rights for productive uses, in the event of overlapping requests, is as follows: a) Agriculture, aquaculture and fisheries; b) Energy, industrial, medicinal and mining; c) Recreational, tourism and transportation; d) Other uses. (...)”

discharge of waste water and to a lesser extent to water use. Article 81 of the Water Resources Law that requires said favorable technical opinion is bound up with other laws regulating the discharge of wastewater;<sup>122</sup> and what is more, Article 138 of the Water Resource Regulations on these opinions as opposed to those of the sectoral authorities is found in the chapter on waste water discharge.<sup>123</sup> On February 25, 2011, INACC Resolution No. 106-2011-ANA was issued, establishing and regulating the procedure for issuing the technical opinion that the ANA must issue as part of the evaluation of environmental impact assessments related to water resources, and laying out the scope of such a favorable technical opinion.<sup>124</sup>

Article 5: The evaluation conducted by the National Water Authority (ANA) shall be based on the following criteria: a) The impact on the quality, quantity, and opportunity of the water resource, taking into account what has been ordered by the competent sector. b) The prevention, control, mitigation, contingency, recovery, and eventual compensation related to water resources. c) Criteria and methodology for determining the ecological flow value.

91. Said article establishes that the opinion is for matters involving an impact on the resource and not with regard to the availability of the resource based on the water use priorities established by the law. The Comments to the EIA that I have identified are in relation to

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<sup>122</sup> Law of Water Resources, Law No. 29338, March 23, 2009 (“Law of Water Resources”), Art. 81 [Exhibit R-287]. “Article 81: Without prejudice to the provisions of Law No. 27446, the National Environmental Impact Assessment Law, approving environmental impact studies related to the water resource to be requires the favorable opinion of the National Water Authority.

<sup>123</sup> Regulations to the Water Resources Law, March 23, 2010, Art. 138 [Exhibit R-165]. “Article 138: The technical opinion of the sectoral environmental authority is expressed via the corresponding environmental certification which covers the waste water treatment system and the effect of discharging said water into a receiving body of water.”

<sup>124</sup> Directorial Resolution Regulating EIA Assessment Process on Water Resources Issues, Directorial Resolution No. 106-2011-ANA, 38 , April 28, 2006, [Exhibit R-274] established and regulates the procedure for issuing the technical opinion that must be issued by the National Water Authority (ANA) as part of the procedure for evaluating environmental impact assessments related to water resources. “Article 5: The evaluation conducted by the National Water Authority (ANA) shall be based on the following criteria: a) The impact on the quality, quantity, and opportunity of the water resource, taking into account what has been ordered by the competent sector. b) The prevention, control, mitigation, contingency, recovery, and eventual compensation related to water resources. c) Criteria and methodology for determining the ecological flow value.”

immanently environmental matters that are the purview of the DGAAM and do not relate to the ANA's own exclusive functions.

92. Point 1.8 of Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD which contains the Comments to the EIA, indicates that the DGAAM received the favorable technical opinion from the ANA, but this favorable opinion should only be interpreted as the approval of the environmental matters related to the use and disposal of water as provided by Article 81 of the Water Resources Law.<sup>125</sup> As I shall explain below in the discussion on applying for licenses from the ANA, regardless of the DGAAM's analysis and evaluation, or whatever the ANA's opinion may be in the context of the EIA, Bear Creek will be required to apply for water use licenses and waste water discharge or treatment and reuse authorizations.

93. The EIA is a preventive environmental management tool and its scope is limited to matters of an environmental nature.<sup>126</sup> An opinion given by the ANA in the context of the EIA does not mean that the ANA approves any technical aspects that fall under its exclusive sphere of competence, such as the availability of water and the priorities for its use. As such, it is not a sufficient response to these Comments to sidestep them by saying that the ANA already gave its consent for the Santa Ana project by giving a favorable opinion of the EIA, since said consent in the framework of its own functions will only really be given when, if ever, in response the application Bear Creek must file in due time, the ANA grants it water use licenses and authorizations to discharge or treat and reuse waste water.

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<sup>125</sup> Law of Water Resources, Arts. 4, 81 [Exhibit R-287]. “Article 81: Without prejudice to the provisions of Law No. 27446, the National Environmental Impact Assessment Law, approving environmental impact studies related to the water resource to be requires the favorable opinion of the National Water Authority. [“Article 4: (...) The National Authority shall refer to the National Water Authority (ANA) (...).”

<sup>126</sup> Regulation on the SEIA Law, Art. 14 [Exhibit R-039]: “Article 14: The environmental impact assessment is a participatory, technical-administrative process designed to prevent, minimize, correct and/or mitigate and report on the potential negative environmental impacts that could arise from policies, plans, programs and investment projects, and also to boost their positive impact. (...).”

94. It has now become clear that Bear Creek knew and understood the difference between the areas of competence of the DGAMM and the ANA, even with regard to the scope of the latter's role in giving its technical opinion. In Comment 99 to the EIA, the DGAAM raises a concern that is not classified as environmental but rather a technical aspect in the ANA's area of competence, specifically, the source and supply of water for the project. Bear Creek's response to the DGAAM indicates that this is a matter over which ANA has jurisdiction and it will be presented to it in due time. This is a clear indication of the separation of duties between the DGAAM and the ANA, and that having resolved Comments formulated by the DGAAM in relation to water does not mean that the ANA may not have its own concerns about technical matters related to water over which it has exclusive jurisdiction.

95. Comment 21 to the EIA has not been resolved. Bear Creek did not respond to the requirement to conduct the missing hydrodynamic tests, prepare a hydrogeological description, and present the results.<sup>127</sup> Bear Creek agreed to conduct the studies and obtain the necessary data to be delivered to the competent authority before applying for any water permits, arguing that it had not had time to conduct the studies. It is clear that in its response Bear Creek is admitting that it still has tests and studies to conduct before applying for water use permits from the ANA. This response on the part of Bear Creek conflicts with the affirmation it made in paragraph 165 of its Counter Memorial, to the effect that it already had all the information it needed to apply for the remaining permits. Bear Creek also plans to conduct other complementary hydrogeological studies including drilling test holes and subsequent tests for the

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<sup>127</sup> Bear Creek's Response to Observations, pp. 55-57 [Exhibit R-184].

purpose of resolving this Comment.<sup>128</sup> Bear Creek does not mention this Comment in its Counter Memorial, despite the fact that I raised my concern in my first Report.

96. In Comment 27, the authority expresses concern regarding the solutions Bear Creek proposes in the event of a shortage of water for the use of the population, which legally takes priority. The authority is clear in mentioning that “this highlights the need to supplement the hydrodynamic tests in said area, and temporarily implement the hydrogeological model, estimate water reserves, simulate scenarios based on the proposals indicated above (...).”<sup>129</sup> Bear Creek indicates that although the likelihood of any negative impact is low, it agrees to conduct supplemental tests and studies and deliver them to the ANA before applying for water use licenses, since they have not yet been able to do the necessary field work. Like in the case of Comment 21, this response belies its earlier assertion that it had everything in place to be able file the applications for all the remaining permits. Bear Creek makes no mention of this objection in its Counter Memorial, despite the fact that I raised my concern in my first Report.

97. Comment 155 to the EIA is related to the offer Bear Creek made in its PPC to conduct guided tours of the Santa Ana project during the EIA evaluation phase. Bear Creek maintains that its response in addressing the Comment is sufficient, since the Comment did not ask for visits to be organized, but rather requested proof (in a separate document) that such visits had been conducted. Bear Creek is incorrect when it asserts in paragraph 160 of its Counter Memorial that it only had to show that guided tours had taken place (presumably during the EIA preparation phase). Although I do not pretend to question the fact that said visits were conducted, Bear Creek did not even consider implementing this participatory mechanism during the EIA

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<sup>128</sup>Bear Creek's Response to Observations, pp. 55-57 [Exhibit R-184].

<sup>129</sup> Bear Creek's Response to Observations, p. 64 [Exhibit R-184].

preparation phase, in accordance with its approved PPC.<sup>130</sup> Without prejudice to my comments on this point in the chapter below on the PPC, the fact is that in the PPC, and in the document in which Bear Creek attempted to resolve the Comments to the EIA, it made two different offers in relation to guided tours: it made one offer in the document containing its responses to the Comments which was to prove that the guided tours were conducted during the EIA preparation phase (in the past) and that they would continue during the EIA evaluation phase, and the other offer it made in the PPC itself was to set up a program to provide guided tours during the execution phase of the project. Bear Creek's response to this Comment focuses solely on the first offer, since it says that it will later provide proof that such visits were conducted (although I have been unable to locate any such proof). But even if it furnished such proof, it would still only have partially complied with this first offer, since it promised to continue the visits throughout the EIA evaluation phase.<sup>131</sup> The second offer (made in the enforceable PPC) was simply not complied with and in its attempt to respond to the DGAAM's Comments, Bear Creek did not even promise to comply with it, based on what it says in paragraph 160 of its Counter Memorial, in which it explicitly denies having made any such commitment.

98. Now then, Comment 155 does not ask for proof that visits have already been made, what it is asking for is proof that the program Bear Creek offered to establish for the EIA evaluation and project execution phases has been implemented. Bear Creek had no response to this requirement<sup>132</sup> And I refer back to Bear Creek's obligations according to what it itself offered in its approved PPC. In reference to the guided tours for community leaders and other stakeholders, point 3.3 of the PPC asserts that “visits will continue to be conducted while the

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<sup>130</sup> Report No. 013-2011-MEM-AAM/WAL/AD/KVS, January 7, 2011, pp. 3, 5 [Exhibit C-0161].

<sup>131</sup> Report No. 013-2011-MEM-AAM/WAL/AD/KVS, January 7, 2011, pp. 3, 5 [Exhibit C-0161].

<sup>132</sup> Claimant's Reply, para. 160.

project is being evaluated.” Point 4.3 of the PPC offers to maintain the guided tour program for residents of the area of influence after the EIA is approved, among others. Such offers are binding on the private party that offers them as of the moment the Citizen Participation Plan is approved, and are part of the range of mechanisms provided by the law. The PPC received preliminary approval via Official Letter No. 021-2011/MEM-AAM and since that time, Bear Creek was obligated to implement whatever mechanisms it offered to implement.

99. Comment 155 to the EIA asks Bear Creek to keep the commitment it voluntarily made. In its Counter Memorial, Bear Creek does not show that it has implemented this citizen participation mechanism and does not resolve the Comment because it does not present any proof of having conducted any of the guided tours it offered and in particular, because it failed to show proof of having implemented the visit programs as the DGAAM expressly requested.

100. To reiterate the position I took in my first Report, given the current circumstances in the areas surrounding the Santa Ana project, in my opinion it must have been too complicated for Bear Creek to comply with this obligation. Bear Creek was aware of this situation, since in the record of environmental field supervision to verify compliance with the obligations assumed in the exploration phase of the Santa Ana project—a record that was signed by Bear Creek representatives—the Environmental Assessment and Oversight Agency (OEFA) notes that “the officials from Bear Creek Mining Company - Peruvian Branch suggested that, due to the current social situation, it would not be reasonable for the company to go with the field inspection to the project area.”<sup>133</sup>

101. We must not lose sight of the fact that even if the Comments had been adequately resolved and the authority had issued the resolution approving the EIA, Bear Creek would have

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<sup>133</sup> Record of Environmental Supervision, November 25, 2011, p. 1 [Exhibit C-0179].

had to wait until this resolution was final. There have been cases in which resolutions approving environmental studies have been challenged by third parties, who do not need to demonstrate any direct interest, and extraordinary motions for reconsideration have been filed against the decisions to approve them. Such extraordinary motions for reconsideration are heard and settled by the Council of Mining, within the lengthy time periods said entity works with, and until the extraordinary motion for reconsideration has been decided, the environmental impact assessment cannot be considered approved and construction cannot begin, nor can the critical path of some of the other permits continue.<sup>134</sup> There have also been cases in which the Mining Council has resolved to revoke the resolution that approved the environmental impact studies, as occurred in the case of the Magistral project at around the same time the Santa Ana projects' EIA was being evaluated.<sup>135</sup> This can happen if someone who simply feels concerned, although they may not have any direct interest, challenges the decision of the DGAAM<sup>136</sup>; certainly a community or an authority, who can indeed demonstrate a direct interest, would have standing to file an extraordinary motion for reconsideration.

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<sup>134</sup> On May 20, 2015, Law No. 30327 was issued (“Law on the Promotion of Investments for Economic Growth and Sustainable Development”), Art. 9 [Exhibit FLURY-049], Article 9 of which created the Global Environmental Certification, which would allow other permits related to a project under environmental review to be processed and approved. This Global Environmental Certification has not yet entered into effect.

<sup>135</sup> Report No. 491-2010-MEM/AAM/FAC, May 20, 2010 [Exhibit R-288]. Handed down in the Magistral Project Environmental Impact Assessment Approval File. In this case, the Conchucos Peasant Community, encouraged by some members of said Community residing in Lima, challenged, among other things, that the planned tailings dam was located at the head of the basin and that the public hearing required as part of the citizen participation process had not been held. The DGAAM had initially formulated 69 comments to the EIA prepared by Vector S.A. (the same company that prepared the EIA for the Santa Ana project) and then reiterated its objections in 38 of them, granting an additional 30 days in which to correct them. Within said time period, the company resolved all the comments and its EIA was approved. It was then that the Conchucos Peasant Community filed a motion for reconsideration which was settled 10 months later by the Mining Council, which revoked the approval of the EIA. I should disclose that I participated as an attorney for the Magistral Project in this case, but all of the above information is public record.

<sup>136</sup> Regulation on the SEIA Law, Art. 59 [Exhibit R-039]: “Article 59: Resolutions that grant or deny Environmental Certification may be challenged in administrative proceedings as provided by Law No. 27444.”

102. The foregoing paragraphs reflect my opinion in the sense that there were still comments on various aspects of the Santa Ana Project's EIA that could not have been satisfactorily resolved in the document the company deposited with the notary. In my opinion, Bear Creek sill had a lot of work to do to be able to keep its EIA approval file on track.

103. The law also provides final deadlines for their approval. If the private party does not adequately resolve in a timely manner all the comments formulated by the authority, with well-reasoned answers, the approval must be declared denied and the administrative proceeding concluded.<sup>137</sup>

104. Another of Bear Creek's arguments is that the suspension of the approval process of its EIA for the Santa Ana project was arbitrary and illegal.<sup>138</sup>

105. The suspension of the EIA approval process is not governed by environmental law. What are available under environmental law as extraordinary remedies are provisional remedies, in the event it becomes necessary to prevent irreparable harm to a vulnerable area or prevent environmental quality standards from being violated.<sup>139</sup> In such cases, the environmental authority may suspend activities. Under Peruvian law, any administrative proceeding may be provisionally suspended, provided the decision is well reasoned and there are sufficient grounds

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<sup>137</sup> Regulation on the SEIA Law, Art. 52 [Exhibit R-039]: “Article 52: If the Comments formulated to the proponent of the project that is the subject of the EIA-sd [semi-detailed] or EIA-d [detailed] are not entirely resolved for justifiable reasons, the competent Authority, at the party's request, may grant a one-time extension of up to twenty (20) additional business days in which to complete the process, counted as of the day after the end of the original period, in which to resolve the corresponding Comments. Depending on whether or not the issues have been resolved, the competent authority shall issue the corresponding environmental certification if applicable, or it shall declare the application denied, bringing an end to the administrative proceeding. (...).”

<sup>138</sup> Claimant's Reply, paras. 123-24.

<sup>139</sup> General Law of the Environment, Art. 34, [Exhibit R-285]. “Article 34: The National Environmental Authority coordinates with the competent authorities, the formulation, execution and evaluation of the plans aimed at improving environmental quality or the prevention of irreversible damage to vulnerable areas or areas where pollution levels exceed environmental standards, and monitors faithful compliance with said plans. As such it has the authority to issue provisional remedies that ensure the implementation of the aforementioned plans, or establish penalties for noncompliance with an action contained in the plan, unless said action would constitute a violation of environmental law, in which case it must be handled by another authority in accordance with the law.”

to do so; however, such administrative provisional remedies cannot be utilized in the event that doing so would cause irreparable harm to the private party.<sup>140</sup> During the time an administrative proceeding is suspended, allotted time periods do not run. As the law itself provides, a provisional remedy is justified “if there is a possibility that failing to order it would jeopardize the effectiveness of the resolution to be issued.”<sup>141</sup> The private party need not have caused or contributed to the events that give rise to the provisional remedy, and that is because the underlying purpose of such a remedy is to protect the integrity of the proceeding and it should not be viewed as a punitive measure.

106. In this case, the DGAAM's reasoning for suspending the Santa Ana project's EIA approval process for twelve months was the overall status of disorder in the region where the project is located, and the possibility that the chaos could spread and the effects of the issuance at that time of a resolution to approve the EIA could have inflamed tempers even more.

107. I should note that environmental law does contain a provision that allots a period for the start of construction work on the project after the EIA has been approved. Thus, in the event that three (3) years elapse (which can be extended to five years) since the EIA was approved and construction has not yet begun, the EIA will no longer be valid and a new approval process must begin. This would occur in the case of the Santa Ana project, for example, if the

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<sup>140</sup> Law on General Administrative Procedure, Law No. 27444 (“Law on General Administrative Procedure”), Art. 146 [Exhibit R-104]. “Article 146: 146.1 Once the proceeding has been initiated, the competent authority, in a reasoned decision with sufficient grounds to do so, may impose, provisionally under its own responsibility, the provisional remedies set forth in this Law or other applicable legal provisions, via a reasoned decision, if there is a possibility that failing to impose it would jeopardize the effectiveness of the resolution to be issued. 146.2 Provisional remedies may be modified or revoked during the course of the proceeding, either *sua sponte* or at the request of a party, by virtue of supervening circumstances or circumstances that it was not possible to take into consideration when the provisional remedy was ordered. 146.3 Provisional remedies expire by action of law when the final resolution that puts an end to the proceeding is issued, when the time period allotted for its enforcement has expired, or upon the issuance of the resolution that puts an end to the proceeding. 146.4 Provisional remedies that could cause irreparable harm to the private citizen cannot be implemented.”

<sup>141</sup> Law on General Administrative Procedure, Art. 146.1 [Exhibit R-104]

conflict situation in the area were to persist. If Bear Creek did not feel able to access the project area in late 2011 to conduct a field supervision, it could hardly have begun construction work.

**D. OTHER PERMITS**

108. As I explained above, Bear Creek's assertion that the authority lacks any discretion in reaching its decisions is incorrect. It is unquestionable that if an applicant fails to adhere to the form and content requirements provided by the law, its application must be rejected (or in the best case scenario, the applicant must be required to correct the errors, with the consequent delay in the proceedings). The authority must be convinced, based on its own professional criteria and in accordance with the law, regardless of whether or not the private party agrees. Some permits have a wider margin of subjectivity and government officials cannot be said to merely act as a filing desk receiving documents. I shall outline below some potential reasons for denials or delays that Bear Creek could encounter in its attempt to obtain the permits for starting construction and/or operation of the Santa Ana project by the established deadlines, in particular with regard to the acquisition of surface rights, archeological certifications, the approval of the mining plan and water use licenses and waste water discharge or reuse authorizations.

**1. Surface Rights**

109. For the purpose of being able to start the application process for construction permits for the project facilities, it is essential to acquire the surface rights. Almost all of the permits, authorizations, licenses, certificates, registrations and other things necessary for the construction and operation of the Santa Ana project require the company to prove that it at least has the right to use the entire surface area of the project site.

110. Under the Land Law, the use of land for mining activities requires a prior agreement with the owner or the completion of the mining easement procedure.<sup>142</sup> Given that the mining authority has not processed mining easement procedures for many years, in order to develop mining projects it is essential to reach express, formal agreements with the owners of the parcels that are needed for the construction and operation of the project.

111. According to the EIA, the Santa Ana project components are located on communal and private lands.<sup>143</sup> In Paragraph 2.4.4.6 of the EIA, Bear Creek mentions that in the direct area of influence the surface land belongs to the peasant communities of Challacollo, Ancomarca, and Concepción de Ingenio (and that the first of these ceded part of its land to the Cóndor de Ancocahua Area). With regard to the place where the Santa Ana project facilities are to be built, the EIA states that in addition to the three aforementioned communities, the Huacullani Neighborhood Council also owns some of the land. Bear Creek correctly adds that “in many of the peasant communities in Peru there are two types of land tenancy that exist simultaneously: the ownership of the surface land, to which the community holds the title, and the possession of the lots by the community members.” Thus, Bear Creek acknowledges that it will have to negotiate with the communities of Challacollo, Ancomarca y Concepción de Ingenio, the Cóndor de Ancocahua Area, the Huacullani Neighborhood Council, and also the possessors of these lands. The EIA mentions that the communities have divided their lands and assigned lots to their members, so that in addition to negotiating to acquire surface rights from the communities themselves, Bear Creek will have to negotiate with 59 possessors in the peasant

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<sup>142</sup> Law on the Private Investment for the Development of Economic Activities Within the National Territory and Native Communities Lanes, Law No. 26505, July 14, 1995 (“Land Law”), Art. 7 [Exhibit R-157]. “Article 7: The use of lands for mining or hydrocarbons activities requires a prior agreement with the owner or the completion of the easement procedure to be specified in the Regulations to this Law. (...)”

<sup>143</sup> 2010 Environmental Impact Assessment Chapter 2: Description of the Project Area, p. 118 [Exhibit R-196].

community of Challacollo, 29 possessors in the peasant community of Ancomarca and 6 possessors in the peasant community of Concepción de Ingenio, for a total of 94 possessors.<sup>144</sup> Lastly, the EIA acknowledges that for the purpose of acquiring the necessary surface rights for the construction of the project, the interested parties had already initiated communications and agreements with regard to the same.<sup>145</sup> This, according to this assertion by Bear Creek, when Bear Creek presented its EIA in December of 2010, it had not yet completed any acquisition of any surface rights for mining use, either with the communities or any of the 94 possessors. In its Counter Memorial, Bear Creek admits that it has only reached an agreement with the Concepción de Ingenio Peasant Community (although I have not been able to locate a final, signed version of the agreement), and that it still needed to complete the negotiations with Ancocahua, Challacollo and Ancomarca; it doesn't mention the Huacullani Neighborhood Council or any of the individual possessors.<sup>146</sup>

112. Although Mr. Antunez de Mayolo says that the agreement with the Concepción de Ingenio community was signed in April of 2011,<sup>147</sup> Report No. 0011-2011-MA-SR/CONSORCIO STA of December 31, 2011 which contains the 2011 annual environmental supervision for the Santa Ana exploration project, concludes that Bear Creek engaged in exploration work without having the proper surface rights between September and November of 2010, and states that the land that was explored belongs to the communities of Concepción de Ingenio, Ancomarca, Challacollo and the Condor de Ancocagua Area and that Bear Creek “has

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<sup>144</sup> 2010 Environmental Impact Assessment Executive Summary, December 23 2010, Section 2.4.1.3 [Exhibit R-194]. “2.4.1.3 (...) The fact that the territory in every Peasant Community is distributed among its members results in the severe fragmentation of the surface lands.”

<sup>145</sup> 2010 Environmental Impact Assessment Executive Summary, December 23 2010, Section 1.1 [Exhibit R-194].

<sup>146</sup> Claimant's Reply, para. 169.

<sup>147</sup> Second Witness Statement of Antunez de Mayolo, para. 87.

certificates for the use of the surface lands of said communities valid through August of 2010.”<sup>148</sup>

113. In relation to the agreement Bear Creek allegedly signed with the peasant community of Concepción de Ingenio, I note that Exhibit C-186 has been submitted, in an attempt to counter Peru's affirmation that there was no agreement in place with said community for the purchase of the lands. The fact is the document in question contains the minutes of a community meeting in said peasant community held on April 2, 2011, and is not actually an agreement between the community and Bear Creek. The document I have reviewed constitutes one of the preliminary steps a peasant community must take so as to then be able to validly contract the sale of all or a portion of its lands.<sup>149</sup> The language of the final agreement has been inserted into this record, but the record itself does not constitute an agreement. It is a unilateral document drafted by the community in which Bear Creek is not a participant, nor does Bear Creek assume any obligation or acquire any right based on said document. As such it is clear to me that Bear Creek had a long way to go to reach a final agreement.

114. Based on my experience, this situation constitutes a critical legal and practical obstacle in view of the necessity of having the surface rights secured and formally acquired before a large number of permits and authorizations needed to begin construction on any mining project can be applied for. For example, in order to obtain authorization for the construction of the plant facilities,<sup>150</sup> it must have the proper authoritative instruments to use 100% of the land

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<sup>148</sup> OEFA Report No. 0011-2011 MA-SR/CONSORCIA STA regarding the Santa Ana project, December 31, 2011, pp. 13, 16 [Exhibit C-0180].

<sup>149</sup> Minutes of the Extraordinary General Meeting of the Peasant Community of Concepción de Ingenio, April 2, 2011 [Exhibit C-0186].

<sup>150</sup> Ministerial Resolution No. 304-2008-MEM-DM, Arts. 35, 37 [Exhibit R-153]. “Article 35. Applicants applying for a beneficiation concession must submit an application to the Directorate General of Mining with the same requirements listed in subparagraphs a), b), c) and i) of paragraph 1) and subparagraphs a) and b) of paragraph 2) of Article 17 of this Regulation. They must also attach the following technical information: (...) d) The document

for mining/industrial use, and to engage in mining activity on the 351 hectares of the site on which the project is to be built, it must have title to the entire surface of the mine,<sup>151</sup> in accordance with the legal requirements applicable at that time for obtaining a license for the construction of the beneficiation plant and requesting the approval of the mining plan.<sup>152</sup>

115. In order to obtain construction authorization for the Beneficiation Plant, it was a requirement to show authorization for the use of the land on which the plant will be located. On June 5, 2012, it was specified that in order to obtain authorization to build a Beneficiation Plant, it would be necessary to submit documents proving the applicant was the owner or authorized by the owner(s) of 100% of the lots on which the Beneficiation activity would take place, either in the form of a SUNARP record, or at least in the form of a public instrument. For its part, in order to request approval of the mining plan that would allow the company to prepare and build the mine, it was likewise necessary to prove that the applicant was the owner (or had the authorization to use the land for mining purposes of the owners) of 100% of the lots on which all the components of the project would be located, likewise duly recorded in SUNARP, or at least in the form of a public instrument. The rule provided that applications in process must also comply with these new requirements. Lastly, as of January 5, 2015, proof of surface rights may

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proving that the applicant is authorized to use the land on which the plant will be built, in the event said land is private property.” “Article 37: (...) The Resolution issued by the Directorate General of Mining authorizing the construction of the plant shall allow the applicant to request any necessary easements and expropriations.”

<sup>151</sup> Mining Health and Safety Regulation, Art. 29 [Exhibit R-156]. “Article 29: Holders of mining titles must comply with the obligations established by the Consolidated Text (TUO) of the General Mining Law and those of its regulations that are applicable to them, and may not engage in mining activities without first notifying the competent mining authority, attaching the following documents with regard to: (...) 2).- To initiate, resume, and cease development, preparation, exploitation and beneficiation: - The corresponding environmental instrument approved by the DGAAM; and - Initiation of Mining Activities - Mining Plan and Authorization to Operate a Beneficiation Plant, approved by the DGM. (...)”

<sup>152</sup>As of June 6, 2012, it is now also necessary to show that one holds the surface rights in order to be able to request the start of construction of the mine facilities. Moreover, as of that date contracts for the acquisition of surface rights must be recorded in a public instrument which must also contain the UTM coordinates of the sides of the lot and the information that the contract be recorded as soon as a registry entry is created for the lot. As of January 6, 2015, the requirement to list the UTM coordinates was dropped, and a legalized copy of the contract with authenticated date is now admissible instead of a public instrument.

be provided in the form of date-certain documents granting authorization to use all necessary surface rights, but this flexibility with regard to the format of the document only applies to cases in which the lots are not registered in SUNARP. Clearly, although the required level of formality of the authoritative document proving the use of surface rights has become more flexible in some cases, what has not changed is the need to have such proof in order to begin the process of applying for a Beneficiation concession and approval of the mining plan.

116. Consequently, even if the EIA had been approved by the deadlines set by the applicable regulations, the start of any construction work at the mine or the plant at the Santa Ana project would have had to wait until Bear Creek could acquire the titles that would allow it to perform construction work for mining purposes on the lots that are the object of this project, for which it had only recently begun the initial stages of negotiation. As I mentioned above, if Bear Creek had been unable to acquire the surface rights and thus been unable to initiate construction within 3 years (which could be extended to 5 years), the EIA would cease to be valid and the company would have to initiate a new approval process.

117. As I stated above, the Santa Ana Project site was located both on community-owned and privately-owned land. In the case of the community-owned land, the acquisition of the surface rights would have to be done at two levels, one involving the owners (the communities themselves) and the other involving the possessors, (community members who were given lots) and they would have to be persuaded to move off of it, which makes the process even more complicated. Bear Creek would also have to negotiate and reach an agreement with a private entity which is the Huacullani Neighborhood Council.

118. To acquire the surface rights from the communities, very strict requirements must be met within the community in order for such agreements to be valid.<sup>153</sup>

- a. As a first step, Bear Creek would have to gain access to the census data on the members of each community and confirm that it was up to date (in certain cases conflicts arise among community members regarding who can access their census data and under what circumstances);
- b. As a second step, it should take care that the agreement for the acquisition of surface rights is made via an assembly in which no fewer than two thirds of the registered community members participate and vote in favor (and for this purpose a simple statement by the community on the contract as it was done on the contract form attached to the meeting minutes of the Concepción de Ingenio Peasant Community will not be sufficient. Rather, for recording purposes, the record of registered residents of the community should be inserted into the public instrument containing the contract);
- c. As a third step, it should ensure that the minutes of the meeting at which it is agreed to transfer some right to the community land for mining use have been drawn up with the formalities required by the community's charter;
- d. As a fourth step, it should be verified that the community authorities authorized to sign the agreements are registered in SUNARP (or wait until the record is updated in the event a new authority is succeeding an old one, or previously register the authorities or agents who are expressly authorized to sign);
- e. As a fifth step, separate the area for which surface rights are to be acquired, in the event the entire community territory is not being acquired (as in the case of the Concepción de Ingenio Peasant Community); and
- f. As a sixth step, record the land agreements in those cases in which the land has already been registered. For purposes of the foregoing, it is important that a title search for the community land have already been conducted.

119. Bear Creek also mentions in its EIA that “the fact that the territory in every Peasant Community is distributed among its members results in the severe fragmentation of the surface lands.”<sup>154</sup> This is in reference to the decision made by the communities in the Santa Ana

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<sup>153</sup> Land Law, Art. 11 [Exhibit R-157]. “Article 11: Any act of disposing, encumbering, leasing or exercising any other action on community-owned land in the mountains or the jungle, shall require a Resolution passed by the General Meeting with a vote in favor of two thirds of the members of the Community.”

<sup>154</sup> 2010 Environmental Impact Assessment Chapter 2: Description of the Project Area, Section 2.4.4.6 [Exhibit R-196].

project area to parcel out their communal land and give parcels in possession to some of the community members. In these cases, the agreements with the possessors may be in a simpler format, since they do not require as many formalities as when agreements are being negotiated and reached with communities, but the negotiations may even be more complicated with the possessors, given that they are the immediate possessors who may have greater emotional ties to the parcels, for which they shall receive compensation which must cover not only the land and any buildings and/or crops or livestock, not to mention any agreements regarding their relocation. The obligation to resettle the possessors is a commitment that comes from financial rules such as those implemented by the World Bank or the Principles of Ecuador (promoted by the largest banks financing extractive activities), but it generally becomes common practice because the possessors themselves require it, even when there is no such obligation currently in place with any financial institution.<sup>155</sup> For example, in the case of the Concepción de Ingenio Peasant Community, this obligation to negotiate with the possessors arises from clause 6.3 of the draft agreement between Bear Creek and the community.<sup>156</sup> In such cases, it is often included as part of the negotiations to jointly identify with the possessor, in advance, the location of the place to which he will be relocated. Were we to assume that the agreement with the Concepción de Ingenio Community had been perfected, Bear Creek would still not have reached agreements with its possessor members as required by the aforementioned Clause 6.3.

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<sup>155</sup> See The Equator Principles II, June 2006, available at [http://equator-principles.com/resources/equator\\_principles\\_II.pdf](http://equator-principles.com/resources/equator_principles_II.pdf), pp. 8, 9 [Exhibit R-289]. See also The Equator Principles III, June 2013, available at [http://equator-principles.com/resources/equator\\_principles\\_III.pdf](http://equator-principles.com/resources/equator_principles_III.pdf), pp. 8-9, 20, 21 [Exhibit R-290].

<sup>156</sup> Minutes of the Extraordinary General Meeting of the Peasant Community of Concepción de Ingenio, April 2, 2011, Art. 6.3 [Exhibit C-0186].

120. Mr. Antunez de Mayolo asserts that the first contract is the hardest and that later the other communities reach agreements more quickly.<sup>157</sup> This assertion surprises me. In my experience in the mining industry and in the negotiation of land rights for mining purposes, the reality is the opposite. It is not uncommon for some possessors to postpone their decision to transfer or grant surface rights, in the hopes of obtaining more advantageous terms and conditions, in the knowledge that the project developers have an interest in starting construction as soon as possible, and are already familiar with the terms and conditions the investor is willing to offer. Nor is it unusual for an agreement signed with one community to generate a certain degree of conflict with a neighboring community with which it has a border dispute or simply due to local rivalries (proof of this is Clause 4.4 of the draft agreement with the Concepción de Ingenio Peasant Community which requires Bear Creek to raise the agreed-upon price in the event other communities are able to negotiate better terms and conditions in their own agreements.)<sup>158</sup>

121. Even if we were to assume that the communities and possessors were favorably inclined toward the Santa Ana project, and had been prepared and willing to quickly grant the surface rights to Bear Creek (which at the very least entails a significant degree of uncertainty), the fact is that the communities and possessors traditionally negotiate at a slow pace, and are also conscious of the obligation and urgency the mining investor has in reaching an agreement with them. For this reason, negotiations tend to go extremely slowly and normally the communities successfully negotiate payments and conditions that are rather onerous for investors. For these

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<sup>157</sup> Second Witness Statement of Antunez de Mayolo, para. 87.

<sup>158</sup> Minutes of the Extraordinary General Meeting of the Peasant Community of Concepción de Ingenio, April 2, 2011 Art. 4.4 [Exhibit C-0186].

reasons, I believe that Bear Creek was facing long and difficult negotiations to acquire the surface rights it needed to process certain construction permits.

## **2. Certificate of Non-existence of Archeological Remains (CIRA)**

122. Before breaking ground on any construction project, Bear Creek ought to have obtained a Certificate of Non-existence of Archeological Remains (CIRA) issued by the Ministry of Culture.<sup>159</sup> To obtain such a certificate, it would have had to complete an Archeological Reconnaissance Survey Project to establish said non-existence. Given the size of the area on which the Santa Ana project site is located, a research project conducted by an archaeologist would be needed. Bear Creek argues that it would not have been difficult for it to obtain a CIRA because it had already surveyed the area and the remains identified were located outside the critical areas of the project.<sup>160</sup> In Bear Creek's Counter Memorial it merely stated that it did not have the CIRA, something it had already acknowledged in the EIA.<sup>161</sup>

123. In order for the project to be granted authorization, it will be necessary to present an Archeological Evaluation Plan, a description of the project objectives, the plans to be executed and the methodology to be used. The Archeological Evaluation Project may involve reconnaissance, excavations or excavations and artifact retrieval, and may not last for more than one year.<sup>162</sup> Upon completion of the evaluation and after the Final Archeological Survey Report

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<sup>159</sup> Regulation on the Archaeological Investigations, Supreme Resolution No. 004-2000-ED, January 24, 2000 (“Archeological Investigation Regulation”), Art. 65 [Exhibit R-160]. “Article 65: Certificates of Non-existence of Archeological Remains will only be issued upon completion of the Archeological Reconnaissance Survey Project, with or without excavation, as applicable. 1. In the event the area in question measures less than five hectares, it may be directly supervised by the Directorate General of Archeological Heritage of the Peruvian National Institute of Culture. 2. In the event the area exceeds the limits set it paragraph 1, such as electrical transmission lines, pipes, highways and other similar structures, a project presented by an archaeologist will be required, pursuant to the provisions of Article 8 of this Regulation. (...)”

<sup>160</sup> Claimant's Reply, para. 170.

<sup>161</sup> Claimant's Reply, para. 170.

<sup>162</sup> Archeological Investigation Regulation, Art. 8 [Exhibit R-160] “Article 8: Archaeological Survey Projects are Projects carried out in the course of productive, extractive, and/or service projects, within both the private sector and

is issued, it will be analyzed by the Ministry of Culture and a field inspection conducted with the lead archaeologist.<sup>163</sup> Only in the event that the evaluation determines that no Archeological remains are present will the authority issue the CIRA.<sup>164</sup>

124. In the event such Archeological remains were found, they would proceed to be retrieved. Retrievals should be done as part of an Archeological Artifact Retrieval Project, which must be scheduled and recommended by the National Technical Committee for Archeology. In the event that during the construction and operation of the Santa Ana project, any incidental archeological remains were found, work must come to a halt.<sup>165</sup>

125. Bear Creek acknowledges that it has not yet begun the process of obtaining a CIRA,<sup>166</sup> even though the surveys identified the presence of archeological remains within the direct area of influence, but it implies that these remains were not within the project site area. In this scenario in which there is evidence of archeological remains in the Santa Ana project's direct

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the government sector, for the purpose of protecting National Archaeological-Historic Heritage which includes both buildings and artifacts. Their purpose is evaluation and research. The following plan shall be followed as applicable in order to achieve the comprehensive execution of this type of project in each specific area: 1 Archeological Reconnaissance Survey Project, no excavations. 2 Archeological Survey Project, with excavations. These projects include the determination of boundaries and site signposting. 3 Archeological Artifact Retrieval Projects. Refers to the partial or total excavation of Archeological sites due to their interference with construction projects that are unavoidable due to their technical nature, or because they have been formally declared to be in the national interest by means of a government accord. These Archeological Artifact Retrieval Projects must be scheduled and are the result of Archaeological Evaluation Projects or Archeological checks performed as part of construction supervision duties. They will require the recommendation of the National Technical Committee on Archeology.”

<sup>163</sup> Archeological Investigation Regulation, Art. 6 [Exhibit R-160] “Article 61: Archeological Evaluation Project Reports (...) must be sent to the National Institute of Culture in accordance with the project schedule. (...)”

<sup>164</sup> As of May 16, 2013, the procedure for obtaining a CIRA has been simplified. Later, via Supreme Decree No. 003-2014-MC of October 3, 2014, it was established that projects must have an Archeological Monitoring Plan in place in case any incidental Archeological remains were found.

<sup>165</sup> Archeological Investigation Regulation, Art. 10 [Exhibit R-160] “Article 10: Both Archeological Retrieval Projects and Emergency Projects require any civil construction works to come to a halt while they are in progress.”

<sup>166</sup> 2010 Environmental Impact Assessment Executive Summary, Section 5.2.5 [Exhibit R-194]. “Pursuant to the rules governing the protection of archeological heritage in effect, all major infrastructure development projects are required to obtain a Certificate of Non-existence of Archeological Remains (CIRA), before breaking ground on their construction projects. In the event of a chance find during earth moving activities, the archeologist in charge of the archeological monitoring program shall halt earth moving work in said sector and call the archeological supervisor at the INC to come down to devise the corresponding mitigation strategy.” [Note.- The INC refers to the National Institute of Culture, which is now the Ministry of Culture].

area of influence, a Research Project would have to be presented for the Archeological Survey, but as of the time the processing of the EIA was suspended, it was still uncertain whether or not any archeological remains were present at the project site. Specifically, I have no evidence that Bear Creek conducted any Research Project for the Archeological Survey.

126. In fact, in Comment 150 to the EIA, the DGAAM asks Bear Creek for more information on the two archeological remains found within the Santa Ana project's direct area of influence. Bear Creek attempted to resolve this comment by mentioning that it would conduct an archeological survey without excavation in order to obtain the CIRA when the time came, which once again confirms that Bear Creek was not yet in a position to request a CIRA. In other words, the required archeological survey was still pending. Moreover, an archeological survey necessarily involves having the right to access the area, and as has been described above, Bear Creek still did not have the surface rights.

127. Having identified the presence of archeological remains, according to Lorenzo de la Puente Brunke, in addition to the CIRA the cultural authority “has been requiring the creation and implementation of an Archeological Monitoring Plan for projects that involve earth moving so as to guarantee the protection of the archeological sites listed on the CIRA and especially any others that may be discovered during said earth moving work.”<sup>167</sup> In said event work will come to a halt and the find reported to the cultural authority. Although this would not have doomed the Project, neither can it be asserted, as Bear Creek does, that it would not have impacted it,<sup>168</sup> since the delays would be inevitable.

128. Even though to date the archeological remains that were found had not been found near any of the primary project components, the fact that they might be at the site, in areas

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<sup>167</sup> Lorenzo de la Puente Brunke, ENVIRONMENTAL LEGISLATION FOR MINING IN PERÚ 222 (2005) [Exhibit R-291].

<sup>168</sup> Claimant's Reply, para. 170.

intended for support facilities, would have been a not-so-minor complication in the EIA approval process. As we have said, the discovery of remains leads to the shutdown of work, the preparation of additional studies and potentially the retrieval or relocation of complementary components, which in turn involves the redesign of access routes, among other modifications that would have to be made to the EIA.

### **3. Mining Plan**

129. In my first Report I outlined some potential complications that Bear Creek might encounter in obtaining approval for its Mining Plan, such as the pit design and other components that could undergo modification as a result of comments on the EIA made by the DGAAM.<sup>169</sup> I also highlighted the fact that until Bear Creek reached an agreement with the peasant communities and other owners to acquire the surface rights, Bear Creek could not initiate the approval process for its mining plan.<sup>170</sup> The approval of the Mining Plan is the most important step for being able to start construction—and later operation—of the mine. Bear Creek only responded that it had completed the necessary studies to be able to file the request for approval of its Mining Plan.<sup>171</sup>

130. When reviewing the comments to the EIA, I made reference to the scope of the mining plan, its purpose and some of the environmental and technical complications that could arise. The EIA is an environmental management tool aimed at minimizing environmental impact; the mining plan is a technical-mining document intended to show that the mine was constructed in accordance with proper mining practices with regard to safety and stability, among others. The studies that may be conducted as additional support for the EIA do not focus

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<sup>169</sup> First Rodríguez Report, paras. 75, 78-79 [Exhibit REX-003].

<sup>170</sup> First Rodríguez Report, paras. 75, 78-79 [Exhibit REX-003].

<sup>171</sup> Claimant's Reply, para. 171.

on the safety of the operations, the height of the banks or the stability of the slopes, among other things. Moreover, Bear Creek could not have been ready to submit its mining plan for approval, as it asserts in paragraph 171 of its Counter Memorial, since it had not yet even consolidated the rights to the necessary land, which is an admissibility requirement for such requests for approval.

#### **4. Water Licenses and Authorizations to Discharge or Reuse of Treated Water**

131. Similarly, when analyzing some of the comments to the EIA, I mentioned water use rights and explained the difference between the scope and purpose of an EIA and the goals of the application process for obtaining water use and discharge and reuse rights from the ANA. I also mentioned that the lack of comments on the EIA on the part of the ANA did not represent any sort of decision on the part of the ANA regarding the water use licenses or authorizations for discharge or reuse of treated water.

132. The land use rights and wastewater discharge authorization are mandatory prerequisites for the mining authority to admit its application for a beneficiation concession, after it had been granted authorization to build the beneficiation plant, and ultimately grant it the operating license for the plant. All of these rules were binding and enforceable on the Santa Ana project, and in order to obtain them, the authority would need to have already approved the water use studies and work execution studies, and favorable technical reports would have had to have been issued. Only as of January of 2015 were new rules issued that simplified the process for obtaining beneficiation concessions, as I noted in paragraph 81 of my first Report. These new rules refer to the studies required to obtain water use licenses, waste water discharge and treated water reuse authorizations, in the framework of the application for beneficiation concessions.

## **5. Conclusions**

133. Based on the foregoing, I feel it necessary to reiterate what I indicated in paragraph 108 of my first Report. Even if we were to assume that Bear Creek had obtained the necessary surface rights and the approval of the EIA within the time frame allotted by the law, and in light of the number of steps that were still pending before it could begin construction on the Santa Ana project, not to mention the fact that in many cases these were lengthy, sequential processes, it would have been very difficult—not to say impossible—for Bear Creek to have begun construction on the Santa Ana project facilities in the 2nd half of 2011, as it states in its Annual Report, or that it would have been able to commence production in Q4 of 2012, as it also indicates in its Annual Report. Clearly, this assertion, which I now reiterate, does not point to any potential discretionary decision making on the part of a public official in granting or denying any permits (which could indeed occur given sufficient basis), but rather to the complications each such permit may encounter which will inevitably draw out the process, many times in excess of the time frames allotted in the regulations. In this sense, I reiterate my opinion that the time frames proposed by Bear Creek for completing the process of obtaining the permits that would have allowed it to start construction in the second half of 2011 and begin production in Q4 of 2012 were in any case extremely optimistic.

## **IV. THE LEGAL RULES GOVERNING CITIZEN PARTICIPATION FOR THE EXPLOITATION OF MINERAL RESOURCES**

134. In my first Report, I outlined the formal requirements for the citizen participation process, including the drafting of a citizen participation plan that would be submitted for the approval of the authority, and the requirement to hold at least one public hearing.<sup>172</sup> The list of mechanisms contained in the law that the project developer can propose are meant as examples;

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<sup>172</sup> First Rodríguez Report, paras. 49-64 [Exhibit REX-003].

the intention is that the process should be as inclusive as possible and as such the mechanisms selected must be all those that fit the reality of the project.

135. Regulation on Citizen Participation in the Mining Sector (approved by S.D. No. 028-2008-EM) provides that:

Citizen participation is a public, dynamic and flexible process which, via the use of various mechanisms, seeks to provide the population involved with adequate and timely information regarding the mining activities that are either planned or underway; promote dialog and consensus building; and hear and transmit the opinions, positions, points of view, comments or suggestions regarding the mining activities to aid the competent decision-making authority is the administrative procedures for which it is responsible.<sup>173</sup>

136. The authority has the specific responsibility to approve the citizen participation mechanisms and monitor compliance with the same during the evaluation and execution phases of the Project, including the holding of a public hearing and anything else that has been approved for the aforementioned stages.<sup>174</sup> Thus, when evaluating the EIA and formulating its comments, the DGAAM verified that Bear Creek was complying with the PPC mechanisms it proposed and it granted them preliminary approval. But it is Bear Creek's responsibility, just like any other project developer, to conduct a public, flexible, and dynamic process with the communities throughout its area of influence.

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<sup>173</sup> Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM, May 26, 2008 (“Regulation on Citizen Participation on the Mining Subsector”), Art. 3 [Exhibit R-159].

<sup>174</sup> Ministerial Resolution No. 304—2008-MEM-DM sets out a series of strict requirements that a company must meet, the purpose of which is to guide the company toward establishing effective communication and dialog with the local communities. These include specific citizen participation mechanisms (Art. 2); mandatory informative workshops, both prior to the preparation of the EIA and while it is being prepared (Arts. 12, 13); detailed requirements for the PPC (Art. 15); detailed requirements for the executive summary of the EIA (Art. 16); requirements to display or publish the executive summary and the PPC (Arts. 19, 20); specific procedures for conducting, canceling or postponing the public hearing (Arts. 24-26); etc. Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304—2008-MEM-DM, June 24, 2008 (“Ministerial Resolution No. 304-2008-MEM-DM”) [Exhibit R-153].

137. The citizen participation process cannot be limited to merely keeping the population informed.<sup>175</sup> The right to sufficient and timely information is only one of the many obligations, which also include the right to participation, respect for cultural diversity, non-discrimination, citizen oversight, and continuous dialog, all of which are set forth as principles in Article 5 of the Regulation on Citizen Participation in the Mining Sector.<sup>176</sup>

138. Dr. Flury cites<sup>177</sup> Article 4 of this same regulation, which has been abrogated, which provided that:

“The right to consultation referenced in Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, is exercised and implemented in the mining sub-sector, via the citizen participation process governed by this Regulation.

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<sup>175</sup> Expert Opinion of Hans Flury, para. 69.

<sup>176</sup> Regulation on Citizen Participation on the Mining Subsector, Art. 5 [Exhibit R-159]. “Article 5: The competent authority, holders of mining titles and the populations involved in the citizen participation process in reference to the mining activity, shall observe the following general provisions in all of their actions. 5.1. On the right to participate: All persons have the right to participate responsibly in the decision-making processes on matters related to mining activity that have the potential to affect their interests, without prejudice to the areas of responsibility that correspond to the authorities at each level of government. The right to participate in matters related to mining activity is exercised in good faith, based on transparency and truth in accordance with the rules and procedures of the established participation mechanisms and the provisions of this Regulation. Any action or measure implemented by the authorities, holders of mining titles or populations involved in the process that hinders or obstructs the initiation, development, or end of a citizen participation process shall constitute a violation of legal provisions on citizen participation. 5.2. On the right to access to Information: The competent authority, holders of mining titles and the populations involved in the citizen participation process, have the right to request, have access to, or receive public information, in a proper and timely manner, with regard the mining construction work and activities that have the potential to directly or indirectly affect the environment, without the need to provide any justification or invoke any interest motivating said request. 5.3. On the principle of respect for cultural diversity: The competent authority, holders of mining titles and the populations involved in the citizen participation process shall act with respect for the characteristics and unique features of the various cultures, in such a way as to promote and facilitate the inclusion of the greatest diversity of interests of the populations, thereby enriching the process and the decision making for which the authority is responsible. 5.4. On the principle of non-discrimination: The competent authority, holders of mining titles and the populations involved in the citizen participation process shall promote the effective participation of all persons in said process, without regard for race, ethnicity, gender, religion, culture, language, political opinion, national or social origin, economic status, sexual orientation, birth or any other condition. 5.5. On the principle of citizen oversight: The populations involved have the right to monitor, control and track the measures, actions, obligations and commitments adopted by the holder of the mine title with regard to the environmental and social aspects of their activity. Citizen oversight shall be exercised in accordance with the provisions of this Regulation. 5.6. On the principle of continuous dialog: The competent authority, the holders of mining titles and the populations involved in a citizen participation process should maintain a continuous dialog for the purpose of encouraging good social relations.”

<sup>177</sup> Expert Opinion of Hans Flury, para. 72 (quoting Regulation on Citizen Participation on the Mining Subsector, Art. 4 [Exhibit R-159]).

As such, the citizen participation mechanisms to be implemented must be implemented in good faith and in a manner appropriate to the circumstances, for the purpose of determining, prior to initiating and engaging in mining activity, whether the interests of the indigenous peoples or peasant communities living in the area of influence of the projected mining activities are safeguarded and to what extent.

Pursuant to Article 72, point 72.2 of the General Law on the Environment No. 28611, in the case of projects or activities to be developed on land occupied by indigenous populations, peasant

and native communities, the citizen participation procedure should primarily be aimed at reaching agreements with their representatives, so as to protect their rights and traditional customs, and to establish whatever benefits and compensation they are entitled to under applicable law.

The consultation does not give the populations involved the right to veto the mining activities or the decisions made by the authority.”

139. I agree with Dr. Flury in that had this article, which was recently abrogated in August of 2013, been in effect, Bear Creek would have been required to comply with the citizen participation mechanisms. What we appear to disagree on is that the obligation does not arise solely from said abrogated article, but also from other rules contained in the regulation in question.<sup>178</sup> The prior consultation process in the framework of Convention 169 of the International Labor Organization (ILO) now gives a different treatment under other premises pursuant to regulations other than those governing citizen participation in mining projects.

140. In summary, apart from their obligation to conduct a public, dynamic and flexible process, project developers should focus on building an atmosphere of mutual respect and confidence with the communities, so that they will accept their presence, the installation of the

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<sup>178</sup> Expert Opinion of Hans Flury, para. 73.

mine and a plant in their territories and the effects and consequences it will involve for them. The laws regarding citizen participation were—and the prior consultation regulations under Convention 169 of the ILO still are—clear in the sense that the communities have no right to a veto, but this does nothing to mitigate the fact that in practice they have other means —both practical and legal—to slow down or even stop a project from being developed. Communities play a very important role in the establishment of mining projects in their environs, and this role is not confined to just what the laws have to say on the matter.

141. Reiterating what I said in my first Report in connection with community relations, my professional experience has taught me that it is not sufficient to merely comply with the basic formalities and obligations the law establishes in relation to citizen participation. It is absolutely essential that the mining company do all it can to understand and consult with the impacted communities so that the communities will accept the project and its consequences. If the company is not aligned with this approach, the communities are not likely to expect the project to provide any benefit to them and they will oppose it. Preventing an atmosphere of conflict must be one of the basic premises of the undertaking from the very moment community relations begin, otherwise it will be very difficult to move forward with the project. Once any kind of conflict breaks out—regardless of whether or not it is justified, or whether or not the mining company is responsible—it will be very difficult to restore the perception of the communities and the local population in general.

142. Although it is not binding, for many years the MINEM has had a Community Relations Guide with proposals for drafting social considerations for environmental impact studies, the proper management of community relationships in areas surrounding projects and proposals for how to design citizen participation mechanisms, and other suggestions related to

this topic. Bear Creek makes no reference in its PPC to this Community Relations Guide,<sup>179</sup> which is a tool that was recommended by the MINEM via Supreme Decree No. 042-2003-EM and Supreme Decree No. 052-2010-EM.<sup>180</sup>

143. Bear Creek declares in paragraph 82 of its Counter Memorial that the approval of the CCP represented an endorsement of the same and that Bear Creek was acting appropriately. The engineer Mr. Antúnez de Mayolo goes even farther, and in paragraph 19 of his opinion, proclaims that the DGAAM unequivocally approved it. The fact is that the DGAAM issued Official Letter No. 021-2011/MEM-AAM of January 7, 2011, the first paragraph of which literally reads:

“It is my pleasure to apprise you of the fact that my office has performed the initial evaluation of the Executive Summary and of the Citizen Participation Plan of the EIA for the Santa Ana mining project, and after reviewing the reference documents and coordinating with your representative; I am informing you of our approval of these documents.”<sup>181</sup>

144. Clearly, the DGAAM recognizes that the evaluation of the PPC is preliminary—it terms it an “initial evaluation”—<sup>182</sup> and it approves it. It could not be otherwise, given the title of Article 17 of Resolution No. 304-2008-MEM-DM. This approval is required for the purposes of

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<sup>179</sup> Ministry of Energy and Mines of Perú, General Direction of Environmental Affairs, “Guide on Community Relations”, January 1, 2001 [Exhibit R-172].

<sup>180</sup> Supreme Decree No. 042-2003-EM, December 12, 2003, Art. 3 (modified by Supreme Decree No. 052-2010-EM of August 18, 2010) [Exhibit R-158]. “Article 3: Environmental studies conducted for the purpose of engaging in mining activity shall include plans or programs detailing the activities for compliance with the obligations set forth in Article 1 of this Supreme Decree (...) The Ministry of Energy and Mines establishes more specific criteria in the corresponding Environmental or Community Relations Guides.” Supreme Decree No. 052-2010-EM, Modification of the articles that established a prior commitment as prerequisite for engaging in mining activities and supplemental rules, August 18, 2010 [Exhibit R-173].

<sup>181</sup> MINEM Resolution No. 021-2011/MEM-AAM, January 7, 2011, p. 1 [Exhibit C-0073].

<sup>182</sup> Ministerial Resolution No. 304-2008-MEM-DM [Exhibit R-153].

the mechanisms proposed in the PPC, pursuant to Article 18 of Ministerial Resolution No. 304-2008-MEM-DM.<sup>183</sup>

145. Under no circumstances could the scope of this approval be interpreted as an alleged confirmation by the authority that Bear Creek had implemented adequate community relations programs, much less that Bear Creek had good relations with the communities with no social conflicts or problems, as Bear Creek asserts in paragraph 85 of its Counter Memorial and Mr. Antúnez de Mayolo asserts in paragraph 21 of his opinion. I repeat, this preliminary approval of the PPC, according to the language of the law itself, is merely to acknowledge the validity of the citizen participation mechanisms proposed for the upcoming phases. It cannot be asserted that the DGAAM conducted an in-depth review of the PPC, particularly since it was required to review the Executive Summary at the same time and in the brief 7 business day period allotted.

146. Bear Creek argues that the public hearing was successful and approved by the DGAMM, which would indicate that the communities support the Santa Ana project.<sup>184</sup> This is not the correct interpretation of the results of the public hearing. The Citizen Participation Plan is regulated in a rather detailed manner. For example, the level of formalities required for public hearings<sup>185</sup> both with regard to how to call them and how to hold them, is particularly high. Thus, there is an extremely detailed article which regulates the potential scenarios in which public hearings may be canceled or suspended.<sup>186</sup> This denotes, at least, awareness of such an eventuality and a concern that it might happen. According to the applicable regulation, a public

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<sup>183</sup> Ministerial Resolution No. 304-2008-MEM-DM [Exhibit R-153].

<sup>184</sup> Claimant's Reply, paras. 88-91.

<sup>185</sup> See Ministerial Resolution No. 304-2008-MEM-DM, Arts. 24, 25 [Exhibit R-153].

<sup>186</sup> Ministerial Resolution No. 304-2008-MEM-DM, Art. 26 [Exhibit R-153].

hearing may only be canceled before or during the hearing for reasons of acts of God or force majeure or any other reason that could jeopardize the health or safety of the participants or the board of directors.<sup>187</sup> The fact that the public hearing for the Santa Ana project was peaceful does not mean that there are no situations or risk of unrest. The formalism with which the public hearing is structured is not accidental, and is in response to one of the Andean communities' idiosyncrasies which is that they tend to be very inclined toward formality and respect for formalities, so it is very important to comply with all the legal requirements with regard to form in order to build a healthy relationship with the surrounding peasant communities. As I noted in my first Report, there were certain formalities that were not respected or that were not duly recorded, as required by the regulation, in the record that was drawn up at the end of the hearing. Moreover, the fact that the public hearing was approved or that it took place without incident does not necessarily indicate that the attendees agree with what was proposed at the hearing, or that they have no lingering doubts or questions, or that they are satisfied with the project. Concerns may be brought up later, by persons who may or may not have attended the hearing. In fact, the Comments submitted to the EIA for the Santa Ana project include four documents submitted by authorities, communities and other different entities.<sup>188</sup>

147. Bear Creek asserts that the Environmental Assessment and Oversight Agency (OEFA) has provided support for the Santa Ana project.<sup>189</sup> I have reviewed the two OEFA reports on Bear Creek's exploration work at Santa Ana, and OEFA has not provided any support. It is particularly important to analyze what the function of the OEFA is. As indicated by the

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<sup>187</sup> Ministerial Resolution No. 304-2008-MEM-DM, Art. 26 [Exhibit R-153] (“The competent authority may declare the cancellation or suspension of the public hearing, *due to acts of God or force majeure or any other for any other reason that could jeopardize the health or safety of the participants* or the Members of the Board of Directors.”) (emphasis added).

<sup>188</sup> See Ministerial Resolution No. 304-2008-MEM-DM, Arts. 24, 25 [Exhibit R-153].

<sup>189</sup> Claimant's Reply, paras. 67, 79-80

name of the agency and the name of the law that created it, the role of the OEFA is immanently environmental and it is in charge of oversight, supervision, evaluation, control, and penalizing violations in environmental matters.<sup>190</sup> Article 11 of the National Environmental Impact Assessment Law, approved by Law No. 29325 establishes that the OEFA's duties are evaluation, direct supervision, supervision of public bodies, oversight and penalization and regulatory duties,<sup>191</sup> the scope of all of which is limited to environmental matters. For the OEFA, a supervisory or even supportive or endorsing role in the running of a company is outside the scope of its functions. It is true that one of the functions of the OEFA is to investigate compliance with the obligations set forth in environmental management tools, such as environmental impact assessments, which do have a corporate component, but said investigation (as well as the potential penalty in the event of noncompliance) is limited to those obligations that the private citizens have undertaken and that they are required to perform as part of their approved environmental instruments. Environmental studies that have not been approved (such as in the case of the EIA for the Santa Ana project) generate no obligations on the part of the private party, and consequently, the OEFA has no jurisdiction over them.

148. This being the case, the only corporate obligations on the part of Bear Creek that OEFA could have overseen would have existed in the context of the semi-detailed environmental impact assessment for exploration. Compliance with Bear Creek's binding commitments in the context of the approved PPC ought to have been—and in fact were—reviewed by the DGAAM as part of the EIA evaluation process. It is in this context, and in no other, that the environmental supervisions found in Exhibits C-143, C-179 and C-180 of the Counter Memorial occur. But

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<sup>190</sup> 2009 Law on the National System for Environmental Evaluation and Fiscalization, Law No. 29325, March 5, 2009, Art. 6 [Exhibit R-292].

<sup>191</sup> 2009 Law on the National System for Environmental Evaluation and Fiscalization, Law No. 29325, March 5, 2009, Art. 11 (modified in 2013 by Law No. 30011) [Exhibit R-292].

what the aforementioned instruments show is that the verification focused on compliance with environmental, and not corporate, obligations. In fact, the OEFA, in its last visit, formulated three Comments that were never resolved by Bear Creek at any time, one of which was in reference to fact that authorization for the use of surface land had not been given by the communities that owned said lands. It indicates that the agreements in place with the communities: (i) are limited to the use of the land for exploration purposes only, (ii) said authorizations expired in August of 2010, and (iii) the authorizations were recorded without compliance with the formalities required by the law. If the authority had noted a lack of surface rights during the final phase of exploration, it could have ordered the complete shutdown of all activities until the company provided proof that it had obtained the necessary surface rights. Consequently, the reports filed by the OEFA cannot be interpreted as a general affirmation of Bear Creek and the Santa Ana project.

## **V. CONCLUSIONS**

149. Based on all of the foregoing in this Reply, I maintain my conclusions as follows:
- a. Mineral resources are the Property of the State and are exploited by private parties through the concession system. A mining concession grants its holder the exclusive right to engage in the exploration and exploitation of the mineral resources in question, always with the limitations established therein and subject to first meeting the requirements for obtaining the other necessary permits. In practice, the holder of a mining concession does not automatically acquire the right to explore or exploit its mining concession until it meets the additional requirements that allow it to engage in said mining activities.
  - b. Authorization to engage in exploration and exploitation activities is subject to obtaining an environmental certification, which will depend on the estimated impact of the mine and the condition of the area that will be impacted. When the environmental certifications for exploration at the Santa Ana project were applied for, they required the express decision of the authority before the exploration could commence.
  - c. Obtaining the proper surface rights for the purpose was a mandatory requirement that had to be met prior to initiating exploration. Before beginning any construction work on mineral production and treatment facilities, land use rights

to the entire surface area where the various components of the project will be built must first be formally obtained. The lack of surface rights prevents a significant number of authorizations from being approved. As far as I have been able to determine, Bear Creek never obtained the surface rights for construction or mineral production at the Santa Ana project.

- d. According to the information provided by Bear Creek, the land on which the Santa Ana site is located is owned by three communities (Concepción de Ingenio, Ancomarca and Challacollo) and the Cónдор de Ancocahua area (which is splitting off from the Challacollo community) and the Huacullani Neighborhood Council. Moreover, there are no less than 94 possessors of the 351 hectares comprising the Santa Ana project site. Surface rights to all these lands had to be obtained, and the negotiations with them were in their initial stages when its Environmental Impact Assessment (EIA) was submitted for approval. Bear Creek has submitted a document that seems to show that it has negotiated an agreement with the Concepción de Ingenio Peasant Community for purchasing part of their land, but said document does not show that this agreement ever took effect. What is clear is that, based on Bear Creek's own statements, it had not reached any agreement with any of the other owners or possessors of the other surface rights that it needed in order to apply for other construction permits.
- e. Before it could start construction on the mineral exploration and treatment facilities, it was required to have a previously and expressly approved environmental study. In the case of the Santa Ana Project, the required environmental study is the Environmental Impact Assessment. Without an approved EIA, no construction could take place at the Santa Ana project. Upon reviewing the document containing the EIA, the Ministry of Energy and Mines (MINEM) had 157 Comments. For its part, the Ministry of Agriculture (MINAM) had an additional 39 Comments. And as part of the citizen participation process, the population submitted to the MINEM four documents outlining their own concerns. Bear Creek had to respond to 196 Comments formulated by the sectoral authorities (MINEM and MINAM) in order for its EIA to be approved. After reviewing the answers by which Bear Creek attempted to resolve these Comments, which it gave before a notary, I think it is very likely that some of the sectoral authorities' comments remained unresolved.
- f. According to the information on the Santa Ana project components and processes as set forth in the EIA that was submitted for purposes of obtaining the authority's approval for the Santa Ana project, the number of outstanding permits that had to be obtained before Bear Creek could begin construction—and then before it could operate the mine, plant and other complementary facilities— was considerable, and in more than a few cases obtaining them was a long and drawn-out process. Under no circumstances could it be considered that the approval of these authorizations would be automatic. Given that Bear Creek had not received approval for its EIA, had not acquired the necessary surface rights and still needed additional permits before it could start construction on the Santa Ana project facilities, in my opinion, the situation was such that Bear Creek would be unable

to meet the deadlines it had set for itself for the construction and startup of mining operations.

- g. Before an EIA can be assessed, the citizen participation process must be completed. Bear Creek submitted its Citizen Participation Plan (PPC) for approval. The authority's approval of the PPC is not a statement of approval of Bear Creek's actions in its relationships with the communities in its area of influence, nor does it reflect the absence of potential social conflicts in the area.

This expert witness opinion is based on my personal experience, and I certify that the contents hereof are true to the best of my knowledge and belief.

Signature  
Luis Rodríguez-Mariátegui Canny

March 31, 2016  
Date