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Expert Report of Luis Rodríguez-Mariátegui Canny

October 6, 2015

English Translation

**UNDER THE RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTES**

**Bear Creek Mining Corporation**  
*Claimant,*

v.

**Republic of Peru**  
*Respondent.*

ICSID Case No. ARB/14/21

**EXPERT REPORT ON PERUVIAN MINING LAW OF  
LUIS RODRIGUEZ-MARIATEGUI CANNY**

**OCTOBER 6, 2015**

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## **I. INTRODUCTION, SCOPE OF THE REPORT AND QUALIFICATIONS**

1. The Republic of Peru (“Peru”) has requested through its counsel that I prepare a legal report on Peruvian mining, socio-environmental, and register law with respect to ICSID Case No. ARB/14/21 between Bear Creek Mining Corporation (“Bear Creek”) and the Republic of Peru (the “Arbitration”).

2. Specifically, Peru has requested my opinion(the “Opinion”) regarding (i) the scopes of the registration of mining contracts with the Mineral Rights Registry and, more specifically, the scopes of the registration of the option agreements for the Santa Ana project by Bear Creek; (ii) the requirements with which Bear Creek should have complied in order to carry out mineral exploration work on the Santa Ana project, including an analysis of the procedures followed by Bear Creek; (iii) the requirements applicable to Bear Creek so that it could continue with the Santa Ana project beyond the exploration stage and begin the construction and operation stages; (iv) the community participation plan for the Santa Ana project that Bear Creek submitted during the environmental assessment evaluation process; and (v) an explanation of revocation as a means of extinguishing mineral rights pursuant to Peruvian law.

3. The basis for this Opinion is the arbitration claim filed by Bear Creek in the Arbitration and certain pieces of evidence it submitted, as well as additional information that I received from the Peruvian counsel or have been able to collect from publicly-available sources related to the Arbitration and that might be useful regarding the Opinion. Furthermore, I have consulted sources of law, case law, and legal scholarship that apply to and are useful concerning the Opinion. The Opinion is based on my experience of over 25 years with mining and Peruvian mining law.

4. I am an attorney and graduate of the Pontifical Catholic University of Peru (1987) and took Introduction to Mining at the Peruvian Institute of Mining Engineers (1998).

5. I taught Environmental and Natural Resources Law at the Peruvian University of Applied Sciences (2009) and The Commercialization of Minerals in the Mining and Law Specialty Courses program provided by the National Society for Mining, Petroleum and Energy.

6. I served as president of the National Institute of Law on Mining, Petroleum and Energy (1998-1999) and of the Institute of Mining Energy Studies.

7. I have served as director of the National Society for Mining, Petroleum and Energy for 13 consecutive years, where I have acted as secretary of the Board of Directors, as a member of the Executive Committee on several occasions, and where I have also served as chair of the Legal Affairs Committee and Mining and Law Committee.

8. I have been a member of First Advisory Board (2000-2001) and the Third Advisory Board (2006-2007) of the Mining Area of the Registry Zone IX-Lima Headquarters under the National Superintendency of Public Registries.

9. I have presented at conferences and authored publications on mining, the environment, contracts, registers, finance, and other topics both in Peru and abroad and have served as an *ad-honorem* drafter of mining-sector laws and regulations.

10. I currently act as an independent director in foreign and domestic mining companies with interests in Peru.

11. I have been a partner at Hernández & Cía. Abogados since 2007 and am a former partner of Rodríguez-Mariátegui & Vidal Abogados.

## **II. SCOPES OF THE AGREEMENTS' REGISTRATION WITH THE MINING RIGHTS REGISTER REGARDING THE ACQUISITION OF MINING RIGHTS FOR THE SANTA ANA PROJECT**

### **A. MINERAL RESOURCES AND PRIVATE-PARTY CONCESSIONS**

12. Mineral resources are recognized as natural resources and national property when in their natural state.<sup>1</sup> Natural resources are exploited by private parties in the manner indicated by the law applicable to each resource,<sup>2</sup> and the proceeds obtained in the manner set forth by the law governing each resource are the property of the holder of the right granted.<sup>3</sup>

13. Mineral resources are exploited by private parties through the concessions system.<sup>4</sup> In their natural state, mineral resources are the property of the Peruvian State, regardless of whether the surface of the land is owned by the State or a private party.<sup>5</sup> Mining concessions provide concessionaires with the exclusive right to explore and exploit the mineral resources under concession<sup>6</sup> pursuant to the restrictions established in the concession and provided the concessionaire obtains all licenses and permits necessary for beginning the mineral

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<sup>1</sup>Constitution of Peru of December 29, 1993 (“Constitution of Peru”), Art. 66 [Exhibit R-001]. Article 66: “Renewable and non-renewable natural resources are national property. The State has sovereignty regarding their exploitation”; Organic Law for the Sustainable use of Natural Resources, Law No. 26821 of June 25, 1997 (“LOASRN”), Arts. 3-4 [Exhibit R-142]. Article 4: “Natural resources located at their source, whether renewable or non-renewable, are national property (...)” Article 3: “The following are considered natural resources (...) f. Minerals (...)”

<sup>2</sup> LOASRN, Art. 19 [Exhibit R-142]. Article 19: “Rights to exploit natural resources are granted to private parties in the manners established by the special laws applicable to each resource (...)”

<sup>3</sup> LOASRN, Art. 4 [Exhibit R-142]. Article 4: “(...) The benefits and proceeds of the natural resources obtained as indicated in this Law are the property of those holding the rights granted to them.”

<sup>4</sup> Compiled text of Peru’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 by means of business activities conducted by the State and private parties through a system of concessions.”

<sup>5</sup> LGM, Art. 9 [Exhibit R-008]. Article 9: “(...) A mining concession constitutes a real property that is separate and distinct from the plot of land where it is located. (...)”; Civil Code of Peru, July 25, 1984 (“Civil Code”), Art. 954 [Exhibit R-033]. Article 954: “Ownership of the soil extends to the subsoil and the subsoil, (...). Ownership of the subsoil does not include natural resources, archaeological sites and remains, or other property governed by special laws.”

<sup>6</sup> LGM, Art. 9 [Exhibit R-008]. Article 9: “A mining concession grants a concessionaire the right to explore and exploit the mineral resources subject matter of the concession (...)”

exploration and/or exploitation stages,<sup>7</sup> that is, a mining concession provides a concessionaire with the exclusive right to begin filings and procedures for obtaining licenses and permits for mineral exploration and exploitation. On its own, a concession does not grant a right to exploit a natural resource. The holders of the mining concessions granted in 2006, when the mining concessions for the Santa Ana project<sup>8</sup> were granted, contained provisions expressly indicating that “in order to begin mineral exploration and exploitation activities, the requirements and authorizations necessary pursuant to laws and regulations must first be met and obtained,”<sup>9</sup> in addition to other specific obligations regarding the environment or the acquisition of surface rights. A mining concession grants a concessionaire an exclusive right to use and enjoy the natural resource subject matter of the concession, provided the concessionaire complies with its legal obligations.<sup>10</sup>

14. Mining concessions are granted to private parties by filing for an ordinary concession procedure by means of which the first party applying for a specific area will be granted the exclusive right to become the concessionaire once the procedure concludes.

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<sup>7</sup> LOASRN, Art. 23 [Exhibit R-142]. Article 23: “A concession authorized pursuant to special laws provides a concessionaire with the right to exploit the natural resources subject to the concession in a sustainable manner pursuant to the conditions and restrictions established in the corresponding concession (...).”

<sup>8</sup> Not all Santa Ana project mining concessions contain the same text, though they all contain provisions requiring the concessionaire to comply with laws in effect at the time. This includes observing environmental obligations, acquiring surface rights, and obtaining additional permits.

<sup>9</sup> Presidential Resolution No. 2868-2007-INGEMMET/PCD/PM, December 14, 2007, Art. 2 [Exhibit R-143], which granted the mining concession to the Karina 5 mining concession application. Article 2: “Mining concessions that are granted do not ever authorize the execution of mining activities in areas prohibited by law, regardless of whether such areas are expressly indicated or confirmed in this resolution. Moreover, in order to begin mining exploration or exploitation activities, the requirements and authorizations necessary pursuant to laws and regulations must first be met and obtained.”

<sup>10</sup> LGM, Art. 127 [Exhibit R-008]. Article 127: “Through a concession, the State acknowledges a concessionaire’s exclusive right, in a duly-defined surface area, to carry out the activities inherent to the concession, as well as the other rights recognized by this Law, without prejudice to the obligations that correspond to it.”

Concessions may be disposed of, and concessions, their disposal, and the rights *in rem* to them must be registered.<sup>11</sup>

15. In this manner, the two manners in which investors may become concessionaires of a mining concession include submitting a mining concession application to the competent authority when the area is free or entering into a transfer agreement when the concession already has a concessionaire. Martín Belaunde Moreyra states that “concessions may be acquired in several ways: (i) by means of a mining concession application in the event the State has not granted them to preferred third parties, or if they have been granted, they have been extinguished and published as subject to being claimed, which would be the original manner; b) by means of a contract, such as a transfer agreement (...); c) through inheritance or testamentary disposition; d) through auction as a result of a mortgage debt or attachment; e) through reduction resulting from joint ownership (...); f) due to the extinguishment of overlaps (...).”<sup>12</sup>

16. It is standard in the market for mining concession transfer agreements to be preceded by an option agreement by means of which the grantor provides the beneficiary with a temporary, exclusive, unconditional, and irrevocable right to enter into a final agreement if the beneficiary requests this within the agreed period.<sup>13</sup> While not the only reason, the most common reason for entering into an option agreement is to allow the beneficiary to assess the geological aspects of the area of the mining concession, so that it may make the most-informed decision.

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<sup>11</sup> LOASRN, Art. 23 [Exhibit R-142]. Article 23: “(...) Concessions are intangible assets that are subject to registration. They may be subjected to disposal, mortgage, assignment, and claim pursuant to special laws. (...) Concessions, their disposal, and the creation of rights *in rem* to them must be registered with the corresponding register.”

<sup>12</sup> Martín Belaunde Moreyra, MINING LAW AND CONCESSIONS, p. 117 [Exhibit R-144].

<sup>13</sup> LGM, Art. 165, [Exhibit R-008]. Article 165: “Under an option agreement, a concessionaire irrevocably and unconditionally agrees to enter into a final agreement in the future, provided the grantor exercises its right to demand the conclusion of the agreement within the specified period (...); Civil Code, Art. 1419 [Exhibit R-033]. Article 1419: “Under an option agreement, one of the parties is bound by its agreement to enter into a final agreement in the future, and the other party is exclusively entitled to enter into it or not.”

However, option agreements are not sufficient for this purpose because the only way to carry out a proper evaluation is through exploration, which is not available to the beneficiary of an option agreement. In order to obtain adequate information on the existing resources or their potential under the concession, it is also necessary to execute a mining assignment agreement through which the concessionaire temporarily assigns its concession exploration and exploitation rights and obligations.<sup>14</sup> For this reason, the industry standard entails jointly executing an option agreement and a mining assignment agreement. Bear Creek entered into two mining option agreements (on November 17, 2004 and December 5, 2004) (the “Option Agreement”) regarding various mineral rights<sup>15</sup> concerning the Santa Ana project for which Jenny Karina Villavicencio Gardini acted as the mining concession applicant.

## **B. MINING CONTRACT REGISTRATION**

17. Bear Creek requested the preemptive annotation of the Option Agreement concerning the transfer regarding the Karina, Karina 1, Karina 2, and Karina 3 mining concession applications.<sup>16</sup> According to the Regulations on Registration with the Mineral Rights Registry,<sup>17</sup> agreements must be registered with the Mineral Rights Registry under the existing record for each mining concession, and records are created when a mining concession

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<sup>14</sup> LGM, Art. 166 [Exhibit R-008]. Article 166: “A concessionaire may deliver its mining concession (...) to a third party in exchange for compensation. The assignee concessionaire assumes all of the assignor’s rights and obligations by means of this agreement.

<sup>15</sup> Mining law covers both the concessions governed by the LGM (i.e., mining concessions, beneficiation concessions, etc.) and mining concession applications, mining claims, beneficiation concession applications, and others necessary for constituting a concession.

<sup>16</sup> SUNARP Notice of Observation No. 2005-00041200, July 5, 2005 [Exhibit C-0039].

<sup>17</sup> Resolution that Approves regulation on Mining Registry, Resolution of the Superintendent’s Office No. 052-2004-SUNARP/SN, February 9, 2004 (“Mineral Right Registration Regulations”), Art. 4 [Exhibit R-145]. Article 4: “A registration record shall be created for each concession under which the corresponding registrations shall be made (...).”

registration application is filed.<sup>18</sup> Preemptive annotations are admitted as an exception when registering transactions regarding mining concession applications, that is, when in regard to the rights being filed for and pending the granting of a mining concession.<sup>19</sup> Preemptive annotations expire 180 business days following the date the entry recording their submission is made (which occurred on June 28, 2005 in the case at hand). They may be extended by the same amount of time on only one occasion and at the request of one of the parties. A preemptive annotation expires once this period ends.<sup>20</sup>

18. It would be prudent to review the purpose of registries and the role of recorders. In general, mining contracts are governed by general rules of civil law to the extent these rules do not violate special mining laws.<sup>21</sup> Pursuant to the general rule of Peruvian civil law, contracts are not required to comply with any formalities whatsoever unless otherwise indicated by law; therefore, they are effective when a meeting of the minds takes place between the parties to them.<sup>22</sup> Although the law governs natural resources, it states that contracts addressing natural resources must be registered with the corresponding register.<sup>23</sup> General rules of law establish that when a law requires compliance with a specific formality but does not render the transaction

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<sup>18</sup> Mineral Right Registration Regulations, Art. 1 [Exhibit R-145]. Article 1: “The Mineral Rights Registry is under the purview of the Land Registry, and the concessions, transactions, and rights indicated in these regulations and in other relevant legal provisions are registered there.”

<sup>19</sup> Mineral Right Registration Regulations, Art. 7 [Exhibit R-145]. Article 7: “The following are subject to preemptive annotation: a) Mining concession applications (...); b) Transactions, contracts, complaints, provisional remedies, and other court orders that do not give rise to final registration and that concern mining concession applications (...).”

<sup>20</sup> Mineral Right Registration Regulations, Art. 8 [Exhibit R-145]. Article 8: “The preemptive annotations indicated in items a) and b) of the previous article produce effects for 180 business days following the date the entry recording their submission is made and may be extended by the same amount of time on only one occasion at the request of one of the parties. Preemptive annotations expire by operation of law once the corresponding period ends (...).”

<sup>21</sup> LGM, Art. 162 [Exhibit R-008]. Article 162: “Mining contracts are governed by general rules of civil law to the extent these rules do not violate this Law.”

<sup>22</sup> Civil Code, Art. 143 [Exhibit R-033]. Article 143: “When the law does not specify a specific format for a legal transaction, the parties to it may employ the format they deem advisable.”

<sup>23</sup> LOASRN, Art. 23 [Exhibit R-142]. Article 23: “Concessions, the disposal thereof, and the creation of rights *in rem* thereto must be registered with the corresponding register.”

void as a result of a failure to observe such formality—as is the present case regarding contracts that address natural resources—the format only serves as evidence for the existence of the transaction and does not render it invalid.<sup>24</sup> Mining law imposes no specific formalities in order for mining contracts to take effect between parties, though it does require the execution of a notarial instrument that must be registered with the corresponding register so that it will be enforceable against the State and third parties.<sup>25</sup> For these reasons, no formalities are required for the Option Agreement to be valid and binding on the parties.

19. Therefore, mining law does not assign registers the role of creating rights: their main duty is to provide the public with the knowledge of the existence and contents of the transactions registered there. The Regulations on Registration with the Mineral Rights Registry state that the Mineral Rights Registry is under the purview of the Land Registry and the principles of registration set forth in the Civil Code and General Regulations on Public Registries are applicable to it.<sup>26</sup> According to the General Regulations on Public Registries, registers legally provide the public with knowledge of the various transactions and rights registered there.<sup>27</sup> As a result, their primary purpose is that of providing public knowledge. Transactions subject to

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<sup>24</sup> Civil Code, Art. 144 [Exhibit R-033]. Article 144: “When a law requires compliance with a specific format but does not render [the transaction] void as a result of a failure to observe such format, the format only serves as evidence for the existence of the transaction.”

<sup>25</sup> LGM, Art. 163 [Exhibit R-008]. Article 163: “Mining contracts shall be set down in notarial instruments that must be registered with the Public Mining Registry so that they will be enforceable against the State and third parties.” [Note: The Public Mining Registry is now under the purview of the National Superintendency of Public Registries (“SUNARP”).]

<sup>26</sup> Mineral Right Registration Regulations, Art. 1 [Exhibit R-145]. Article 1: “The Mineral Rights Registry is under the purview of the Land Registry, and the concessions, transactions, and rights indicated in these regulations and in other relevant legal provisions are registered there.”

<sup>27</sup> Unified Text of the General Rules of the Public Registry, Resolution of the National Superintendent of the Public Registries No. 079-2005-SUNARP/SN, March 21, 2005 (“General Rules of the Public Registry”), Art. 1 [Exhibit R-146]. Article I: “The Registry legally provides the public with knowledge of the various transactions and rights registered there (...).”

registration with the Mineral Rights Registry include contracts executed addressing mining concessions based on public instruments (such as notarial instruments).<sup>28</sup>

20. An observation was issued on the request for preemptive annotation in which the recorder gave notice of defects that were subject to correction, which included demonstrating that Bear Creek had no foreign shareholders. In this observation, the recorder requested an affidavit in which Bear Creek indicated it had no foreign shareholders in order to justify its failure to obtain the corresponding supreme decree pursuant to Article 71 of the Constitution. This constitutional article restricts the rights of foreigners and prohibits them—under penalty of losing their rights to the State—from in any manner acquiring or possessing, either directly, indirectly, individually, or in partnership, mines and other property located within a distance of 50 kilometers from national borders.<sup>29</sup> Bear Creek appealed this observation with the Registry Tribunal.<sup>30</sup>

21. The Registry Tribunal is the appellate body that hears final administrative appeals against registration denials.<sup>31</sup> The Registry Tribunal heard Bear Creek’s appeal and by means of

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<sup>28</sup> Mineral Right Registration Regulations, Art. 11 [Exhibit R-145]. Article 11: “Registrations are carried out based on public instruments (...).”

<sup>29</sup> Constitution of Peru, Art. 71 [Exhibit R-001]. Article 71: “Concerning property, foreigners, whether they are individuals or legal entities, enjoy the same rights as Peruvians; however, in no instance may they invoke diplomatic protection or defense. However, within a distance of 50 kilometers from borders, foreigners may not in any manner acquire or possess mines, land, forests, water, fuel, or energy sources, either directly, indirectly, individually, or in partnership, under penalty of losing such so-acquired right to the State. The sole exception is in the event of public necessity expressly declared by means of a supreme decree authorized by the Cabinet in accordance with law.”

<sup>30</sup> Bear Creek Appeal, June 28, 2005 [Exhibit C-0040].

<sup>31</sup> Law Creating the National System and the Superintendency of Public Registries, Law No. 26366, October 14, 1994 (“SUNARP Law”), Art. 26 [Exhibit R-147]. Article 26: “The duties of the Registry Tribunal include the following: a) Hearing and deciding appeals filed against registration denials and other decisions issued by recorders (...).”

Order No. 193-2005-SUNARP-TR-A dated November 7, 2005, it revoked the challenged registration observation and ordered the instrument's registration.<sup>32</sup>

22. Article 2011 of the Civil Code addresses the principle of legality underlying register law pursuant to which recorders determine whether documents are legal, the grantors thereof have sufficient capacity, and the transactions therein are valid with respect to their effects, their background, and register entries.<sup>33</sup> According to Article 2011, the validity of a transaction whose eligibility for registration is determined by a recorder must be based on the instrument filed for registration and the registration background both on the registration record under which the transaction must be filed as well as the remaining background.

23. According to Alvaro Delgado Scheelje, "determination of eligibility for registration is an evaluation a recorder performs to determine whether an instrument filed with a register can be registered based on the various principles contemplated by each system as technical premises and requirements for registration."<sup>34</sup> This assertion matches the definition of "determination of eligibility for registration" found in the General Regulations on Public Registries, which state that "[it] is a comprehensive evaluation of the instruments filed with the register in order to determine whether they are eligible for registration."<sup>35</sup>

24. This means that it is a comprehensive determination of whether the instruments filed for registration (including their registration background) are eligible for registration, and

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<sup>32</sup> Resolution No. 193-2005-SUNARP-TR-A issued by the SUNARP Tribunal Registral, November 7, 2005 [Exhibit C-0038].

<sup>33</sup> Civil Code, Art. 2011 [Exhibit R-033]. Article 2011: "Recorders determine whether documents filed for registration are legal, the grantors thereof have sufficient capacity, and the transactions are valid with respect to their effects, their background, and public register entries."

<sup>34</sup> Delgado Scheelje, Alvaro *Working Towards the Reform of Civil Code's Book IX on the Public Registry*, IUS VERITAS JOURNAL, vol. 21, p. 74 [Exhibit R-148].

<sup>35</sup> General Rules of the Public Registry, Art. 31 [Exhibit R-146]. Article 31: "Determination of eligibility for registration is a comprehensive evaluation of the instruments filed with the register in order to determine whether they are eligible for registration (...)."

not a complete evaluation of the transaction and everything that has or has not been submitted for determining whether they are eligible for registration. Therefore, it cannot be asserted that the validity of an option agreement was confirmed pursuant to Peruvian law through its registration, as alleged in paragraph 33 of the Claimant’s Brief in the case at hand.<sup>36</sup>

25. Furthermore, the Registry Tribunal decided that “determination of eligibility for registration must exclusively address the documents filed for registering the transaction, and recorders are not responsible for conducting investigations that fall outside the scope of the register or that are of a personal nature.”<sup>37</sup>

26. Regarding the above, registry law also allows for correction—at the recorder’s own initiative in some cases—when there are errors due to material discrepancies between a registration entry and reality outside the scope of the register pursuant to Article 2013 of the Civil Code<sup>38</sup> and Article 75 of the General Regulations on Public Registries.<sup>39</sup> Again, Alvaro Delgado Scheelje states that registration “gives rise to a relative presumption of accuracy in the sense that the contents of registrations correspond to reality outside the scope of the register.”<sup>40</sup>

27. As a result, a transaction is considered valid or not based on whether the requirements for validity applicable to it have been met, and a register neither grants nor confirms its validity. Article 46 of the General Regulations on Public Registries specifically

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<sup>36</sup> Claimant’s Memorial dated May 29, 2015 (“Claimant’s Memorial”), para. 33.

<sup>37</sup> Order No. 024-98-ORLC/TR, quote cited by Luis García García in *Art. 2011 (Principio de Rogación y Legalidad)*, CIVIL CODE WITH COMMENTARIES, vol. X, p. 403 [Exhibit R-149].

<sup>38</sup> Civil Code, Art. 2013 [Exhibit R-033]. Article 2013: “The contents of a registration are presumed accurate and take full effect so long as it is not corrected or determined to be invalid by court order.”

<sup>39</sup> General Rules of the Public Registry, Art. 76 [Exhibit R-146]. Article 76: “Recorders shall correct errors at the request of a party. They may also do so at their own initiative when they give notice of clerical errors. The correction of material errors shall take place at the recorder’s own initiative only when, while determining whether an application for registration is eligible, the recorder determines that registration cannot take place unless the error is corrected, and based on the instrument that has already been registered.”

<sup>40</sup> Delgado Scheelje, Alvaro, *Working Towards the Reform of Civil Code’s Book IX on the Public Registry*, IUS VERITAS JOURNAL, vol. 21, p. 84 [Exhibit R-148].

states that “registration does not validate transactions that are void or voidable pursuant to rules in force.”<sup>41</sup> For this reason, Luis Diez-Picazo points out that “registration is not capable of magically rendering valid that which is void.”<sup>42</sup>

28. As an example, if another mining company acquired the same mining concessions regarding which Bear Creek executed and registered the Option Agreement and the registration of the transfer took place because the Option Agreement has been previously registered, the other mining company could take the dispute to court in Peru. In such an event, the Peruvian court could reconsider the legality of the Option Agreement, regardless of whether it had been decided on by the Registry Tribunal. The Peruvian court would conduct its own review of the Option Agreement and could determine that the registration entries corresponding to the Option Agreement were invalid.

29. The Registry Tribunal’s powers include handing down binding precedent when sitting en banc when convened for such purpose, which constitutes criteria for interpreting transactions and rights subject to registration that must be complied with by recorders at the national level.<sup>43</sup> These criteria both provide recorders with a clear frame of interpretive reference and allow register users to know in advance which actions to take in the same or similar situations. Binding precedent only applies at the administrative registration level, and the criteria set forth in precedent are subject not only to change or avoidance by the courts, but also to being disregarded by any national court. Only the decisions handed down by the Registry Tribunal

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<sup>41</sup> General Rules of the Public Registry, Art. 46 [Exhibit R-146]. Article 46: “A registration entry necessarily indicates the legal transaction directly or immediately giving rise to the registered right, which must be recorded in the corresponding instrument. Registration does not validate transactions that are void or voidable pursuant to rules in force.”

<sup>42</sup> Diez-Picazo, Luis, FOUNDATIONS OF CIVIL PROPERTY LAW, vol. 3, p. 429 [Exhibit R-150].

<sup>43</sup> SUNARP Law, Art. 26 [Exhibit R-147]. Article 26: “The duties of the Registry Tribunal include the following: (...) c) Handing down binding precedent when sitting en banc when convened for such purpose (...).”

sitting en banc constitute binding precedent. For this reason, only the criteria upheld in decisions issued by the Registry Tribunal on two or more occasions must be taken into consideration. Such precedent must be published as precedent in the El Peruano Official Gazette in the form of a SUNARP Assistant Superintendent Order.

30. Order No. 193-2005-SUNARP-TR-A dated November 7, 2005, by means of which Bear Creek's appeal of the registration observation on the preemptive annotation it requested for its Option Agreement was decided, was published in the December 22, 2005 edition of the El Peruano Official Gazette by the Fifth Division of the Arequipa Registry Tribunal. This publication in the El Peruano Official Gazette is not binding on recorders unless the other requirements set forth in Article 26 of the SUNARP Law and Article 158 of the General Regulations on Public Registries are met, that is, (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 reason, (iii) the criteria adopted must have been issued in prior Registry Tribunal orders, and (iv) it must have been published in the El Peruano Official Gazette by means of a SUNARP Assistant Superintendent Order.<sup>44</sup> Therefore, it cannot be concluded that Order No. 193-2005-SUNARP-TR-A constitutes binding precedent simply because it was published in the El Peruano Official Gazette.

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<sup>44</sup>General Rules of the Public Registry, Art. 158 [Exhibit R-146]. Article 158: "Binding precedent includes decisions handed down by the Registry Tribunal sitting en banc, which establish the criteria for interpreting the rules governing transactions and rights that are subject to registration, and they must be observed by national registers so long as they are not expressly amended or avoided by another decision handed down by the Registry Tribunal sitting en banc by means of a final court order or subsequent amendment. Criteria upheld in the Court's orders shall be submitted to the consideration of the Registry Tribunal sitting en banc so that they may be deemed binding precedent. For such purpose, a criteria is considered to be upheld when it is put forward in more than two orders issued by the same division or by different Court divisions. (...) Binding precedent handed down by the Registry Tribunal sitting en banc shall be published in the El Peruano Official Gazette and on the SUNARP website in the form of an assistant superintendent order and shall take effect beginning on the day following their date of publication in such gazette."

31. In conclusion, the Registry Tribunal's decision regarding the Bear Creek Option Agreement does not constitute binding precedent. Even if it did, it would produce no effects outside the administrative realm of registration. In any case, the Registry Tribunal has no jurisdiction over constitutional matters in Peru.

### **III. REQUIREMENTS FOR MINERAL EXPLORATION IN PERU AS WELL AS REQUIREMENTS FOR MINING PROJECT CONSTRUCTION AND OPERATION AT THE TIME FILING OF THE ENVIRONMENTAL IMPACT ASSESSMENT FOR THE SANTA ANA PROJECT WAS SUSPENDED AND AS OF TODAY'S DATE**

#### **B. EXPLORATION**

32. According to the Bear Creek Brief, after the Santa Ana project was acquired, extensive effort was expended on exploration and development.<sup>45</sup> Bear Creek acquired mineral rights on December 3, 2007. According to the Environmental Impact Assessment for the Santa Ana project dated December 2010 that Bear Creek submitted to the Ministry of Energy and Mines (MINEM) on December 23, 2010 (hereinafter, the "EIA"), Bear Creek began exploration in 2007.<sup>46</sup>

33. In its brief, Bear Creek also stated that it had already concluded preliminary exploration and that drilling results were promising.<sup>47</sup> Beginning at that time and up to June 17, 2010, exploratory work intensified. This leads us to conclude that Bear Creek conducted at least two exploration campaigns: one beginning in December 2007 and another ending in June 2010. Environmental regulations on mineral exploration were amended in April 2008; therefore, the two exploration campaigns likely occurred under different sets of regulations. As explained below, Ms. Jenny Karina Villavicencio Gardini began the exploration process in 2006. Once

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<sup>45</sup> Claimant's Memorial, para. 4.

<sup>46</sup> 2010 Environmental Impact Assessment, Chapter 1: Introduction, Section 1.1 [Exhibit R-195].

<sup>47</sup> Claimant's Memorial, para. 44.

Bear Creek became the concessionaire, it replaced her in the exploration authorization procedures in April 2008.

34. As indicated above, the Option Agreement only granted Bear Creek a temporary, exclusive, unconditional, and irrevocable right to acquire the mining concessions for the Santa Ana project, but it did not grant Bear Creek an exploration right. All exploration under concessions could only have been conducted directly by the concessionaire. The Option Agreement made no reference to exploration that the concessionaire could carry out under the concessions while the option was in effect, though it would not have indicated that exploration by the concessionaire was contemplated because the standard conditions for exploration had not been defined and only reimbursement to the concessionaire for the cost of keeping the mineral rights valid was contemplated.<sup>48</sup> For example, if an option agreement is executed without executing a mining assignment agreement, that is, if exploration and exploitation rights are not transferred to the grantor, the grantor must take care when defining the conditions under which the concessionaire's mining activity will eventually take place. This includes the types of exploration work to be carried out, control over or limits on permitted extraction, environmental conditions applicable to work, relations with communities and the authorities, requiring that necessary permits be obtained, costs incurred, use of surface rights acquired for carrying out mining work, reimbursement of specific exploration costs, preservation of sample cores, removal of the materials and equipment introduced, periodic activities reports, etc. In this manner, contingencies assumed in the event the option is exercised are eliminated or mitigated. The fact

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<sup>48</sup> Option Contract for the Transfer of Mineral Rights No. 4,383, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, September 5, 2006 ("Option Contract"), Clause Two [Exhibit R-007]. "Clause Two. (...) 2.3.3 to maintain the option active, within ten (10) business days of receipt of the respective request, bear creek will provide the rights holder with the funds necessary to cover all costs for maintenance of the mineral property, including the annual mining concession payment, publication of notices and registry expenses incurred by the rights holder. with regard to the maintenance of the mineral property. these funds will not be reimbursed to Bear Creek."

that Bear Creek did not take these precautions under the Option Agreement and left Jenny Karina Villavicencio Gardini in charge of mining activities could be interpreted as it having placed great trust in her to oversee these activities.

35. Notwithstanding, using publicly-available information, I have been able to verify that on June 9, 2006, Jenny Karina Villavicencio Gardini applied for the approval of an affidavit for Santa Ana project exploration under the Karina 9A mining concession, which was authorized by means of Directorial Resolution No. 256-2006-MEM/AAM of July 10, 2006<sup>49</sup> (later amended and supplemented on December 11, 2006 by means of Directorial Resolution No. 489-2006-MEM/AAM). This authorization allowed Jenny Karina Villavicencio Gardini to carry out diamond drilling at 20 platforms for 20 exploration boreholes in an area measuring 257.05 square meters over a period of 130 days beginning on the date the decision was notified (December 11, 2011).<sup>50</sup>

36. Later, on January 30, 2007, Jenny Karina Villavicencio Gardini submitted an application for the approval of an environmental assessment for 20 boreholes made with diamond drills at 20 platforms under the Karina 9A mining concession and for an area of 913.79 square meters to be disturbed. It was approved by means of Directorial Resolution No. 269-2007-MEM/AAM of September 4, 2007 for seven months beginning on the date notice of the

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<sup>49</sup> Directorial Resolution No. 256-2006-MEM/AAM, July 10, 2006 [Exhibit R-034].

<sup>50</sup> Directorial Resolution No. 256-2006-MEM/AAM, July 11, 2006 [Exhibit R-034]. “Having seen Report No. 170-2006-MEM-AAM/EA referring to the ruling dated July 10, 2006, which I approve, the Sworn Statement of the “Santa Ana” mining exploration project submitted by Jenny Karina Villavicencio Gardini, IS APPROVED, to be carried out in the mining concession called “Karina 9A,” according to the stipulations of Supreme Decree No. 038-98-EM. The Concession Holder of the project may carry out exploration activities from July 13, 2006 to October 13, 2006, including preparation/restoration work (...); Directorial Resolution No. 489-2006-MEM/AAM, December 11, 2006 [Exhibit R-174]: “Having reviewed Report No. 300-2006-MEM-AAM/EA issued under the procedural order dated November 24, 2006, which I am in agreement: IT IS HEREBY RESOLVED: TO APPROVE an amendment to the Affidavit for Santa Ana project mineral exploration submitted by Jenny Karina Villavicencio Gardini, which will be carried out under the Karina 9A mining concession and pursuant to Supreme Decree No. 038-98-EM. The project concessionaire may carry out exploration activities for one hundred thirty (130) calendar days, beginning on the date notice of this Directorial Resolution is given, including rehabilitation work (...).”

resolution was given.<sup>51</sup> I was also able to ascertain that on April 3, 2008, Bear Creek, as the new concessionaire of the Santa Ana project mining concessions, applied for an amendment to the environmental assessment approved for Jenny Karina Villavicencio Gardini to include exploration for the Karina 1 mining concession and to increase the number of drilling platforms to 80 (for a total of 100 platforms) in an area of 3,423.15 square meters. A period of 10 months was approved, beginning on the date notice of Directorial Resolution No. 216-2008-MEM/AAM of September 5, 2008 was given.<sup>52</sup> Finally, Bear Creek applied for two additional amendments to the environmental assessment on March 13, 2009 (for 12 months) and March 16, 2010 (for 8 months) in order to increase the number of platforms by 140 and 115, respectively (for a total of 350 platforms). Approval was given by means of Directorial Resolution No. 310-2009-MEM/AAM of October 6, 2009<sup>53</sup> and Directorial Resolution No. 280-2010-MEM/AAM of September 8, 2010.<sup>54</sup> The last two amendments were applied for pursuant to the amended regulations dated April 1, 2008.

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<sup>51</sup> Directorial Resolution No. 269-2007-MEM/AAM, September 4, 2007, Art. 1 [Exhibit R-035]: “(...) Article 1. TO APPROVE the Environmental Evaluation of the Santa Ana exploration project submitted by Ms. Jenny Karina Villavicencio Gardini, to be carried out in the Karina 9A mining concession located in Huacullani district, Chucuito province, Puno department. The specification of the evaluation of this modification of the Environmental Evaluation are indicated in Report No. 773-2007/MEM-AAM/PRN, dated August 8, 2007, is attached as annex of this Directorial Resolution and forms an integral part of the same (...).”

<sup>52</sup> Directorial Resolution No. 2016-2008-MEM/AAM, September 5, 2008, Art. 1 [Exhibit R-036]: “(...) Article 1. The APPROVAL of the amendment to the Environmental Impact Assessment of the “Santa Ana” mineral exploration project to be developed at the “Karina 9A” and “Karina 1” mining concessions located in the district of Huacullani, Chucuito province, department of Puno. The technical specifications of the approval of this Amendment are indicated in Report No. 904-2008/MEM-AAM/WBF/PRN, dated August 12, 2008, attached to this Directorial Resolution as an annex, forming an integral part thereof..”

<sup>53</sup> Directorial Resolution No. 310-2009-MEM/AAM, October 6, 2009, Art. 1 [Exhibit R-037]: “(...) Article 1. TO APPROVE the Second Amendment of the Semi-Detailed Environmental Impact Study of the Santa Ana mining exploration project, submitted by BEAR CREEK MINING COMPANY – SUCURSAL DEL PERÚ, for the implementation of 140 platforms in addition to those approved by the DGAA by means of Directorial Resolution No. 216-2008-MEM-AAM. The project is located in Huacullani district, Chucuito province, Puno department; The specifications of this Semi-Detailed Environmental Impact Study are indicated in Report No. 1148-2009-MEM-AAM/AD/WAL dated October 5, 2009, which is included as an annex to this Directorial Resolution and is an integral part of the same.”

<sup>54</sup> Directorial Resolution No. 280-2010-MEM/AAM, September 8, 2010, Art. 1 [Exhibit R-038]: “(...) Article 1. TO APPROVE the Third Amendment to the Semi-Detailed Environmental Impact Study of the “Santa Ana” mining

37. Exploration carried out by Jenny Karina Villavicencio Gardini and the first exploration carried out by Bear Creek were governed by the parameters of the Exploration Regulations of 1998 (as amended by Supreme Decree No. 014-2007-EM).<sup>55</sup> According to these regulations, exploration that results in dumping and requires the disposal of waste that could damage the environment must be previously authorized by the competent environmental authority. Therefore, an affidavit should have been submitted for approval stating that the number of platforms to be built would not exceed 20 and that the impact area would not be larger than 10 hectares. An environmental assessment should have been submitted if any of these limits were exceeded (or tunnels measuring more than 50 meters were built).<sup>56</sup> The environmental

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exploration project, evaluated and approved through Directorial Resolution No. 269-2007-MEM/AAM, dated October 6, 2007, to be carried out in the Karina 9A and Karina 1 mining concessions. The project is located in the District of Huacullani, Province of Chucuito, Puno Region. The specifications of this amendment to the Semi-Detailed Environmental Impact Study are included in Report No. 855-2010-MEM-AAM/AD/WAL of September 8, 2010, which is attached hereto as annex to this Directorial Resolution and is an integral part thereof.”

<sup>55</sup> Regulation on the Environmental Aspects of Mining Exploration, Supreme Decree No. 038-98-EM, November 25, 1998 (“Exploration Regulation of 1998”), 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>56</sup> Exploration Regulation of 1998, Arts. 4-6 [Exhibit R-151] (as amended by Article 1 of Supreme Decree No. 014-2007-EM, which was published on March 10, 2007): “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, as follows: 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 provoking greater alteration than generally caused 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 carried out 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 will issue an environmental feasibility certificate within five calendar days after the date of submission. The affidavit will be subject to subsequent oversight. 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, for a total of more than 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.”

assessments should have been published for comment by interested parties. In all of these cases, an agreement should have been reached in advance with the owners of the surface of the land.

38. On April 1, 2008, the Exploration Regulations of 1998 were amended by means of Supreme Decree No. 020-2008-EM.<sup>57</sup> The same parameters continued to apply to exploration projects that required an affidavit, where approval of an environmental impact statement had to be filed for, and to projects that required an environmental assessment, where a semi-detailed environmental impact assessment had to be filed; nevertheless, though environmental impact statements were deemed automatically approved as a general rule and the regulations were much more clear and detailed (especially with respect to community participation), they were similar to the regulations they replaced with respect to mandatory procedures and requirements and for the purpose of this analysis.

39. The applications for approval of the corresponding assessments were submitted, processed, and ruled upon according to formal and procedural requirements on the respective dates. Apart from compliance with environmental rules, the most important substantial requirement under both sets of regulations was demonstration that the necessary surface rights were present.

## **B. CONSTRUCTION AND EXPLOITATION**

40. The construction and exploitation of a mine can only begin once a company has met all of the necessary legal requirements and once the Ministry of Energy and Mines has issued the company certification authorizing the start of operations. Approval of a mining plan is

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<sup>57</sup> Regulation on the Environmental Aspects of Mining Exploration, Supreme Decree No. 020-2008-EM, April 1, 2008 (“Exploration Regulation of 2008”), Art. 7 [Exhibit R-152]: “Article 7. 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 (...).”

authorization to begin exploitation activities, but this is always contingent upon possession of the remaining mandatory permits. Mining plan authorization is also a requirement for obtaining other permits, for example, the mining operation certificate, which is, in turn, a requirement for other certificates, such as the explosives purchasing certificate. Prior to this, a company is not authorized to exploit a mine. In order to achieve final legal authorization to begin mineral extraction operations, a mining company must obtain a series of permits, authorizations, and licenses from various government entities. Among the numerous permits and authorizations required, several involve complex and/or lengthy reviews and procedures and are subject to the discretion of the authorities (or of the landowner or possessor when in regard to surface rights). This includes approval of an environmental impact assessment for the exploitation stage, obtaining surface rights from all landowners or possessors, confirming the absence or recovery of archaeological remains, and obtaining approval of a mining plan. After this, there is no guarantee that the environmental assessment or the other permits required for the construction and exploitation stage will be approved or authorized. There is even less of a guarantee that all necessary surface rights will be obtained and that no archaeological remains will be found. It is my understanding that Bear Creek had not even commenced with the procedures required for obtaining many of these permits, since as of June 2011 its environmental assessment for the construction and exploitation stage had not been approved. In many cases, environmental assessments must be approved before filings and procedures can begin. For this reason, I am of the opinion that the company was still far from being able to begin preparation, development, and construction of the Santa Ana project. It is also not clear whether the project could have then continued toward the operation stage if the Peruvian government had not revoked the declaration of public necessity for the Santa Ana project that was required pursuant to Article 71 of the

Constitution of Peru. Below is a description of the permits, licenses, and authorizations Bear Creek was still required to file for and obtain in order to begin construction and then operation on the Santa Ana project.

### **1. Environmental Certification**

41. Beginning with the promulgation of Legislative Decree No. 708 in June 1992, in order to carry out mineral exploitation, projects must previously receive approval regarding their environmental impact from the competent authority.<sup>58</sup> Subsequently, after the National System for Environmental Impact Assessment Law was passed, environmental certification was required for projects and activities that could potentially cause significant adverse impact.<sup>59</sup> Therefore, it became evident that in order to commence with construction projects that could result in significant adverse environmental impact, environmental certification was required. According to the Regulations on Environmental Protection from Mining and Metallurgical Activities, the environmental instrument applicable to mining and metallurgical exploitation activities, and specifically to mineral beneficiation activities, is the environmental impact assessment.

42. With respect to the Santa Ana project, on December 23, 2010 (filing record 02052958), Bear Creek submitted an EIA for exploiting the mining concessions making up the project to the Office of Mining Environmental Affairs of the Ministry of Energy and Mines in order to use an open-pit system for a period of approximately 11 years and allocate 10,000 tons

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<sup>58</sup> LGM, Art. 221 [Exhibit R-008]: “Article 221. Individuals and legal entities that carry out or wish to carry out exploitation and beneficiation activities must obtain approval for the location, design, and operation projects concerning their activity from the competent authority. Such approval is subject to the express indications of the rules and obligations applicable to the protection of the environment (...). New beneficiation concession applications shall include an environmental impact assessment.”

<sup>59</sup> Regulation of the Law on the National System for Environmental Impact Studies, Supreme Decree No. 019-2009-MINAM, September 24, 2009, Art. 15 [Exhibit R-039]: “Article 15. All public, private, domestic, and foreign individuals and legal entities that intend to carry out an investment project that could potentially cause significant adverse impact related to environmental protection criteria (...) must file for environmental certification with the corresponding competent authority (...).”

per day to processing for the purpose of obtaining doré silver bars by leaching crushed minerals and then processing them using the Merrill-Crowe method. The EIA was submitted in compliance with the applicable formal requirements after the minimum amount of community participation workshops had been held pursuant to the rules in force at the time<sup>60</sup> and after copies of the EIA had been delivered to the competent national authorities.

43. The Office of Mining Environmental Affairs of the Ministry of Energy and Mines authorized the executive summary of the EIA and the accompanying community participation plan as well as specified the steps that should be taken. The effects of this authorization were exclusively related to Bear Creek's obligation to provide persons, either alone or together, within the area of influence with access to the information collected on the area that would be impacted and on aspects of the planned mining activities. The approval served as an authorization to allow community participation mechanisms proposed by Bear Creek and did not constitute a ruling by the authority on the merits of the EIA.<sup>61</sup>

44. Accordingly, the EIA describes the Santa Ana mining and metallurgical project as well as its components and planned processes. The Ministry of Energy and Mines must review

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<sup>60</sup> Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304-2008-MEM-DM, June 24, 2008 ("Resolution Regulating the Citizen Participation Process in the Mining Subsector"), Arts. 13-14 [R-153]: "Article 13. While preparing an EIA or a semi-detailed EIA, a mining concessionaire must work with the competent authority in the region where the mining project is to be carried out in order to provide at least one participatory workshop and any other community participation mechanisms indicated in Article 2 of this Ministerial Resolution in order to provide information on progress and results in preparing the EIA or semi-detailed EIA and on the regulatory framework applicable to the competent authority's review of the environmental assessment (...)." "Article 14: The application for approval of the EIA or semi-detailed EIA that is filed with the competent authority must contain two (2) digital and printed copies of the EIA or semi-detailed EIA and include the executive summary and community participation plan; it must also be in compliance with the requirements indicated by the corresponding entity's sole text of administrative procedures."

<sup>61</sup> Resolution Regulating the Citizen Participation Process in the Mining Subsector, Art. 18 [R-153]: "Article 18. Within the period indicated in the previous article, the competent authority shall notify the mining concessionaire of its agreement regarding the mechanisms proposed in the community participation plan corresponding to the environmental assessment evaluation procedure and shall set a timeline for implementing the mechanisms, as well as for any other matter it deems necessary in order to guarantee the efficacy of the community participation process."

the large amount of documentation submitted in order to determine whether the documents are in compliance with legal and socio-environmental standards set forth in Peruvian law and with the previous requirements, terms of reference, and the filing scheme requested. Specifically, the Ministry of Energy and Mines must review the EIA and determine whether it is insufficient or inconsistent. If additional clarification or explanation is required, it must notify the mining company of its observations on the EIA (as well as the observations of other sectors and resulting from the community participation process).<sup>62</sup> In the same evaluation stage, the public hearings indicated in the community participation plan must have held and the opinions of the other entities involved must have been collected. The company must have corrected all mistakes, errors, and omissions and addressed all observations. Finally, the Ministry of Energy and Mines must approve or reject the EIA. It generally takes one hundred twenty (120) business days after an EIA is submitted for it to be approved. This period may be extended by a maximum of thirty (30) business days on only one occasion.<sup>63</sup>

45. In April 2011, the Ministry of Energy and Mines issued 157 observations on flaws, errors, omissions, and inconsistencies in the EIA.<sup>64</sup> The Ministry of Agriculture, which must be consulted regarding future impacts on natural resources, such as in the case of

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<sup>62</sup> DGAAM's Observations to Bear Creek's EIA for Exploration, Report No. 399-2011-MEM-AAM/WAL/JCC/CMC/JST/KVS/AD, April 19, 2011 [Exhibit R-040].

<sup>63</sup> Regulation of the Law on the National System for Environmental Impact Studies, Supreme Decree No. 019-2009-MINAM, Art. 52 [Exhibit R-039]: "Article 52: (...) The detailed EIA evaluation process shall take place within no later than one hundred twenty (120) business days after the day following submission of the application for environmental certification; (...) the competent authority shall issue the corresponding environmental certification if applicable, or it shall deny the application, 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 (...) 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) days on only one occasion, and this must be backed by the proper technical support submitted by the concessionaire based on the needs and characteristics of each case."

<sup>64</sup> DGAAM's Observations to Bear Creek's EIA for Exploitation, Report No. 399-2011-MEM-AAM/WAL/JCC/CMC/JST/KVS/AD, April 19, 2011, pp. 29-32, 49 [Exhibit R-040].

earthmoving, also issued 39 observations specifying its own preoccupations regarding the EIA.<sup>65</sup> Based on my experience as an attorney who has reviewed several environmental assessments, the scope of these observations indicates that the EIA's approval was at best uncertain. The Ministry of Energy and Mines would not have approved the EIA without a proper answer from Bear Creek addressing all of its observations.

46. In my understanding, the EIA review process was suspended before the company could address the Ministry of Energy and Mines' and the Ministry of Agriculture's observations. The Ministry of Energy and Mines did not approve the EIA, and in its current state, it contains several issues that have not been resolved. Even if the EIA evaluation process had not been suspended, it cannot be assumed that Bear Creek would have been able to address all of the Ministry of Energy and Mines' and the Ministry of Agriculture's observations in a timely and proper manner. Some of the Ministry of Energy and Mines' observations concern issues that could be considered critical, such as those related to redesigning the pit (Ministry of Energy and Mines' Observation No. 114),<sup>66</sup> submitting additional feasibility studies (Ministry of Energy and Mines' Observations No. 34 and No. 78),<sup>67</sup> preparing seasonal studies for which information must be collected over extended periods (Ministry of Energy and Mines' Observations No. 28, No. 53, and No. 154),<sup>68</sup> redirecting the courses of waterways (Ministry of Energy and Mines'

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<sup>65</sup> Ministry of Agriculture, Observations to the Environmental Impact Study, Technical Opinion No. 016-11-AG-DVM-DGAA-DGA, January 2011 [Exhibit R-041].

<sup>66</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, p. 45 [Exhibit R-040].

<sup>67</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, pp. 35, 40-41 [Exhibit R-040].

<sup>68</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, pp. 42, 44, 48 [Exhibit R-040].

Observations No. 90, No. 111, and No. 141),<sup>69</sup> conducting stability studies for specific components (Ministry of Energy and Mines' Observation No. 37),<sup>70</sup> performing additional testing (Ministry of Energy and Mines' Observations No. 21 and No. 27),<sup>71</sup> available water volume limits (Ministry of Energy and Mines' Observations No. 23, No. 24, and No. 99),<sup>72</sup> including a program that Bear Creek should include in its community relations plan (Ministry of Energy and Mines' Observation No. 101),<sup>73</sup> etc. In addition, several Ministry of Agriculture observations could lead to specific doubts regarding the accuracy of the EIA (Ministry of Agriculture Observation No. 3 regarding the lack of information on the soil map)<sup>74</sup> or regarding the level of detail of the information available for its preparation (Ministry of Agriculture Observations No. 17, No. 22, and No. 25, such as the lack of information on environmental impact and management in several regards).<sup>75</sup> It cannot be assumed that the EIA would have been approved with certainty. If the EIA were not approved, Bear Creek would not have been able to initiate and conclude the procedures required for obtaining several of the permits and licenses indicated below.

47. The description of the Santa Ana project contained in the EIA allows for the identification of permits that will be required in addition to the environmental certification in

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<sup>69</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, pp. 35-36 [Exhibit R-040].

<sup>70</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, pp. 32, 33-34 [Exhibit R-040].

<sup>71</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, pp. 33, 43 [Exhibit R-040].

<sup>72</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, pp. 43 [Exhibit R-040].

<sup>73</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, pp. 43 [Exhibit R-040].

<sup>74</sup> Ministry of Agriculture, Observations to the Environmental Impact Study, Technical Opinion No. 016-11-AG-DVM-DGAA-DGA, January 2011, p. 2 [Exhibit R-041].

<sup>75</sup> Ministry of Agriculture, Observations to the Environmental Impact Study, Technical Opinion No. 016-11-AG-DVM-DGAA-DGA, January 2011, p. 4 [Exhibit R-041].

order to begin with the construction of planned installations and/or initiate mineral extraction and/or processing work. Therefore, the EIA—and its approval in certain cases—could be considered the starting point for filing for all of the other permits, licenses, authorizations, certificates, and registrations required for its various components and processes. According to the EIA submitted for approval, the Santa Ana project consists of the following components and processes:

- a) Mine
- b) Crushed rock
- c) Leach pads
- d) Process pits
- e) Mine muck deposit
- f) Bad material and topsoil deposit
- g) Surplus material deposit
- h) Low-grade mineral deposit
- i) Access roads
- j) Process plant
- k) Auxiliary cyanide destruction plant
- l) General offices
- m) Camp
- n) General storage houses
- o) Equipment maintenance workshop
- p) Fuel tap
- q) Gunpowder magazine
- r) Ammonium nitrate warehouse
- s) Laboratory
- t) Acidic drainage treatment plant
- u) Water collection system
- v) Domestic waste water treatment plant
- w) Borrow pit
- x) Construction water supply
- y) Power supply
- z) Fuel supply
- aa) Domestic solid waste handling, transportation, and disposal
- bb) Construction solid waste handling, transportation, and disposal
- cc) Hazardous waste handling, transportation, and disposal
- dd) Domestic waste water handling

- ee) Handling of gas and particulate matter emissions
- ff) Handling of noise and vibrations

48. Below is a description of various essential steps related to Santa Ana project components and processes that Bear Creek should have taken prior to beginning the construction and/or operation stage under the conditions proposed in the EIA if the Ministry of Energy and Mines had approved the EIA within the legal time limits (of which I cannot be certain, of course).

## **2. Citizen Participation Plan<sup>76</sup>**

49. Prior to initiating any mining activity, concessionaires must complete a process whereby they involve the local population of the area of influence in any decision making that could affect them. In the case of mining concession applications filed after December 12, 2003, applicants must submit an affidavit undertaking a number of commitments, including commitments to develop responsible relations with the local individuals and authorities and to maintain a continuous, transparent dialog with them as requirements for being granted mining concessions.<sup>77</sup>

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<sup>76</sup> On January 16, 2009, the Regulation on Transparency, Access to Environmental Public Information, Participation and Citizen Consultations on Environmental Issues, Supreme Decree No. 002-2209-MINAM, containing provisions on community participation and on the preparation and evaluation of environmental impact assessments. While Article 2 of these regulations excluded from their scope any entities that were subject to rules applicable to those matters—as is usually the case in the mining subsector—, it was subsequently determined under Supreme Decree No. 040-2014-EM of November 5, 2014 (“Environmental Management and Protection Regulations for Mineral Exploitation, Beneficiation, General Labor, Transportation and Storage Activities”) [Exhibit R-154] that for the purposes of community participation and the evaluation of environmental impact assessments, both the 2009 regulations and sectoral provisions would be applicable.

<sup>77</sup> Regulation on Mining Procedures, Supreme Decree No. 018-92-EM, September 7, 1992 (“Regulation on Mining Procedures”), Art. 17 [Exhibit R-155]. “Article 17: The mining concession application must comply with the following requirements: (...) i) Prior commitment in the form of an affidavit whereby the applicant undertakes a commitment to (...) d) Responsible Relations. Showing respect for local people and institutions, authorities, culture, and traditions. Promoting actions that strengthen trust among those involved in mining activities by establishing and applying participative processes and favoring dispute prevention and settlement and the use of alternative dispute resolution methods. (...)” [Note: Item i) was introduced by Supreme Decree No. 042-2003-EM, as amended by Supreme Decree No. 052-2010-EM].

50. For existing mining concessions as of December 12, 2003, any prior commitments must be stated in the environmental assessments submitted.<sup>78</sup>

51. To this end, a community participation process must be initiated<sup>79</sup> through any of the mechanisms proposed by the party interested in carrying out a mining project. This process requires approval (although it can be amended or supplemented) by the competent authority.<sup>80</sup> The community participation process must be implemented in four stages by applying any participation mechanism deemed advisable in each stage: (i) prior to drafting the environmental assessment; (ii) throughout the drafting of the environmental assessment; (iii) during the evaluation of the environmental assessment, and (iv) during project execution (construction and operation).<sup>81</sup>

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<sup>78</sup> Supreme Decree No. 042-2003-EM, December 12, 2003, Art. 3 (as amended by Supreme Decree No. 052-2010-EM of August 18, 2010) [Exhibit R-158]. “Article 3: The environmental assessments required to perform mining activities shall include plans or programs that describe the activities designed to comply with the commitments set forth in Article 1 hereof (...) The Ministry of Energy and Mines provides more specific criteria in the relevant Environmental or Community Relations Guidelines.” [Note: The commitments set forth in Article 1 are, among others, those mentioned in Article 17 of the Regulations on Mining Procedures].

<sup>79</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]. “Article 3: Community participation is a public, dynamic, flexible process that, through the application of several mechanisms, allows for timely and proper information relating to projected or ongoing mining activities to be provided to the population concerned; for promoting dialogue and consensus building; and for becoming familiar with and channeling opinions, positions, points of view, observations, or contributions regarding mining activities in order for the competent authority to make decisions in administrative procedures within its scope of authority (...).”

<sup>80</sup> Regulation on Citizen Participation on the Mining Subsector, Art. 7 [Exhibit R-159]. “Article 7: The competent authority shall determine and select the most-appropriate mechanisms for community participation in order to ensure the concerned population’s right to community participation by taking into consideration the characteristics of said population and the specificities of the relevant mining project. To such end, the concessionaire must propose the community participation mechanisms that will be implemented by drafting its proposal based on the following criteria: 7.1. Identification and determination of the area of influence of the project according to its impact. 7.2. Identification of centers of population, communities, local authorities, or interest groups that may be affected by the impact of the project and inhabit or carry out some type of activity in said area.”

<sup>81</sup> Regulations on Community Participation in the Mining Subsector, Arts. 14-15 [Exhibit R-159]. “Article 14: The performance of mineral exploitation and/or beneficiation activities requires community participation mechanisms to be implemented before and throughout the drafting of environmental assessments, and during the evaluation procedure conducted by the competent authority (...).” “Article 15: The Citizen Participation Plan shall also contain a proposal for community participation mechanisms to be implemented during the execution of the mining project. These mechanisms shall be evaluated by the authority along with the environmental assessment and in accordance with the Community Relations Plan (...).”

52. The law provides for and establishes a variety of community participation mechanisms to be applied at one or more of the environmental assessment approval process and project execution stages.<sup>82</sup>

53. These commitments to implement the community participation mechanisms, as well as detailed additional information on compliance with the requirements for prior stages, must be included in a Citizen Participation Plan (PPC)<sup>83</sup> that must be submitted to the authority for approval together with the executive summary of the environmental assessment.<sup>84</sup>

54. In addition to the community participation mechanisms that must be adopted at each stage, a relations protocol must be added to the PPC that contains guidelines on the behavior that must be maintained throughout project execution and during mine construction, operation, and closure. The population involved must participate in the drafting of said protocol, and the document must be submitted to the authority together with the PPC.<sup>85</sup>

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<sup>82</sup> Regulation on Citizen Participation on the Mining Subsector, Art. 6 [Exhibit R-159]. “Article 6: (...) The community participation mechanisms that can be used are as follows: providing the population with access to executive summaries and to the contents of environmental assessments; publishing or broadcasting community participation advertisements in written media and/or on the radio; conducting surveys, carrying out interviews, or holding focus groups; distributing informative materials; offering guided tours of the project area or facilities; spreading information through facilitating teams; offering participation workshops; holding public hearings; submitting contributions, comments, or observations to competent authorities; establishing a permanent information office; conducting participative environmental oversight and monitoring; using traditional means; organizing round tables; and carrying out any other activities determined by competent national authorities by means of ministerial resolutions in order to assure adequate community participation.”

<sup>83</sup> The Environmental Management and Protection Regulations for Mineral Exploitation, Beneficiation, General Labor, Transportation and Storage Activities, which entered into force on March 11, 2015, places the PPC within the framework of a much more comprehensive social management plan.

<sup>84</sup> Resolution Governing the Community Participation Process in the Mining Subsector, Art. 15 [Exhibit R-153]. “Article 15: A Citizen Participation Plan is a document whereby a holder of mineral rights proposes to the competent authority the participation mechanisms that will be implemented during the evaluation of the EIA or the semi-detailed EIA and during the execution of the mining project (...).” [Note: Depending on the size of the project, the environmental assessment required will be either an environmental impact assessment (EIA) or a semi-detailed environmental impact assessment (semi-detailed EIA).]

<sup>85</sup> Regulation on Citizen Participation on the Mining Subsector, Art. 8 [Exhibit R-159]. “Article 8: Holders of mining activity rights shall have a relations protocol containing the guidelines, principles, and behavior policies they will implement while exercising such activity in connection with each of the social actors located within the area of influence of the project. The holder of mineral rights shall encourage the joint drafting of the protocol with the population concerned from the early stages of their relations (...).”

55. In compliance with regulatory formalities,<sup>86</sup> on December 23, 2010, Bear Creek submitted its PPC for the Santa Ana project to the mining authority for approval, along with the EIA executive summary.<sup>87</sup> The PPC had the structure required under the Resolution Governing the Community Participation Process in the Mining Subsector and identified the areas of influence of the project.

56. In the introductory section of its PPC, Bear Creek mentioned that prior to drafting the EIA, which began in August 2009, it had implemented the community participation mechanisms set forth in regulatory provisions, including the following: (a) conducting surveys, carrying out interviews, or holding focus groups and (b) offering participation workshops.<sup>88</sup> During the preparation of the EIA, Bear Creek states that it conducted prior consultations and informative workshops, and it supplied supporting charts and minutes. It further provided minutes from opening workshops in August 2009 and in November 2010, whereby it complied with requirements for compiling information for a social base line and the workshops held before the EIA was drafted and filed in accordance with the Resolution Governing the Community Participation Process in the Mining Subsector. However, it did not provide evidence that it had coordinated with regional authorities regarding the number of workshops required for each occasion or the venue where they should have been held.

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<sup>86</sup> Resolution Governing the Community Participation Process in the Mining Subsector, Art. 14 [Exhibit R-153]. “Article 14: The application for approval of the EIA or semi-detailed EIA that is filed with the competent authority must contain two (2) digital and printed copies of the EIA or semi-detailed EIA and include the executive summary and community participation plan (...).”

<sup>87</sup> EIA Executive Summary [Exhibit C-0071].

<sup>88</sup> Citizen Participation Plan submitted by Bear Creek for approval, December 23, 2010 (“PPC”), para. 2 [Exhibit R-174]. “2.1. (...) Bear Creek Mining Company held Informative Workshops before drafting of the EIA commenced (August 2009) for the Santa Ana Project in 2007, 2008, and 2009 (...).” “2.2. (...) As part of these community participation mechanisms, meetings and/or informative workshops have been held with the communities since 2007 (...).”

57. With regard to the participation mechanisms during the EIA evaluation stage, Bear Creek proposed the following mechanisms:<sup>89</sup> (a) providing the population with access to executive summaries and to the contents of the EIA; (b) publishing and broadcasting community participation advertisements in written media and/or on the radio; (c) distributing informative materials; (d) offering guided tours of the project area or facilities; (e) holding public hearings, and (f) establishing a permanent information office. Thus, it complied with the requirement that it submit and explain a number of mechanisms to be implemented at this stage.

58. A public hearing (or public hearings, as the authority may determine) is a mandatory community participation mechanism where an environmental impact assessment serves as the environmental assessment to be evaluated.<sup>90</sup> Pertinent regulations establish the means for calling the population to the activities referred to in the PPC for the EIA evaluation stage (including public hearings). The project concessionaire must do this in three ways: newspaper publications, radio announcements, and notices. It should be noted that the publication of a notice in the El Peruano Official Gazette stating the venue, date, and time of the public hearing is a requirement for the meeting to be considered valid, but this is not sufficient in and of itself. In addition to such publication, notices must be published in a regional newspaper, radio announcements must be made, and the publication of ads in the El Peruano Official Gazette containing notices consisting of the call page must be requested. The omission of any of these

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<sup>89</sup> PPC, para. 3 [Exhibit R-174]. “3. Once the groups of interest have been identified and in accordance with the Regulations on Community Participation in the Mining Sector (Supreme Decree No. 028-2008-EM) and Ministerial Resolution No. 304-2008-EM-MEM/DM, the following community participation mechanisms will be implemented during the evaluation of this EIA: establishing a permanent information office, providing periodic tours of the Santa Ana Project, distributing informative material and issuing a variety of publications, providing access to the Executive Summary and to the contents of the Environmental Assessment, publishing and broadcasting Community Participation Notices in written media and on the radio, and holding a public hearing.” (...)

<sup>90</sup> Resolution Regulating the Citizen Participation Process in the Mining Subsector, Art. 24 [Exhibit R-153]. “Article 24: For the evaluation procedures applicable to Environmental Impact Assessments relating to new projects, one or more public hearings, as the authority may determine, shall be held within no less than forty (40) calendar days after publication of the notice in the El Peruano Official Gazette. The public hearing must be held at the time and place or places ordered by the authority (...).”

additional requirements amounts to a defect in the public hearing that results in its annulment, even if it is not mandatory to prove to the authority that one or more of these requirements have been met.

59. The public hearing—one of the mandatory mechanisms—was held on February 23, 2011 pursuant to the orders of the authority, and reference to compliance with all formal requirements was made during the meeting. However, the meeting minutes do not state that the informative material was handed out to participants or that verification of the proper operation of the audiovisual equipment required by law took place.<sup>91</sup> Further, there is no statement regarding

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<sup>91</sup> Resolution Governing the Community Participation Process in the Mining Subsector, Art. 25 [Exhibit R-153]. “Article 25: The public hearing or meetings shall be held as follows: 25.1. Direction of Public Meetings. Public meetings shall be presided over by a committee comprised of a representative of the Office of Mining Environmental Affairs (DGAAM), who shall preside over the committee, and a representative of the Regional Energy and Mines Office of the regional government, who shall act as technical secretary. Absence of the regional government representative at a public hearing shall not affect the meeting’s proceedings: the committee chair may replace him or her personally or appoint another authority or attendee. The committee chair may invite the head of the regional government, the province mayor, and the mayors of the districts within the area directly influenced by the project to serve on the committee, as well as any other public authorities present. In the event that the meeting is suspended, absence of the invited authorities at the rescheduled event shall not invalidate the meeting or prevent it from being held. In the case of small-scale mining and artisanal mining, the regional government shall preside over the committee for the public hearings corresponding to the semi-detailed EIA. 25.2. Public Meeting Proceedings. A public hearing shall be held on a single day, unless the meeting needs to be rescheduled for reasons that warrant its suspension or cancellation. The public hearing shall be held in Spanish, unless the majority of the local population speaks a language other than Spanish, in which case dialogue facilitators and interpreters shall be allowed to participate. 25.2.1. The committee chair shall call the public hearing to order by explaining its purpose and recognizing the representatives of the holder of mineral rights, of the entity or professional responsible for the preparation of the environmental assessment, and any participating interpreters. 25.2.2. The chair will then invite the representatives of the company and the entity that prepared the EIA or semi-detailed EIA to provide support for their assessment. 25.2.3. Once the assessment has been explained, the committee chair will invite the attendees to formulate up to two rounds of written questions. A third round of verbal questions may take place for the amount of time determined by the committee chair and for which purpose a list of speakers will be prepared in advance. 25.2.4. The questions will be answered by the speakers or the representatives of the authority or of the holder of mineral rights, as applicable; questions may be answered jointly and may be grouped based on their subject matter. 25.2.5. Once the questions have been answered, the committee chair will invite attendees to hand over to the committee any documents, briefs, reports, or other testimonies they wish to have added to the file and reviewed by the authority. 25.2.6. At the end of the meeting, minutes will be drawn up recording the number of participants, how the public hearing was carried out, a summary of what has been explained and discussed, and any contributions received, and any documents that have been provided to the committee by attendees will be indicated. The minutes will be signed by the committee members, the representative of the holder of mineral rights, the representative of the entity that prepared the EIA or semi-detailed EIA, and any attendees wishing to do so. 25.2.7. All that is explained and discussed at the public hearing shall be recorded using audio equipment and, if possible, by means of audiovisual recording. The transcription of the questions and answers formulated at the public hearing and any documents received by the committee shall be added to the EIA or semi-detailed EIA file and shall be assessed during the relevant evaluation.”

the participation of an Aymara translator, even though the translator's participation was necessary at participation workshops. Finally, there is an inconsistency between the number of attendees stated in the minutes (380) and the number of attendees stated in a note in the margin signed by the secretary of the meeting (729).<sup>92</sup>

60. Finally, in terms of the participation mechanisms during the project execution stage, Bear Creek offers the following mechanisms in addition to the Relations Protocol filed:<sup>93</sup> (a) distribution of informative materials; (b) guided tours of the project area or facilities; (c) a permanent information office, and (d) participative environmental oversight and monitoring. The last two mechanisms suffice, however: they are the two mechanisms privileged by law for this stage of the participation process.

61. The PPC and the EIA executive summary were approved by means of Official Letter No. 201-2011/MEM-AAM, dated January 7, 2011, and certain obligations were imposed upon Bear Creek, such as: (a) delivering copies of the EIA to certain *comunidades campesinas* and authorities; (b) delivering a copy of the EIA to the National Water Authority (ANA); (c) publishing notices in the El Peruano Official Gazette and in regional gazettes where legal notices are published, where they were required to provide information on both the submission of the EIA and the community participation mechanisms applicable to this stage; (d) making radio announcements advertising the community participation mechanisms; (e) publishing

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<sup>92</sup> Minutes of the Public hearing—Mineral Subsector No. 007-2011/MEM-AAM, February 23, 2011 [Exhibit C-0076]. “Everything explained and discussed at the public event has been recorded by means of audio and/or video equipment. In addition, it is hereby recorded that (380) people were in attendance (...). Note: total attendance 729.”

<sup>93</sup> PPC, para. 4 [Exhibit R-174]. “4. In accordance with the Regulations on Community Participation in the Mining Sector (Supreme Decree No. 028-2008-EM) and Ministerial Resolution No. 304-2008-EM-MEM/DM (April 26, 2008), in which the provisions governing the Community Participation process for the Mining Subsector applicable to this EIA are approved, the following community participation mechanisms have been planned to take place throughout the execution of the mining project: A permanent information office; Guided tours of the Santa Ana Project area or facilities; Distribution of informative materials; Participative environmental oversight and monitoring. (...).”

advertisements containing the notice published in the El Peruano Official Gazette in a variety of local venues; and (f) providing the competent authority with copies of (i) the charges for submitting the EIA to the authorities; (ii) the entire newspaper pages on which the notice was published; (iii) the contracts with radio stations; (iv) the personal invitations to the public hearing issued to a variety of authorities and institutions; (v) the monthly reports submitted to the authority on the services provided at the permanent information office, and (vi) the arrangements made with authorities to conduct guided tours (which must be recorded with audiovisual equipment).

62. The consequences of the approval of the PPC by the authority imply that all community participation mechanisms prior to the submission of the EIA have been formally complied with and that the mechanisms proposed for subsequent stages are pertinent, in view of the activities planned and of the characteristics of the population concerned. Approval of the PPC does not imply any determination regarding whether Bear Creek's activities at the Santa Ana project area of influence are correct or incorrect; neither does it imply that no previous or current social conflicts or open issues exist with authorities, communities, or, in general, the population of the area of influence.

63. As a general comment on relations with communities, my professional experience with mining in Peru has shown that it is not enough to merely comply with the basic obligations and formalities set forth in the rules governing community participation. It is essential for a mining company to do everything in its power to understand and consult with the communities concerned so that the communities will accept the project and its consequences. If the company does not use this approach, the communities will probably feel that the project has no benefits for

them and will oppose the project. Avoiding an environment of conflict should be one of the premises of the project; otherwise, it will be very difficult to carry it out.

64. Although it is not binding, the Ministry of Energy and Mines has a Community Relations Guide containing proposals for the preparation of social considerations in environmental impact assessments, the proper management of relations with communities affected by projects, and design proposals for community participation mechanisms, among other relevant matters. In its PPC, Bear Creek makes no reference to this Community Relations Guide<sup>94</sup>—a tool recommended by the Ministry of Energy and Mines in Supreme Decree No. 052-2010-EM.<sup>95</sup>

### **3. Land**

65. The acquisition of surface rights is fundamental in order to take the first steps towards obtaining permits for the construction of facilities. According to the projected operations, the initial preparation stage will require earthmoving in order to grade the surface. While at this initial stage of the project these works are limited to preparing the mine muck deposits, the leach pad area, and the first haul roads, it is a fact that the total facility site area—referred to as the Direct Site Area in the EIA—will measure 351 hectares. Almost all permits, authorizations, licenses, certificates, registrations, and other documents necessary for Santa Ana project construction and operation require at least proof that surface rights have been obtained.

66. Pursuant to the Land Act, the use of land for mining activities requires prior agreement with the owner or completion of the mining easement procedure.<sup>96</sup> Since the mining

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<sup>94</sup> Ministry of Energy and Mines of Peru, General Direction of Environmental Affairs, “Guide on Community Relations”, January 2001 [Exhibit R-172].

<sup>95</sup> Decree Amending Certain Articles on the Previous Compromise Required to Develop Mining Activities and Complementary Regulations, Supreme Decree No. 052-2010-EM, August 18, 2010 [Exhibit R-173].

<sup>96</sup> Law on the Private Investment for the Development of Economic Activities Within the National Territory and Native Communities Lands, Law No. 26505, July 14, 1995 (“Land Act”), Art. 7 [Exhibit R-157]. “Article 7: The use

authority does not approve mining easement procedures, it is essential to reach express, formal agreements with the owners of the land required to build and operate the project.

67. According to the EIA, the components of the Santa Ana project are located on community- and privately-owned land. The same EIA states that two out of the three communities that own the land required for the project—the Ancomarca Rural Community and Challacollo Rural Community—have divided their lands and assigned them to the members of their communities; thus, in addition to negotiating the acquisition of the lands with the communities themselves, negotiations with at least 94 holders will be required as well.<sup>97</sup> Finally, the EIA recognizes that for the purpose of acquiring the surface rights required to initiate project construction, the interested parties have initiated communications and agreements relating thereto. Thus, according to a statement by Bear Creek, when Bear Creek submitted the EIA in December 2010, it had not completed the acquisition of any surface rights for mining use from either the communities or the 94 holders. According to my experience, this situation amounts to a critical legal and practical obstacle in view of the need to assure ownership of formally-acquired surface rights in order to manage a high number of permits and authorizations required to initiate construction works for any mining project. Even assuming that the communities and holders are in favor of the Santa Ana project and are prepared and willing to swiftly grant surface rights to Bear Creek (which is, at best, reasonably uncertain), the fact is that the communities and holders traditionally have a slow pace of negotiation and are aware of a mining investor’s obligation and urge to reach some sort of agreement with them. As a consequence, negotiation

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of land for mining or hydrocarbons-related activities requires prior agreement with the owner or completion of the mining easement procedure to be determined in the Regulations on this Law (...).”

<sup>97</sup> EIA Executive Summary, Section 2.4.1.3 [Exhibit C-071]. “2.4.1.3. (...) The fact that the land of each rural community is distributed among the members of the community results in great fragmentation of surface land.”

processes are generally considerably slow and normally the communities and holders obtain payments and conditions that are quite burdensome on investors.

68. As a result, even if the EIA had been approved within the time periods set forth in applicable regulations, the commencement of any construction works at the Santa Ana project plant would have had to wait until title was obtained to the surface of the land that would enable Bear Creek to conduct work for mining purposes on the land that is earmarked for the project; however, negotiations for such title were only in the initial stages. It should be added that having the authoritative instruments is necessary in order to obtain authorization for construction of facilities in connection with the plant,<sup>98</sup> and title over all of the surface of the mine is required in order to conduct mining activities throughout the entire 351 hectares of the site on which the project will be set up<sup>99</sup> according to the legal requirements applicable at the time to obtaining beneficiation plant construction licenses and to requesting approval of the mining plan.<sup>100</sup>

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<sup>98</sup> Regulations on Mining Procedures, Arts. 35 and 37 [Exhibit R-155]. “Article 35: Applicants for a beneficiation concession shall submit an application to the Bureau of Mining meeting the same requirements as those set forth in subsections a), b), c), and i) of section 1) and subsections a) and b) of section 2) of Article 17 hereof. In addition, applicants shall provide the following technical information: (...) d) A document in support of the fact that the applicant is authorized to use the land on which it will build the plant if said land is privately owned.” “Article 37: (...) The Resolution issued by the Bureau of Mining authorizing the construction of the plant will enable the interested party to request any easements and expropriation that may be necessary.”

<sup>99</sup> Regulation on the Security and Occupational Health and Other Complementary Measures on Mining Activities, Supreme Decree No. 055-2010-EM, August 21, 2010 (“Regulation on Health and Safety in the Mining Industry”), Art. 29 [Exhibit R-156]. “Article 29: Holders of mining rights shall comply with the obligations set forth in the Consolidated General Mining Law and any regulations thereon that may apply, and they may not conduct mining activities without giving prior notice to the competent mining authority and providing copies of the following documents with regard to: (...) 2). For the purpose of initiating, resuming, and ceasing to conduct development, preparation, exploitation, and beneficiation activities: - The relevant environmental instrument approved by Office of Mining Environmental Affairs; and – The commencement of Mining Operations – Mining Plan and Authorization of Beneficiation Plant Operation approved by the Bureau of Mining (...).”

<sup>100</sup> Beginning on June 6, 2012, demonstrating ownership of surface rights was also required in order to apply for commencement of mine facility construction. In addition, as of said date, surface rights acquisition agreements must be set down in notarial instruments containing the UTM coordinates of plot corners, and an agreement must be registered when there is a registration record for such plot. On January 6, 2015, the UTM coordinate requirement was abolished, and a duly-dated legalized copy of the agreement was deemed admissible instead of a notarial instrument.

69. The acquisition of surface rights needs to take place at two levels: first with the owners of the surface rights and then with holders in order to vacate the land, which makes the process even more complicated. In order to acquire the communities' surface rights, very strict requirements have to be met within the community for the agreements to be valid.<sup>101</sup> The acquisition has to take place by means of a land purchase and sale agreement or by conventional easement or usufruct agreements, and it cannot be executed via a lease where only right of use is assigned because the work that would be conducted on such land would distort the essence of that kind of contract, and because use for the entire projected life of the mine could not be assured.<sup>102</sup>

#### **4. Archaeological Remains**

70. Prior to initiating any construction work, Bear Creek must have obtained a Certificate of Inexistence of Archaeological Remains (CIRA) issued by the Ministry of Culture.<sup>103</sup> To such end, it must have carried out an Archaeological Reconnaissance Survey Project to determine whether any were present. Given the extension of the area involved in the Santa Ana project site area, a research project conducted by an archaeologist was required.

71. In order for the project to be authorized, the following must be submitted: an Archaeological Survey Plan, a description of the project's objectives, the plans to be executed,

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<sup>101</sup> Land Act, Art. 11 [Exhibit R-157]. "Article 11: In order to transfer, encumber, lease, or exercise any other action over communal Hills or Jungle lands, a General Assembly Resolution shall be required consisting of the favorable vote of no less than two-thirds of all members of the Community."

<sup>102</sup> Civil Code, Art. 1688 [Exhibit R-033]. "Article 1688: The duration of fixed-term leases shall not exceed 10 years. (...) Any period or extension exceeding the above-stated terms shall be deemed reduced to such terms."

<sup>103</sup> Regulation on the Archaeological Investigations, Supreme Resolution No. 004-2000-ED, January 24, 2000 ("Archaeological Research Regulations"), Art. 65 [Exhibit R-160]. "Article 65: Certificates of Inexistence of Archaeological Remains shall only be issued once an Archaeological Reconnaissance Survey Project has been conducted, with or without excavation, as the case may be. 1. In the event that the area is less than five hectares, the General Archaeological Heritage Bureau of the National Culture Institute may supervise directly. 2. In the event that the limits set forth in section 1, such as power transmission lines, piping, roads, and similar works, are exceeded, a project shall be required, which must be submitted by an archaeologist pursuant to Article 8 of these Regulations (...)."

and their methodology. The Archaeological Survey Plan may consist of reconnaissance, excavations, or recovery excavations, and its duration shall not exceed one year.<sup>104</sup> Upon completion of the survey and issuance of the Final Archaeological Survey Report, the report will be reviewed by the Ministry of Culture, and a field inspection will be conducted in the company of the archaeologist responsible.<sup>105</sup> The authority will only issue a CIRA if the evaluation determines that there are no archaeological remains.<sup>106</sup>

72. In the event that archaeological remains are found, they must be recovered. Recovery activities must be part of an Archaeological Recovery Project and must be scheduled and recommended by the National Archaeological Technical Commission. In the event of any circumstantial finding of archaeological remains during the construction and operation of the Santa Ana project, works must be suspended.<sup>107</sup>

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<sup>104</sup> Archaeological Research Regulations, Art. 8 [Exhibit R-160]. “Article 8: Archaeological Survey Projects concern works carried out in the course of productive, extractive, and/or service projects, within both the private sector and the government sector, for the purpose of protecting National Archaeological-Historic Heritage, both movable and immovable. They have evaluation and research purposes. 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. Archaeological Survey Project for reconnaissance purposes, without excavations. 2. Archaeological Survey Project with excavations. These projects include the determination of boundaries and site signposting. 3. Archaeological Recovery Projects. These concern partial or total excavation works at archaeological sites in cases where unavoidable works are affected due to technical reasons or because of they are of national interest pursuant to a government agreement. Such Archaeological Recovery Projects shall be scheduled and result from Archaeological Survey Projects or works supervision archaeological monitoring. They shall be conducted on recommendation from the National Archaeological Technical Commission.”

<sup>105</sup> Archaeological Research Regulations, Art. 61 [Exhibit R-160]. “Article 61: Archaeologic Survey Project reports (...) must be submitted to the National Culture Institute according to the project schedule (...).” [Note: the National Culture Institute is now the Ministry of Culture.]

<sup>106</sup> Since May 16, 2013, the procedure to obtain a CIRA has been simplified. Later, by means of Supreme Decree No. 003-2014-MC of October 3, 2014, it was established that an Archaeological Monitoring Plan was necessary in the event archaeological remains were found circumstantially.

<sup>107</sup> Archaeological Research Regulations, Art. 10 [Exhibit R-160]. “Article 10: Both Archaeological Recovery Projects and Emergency Projects imply, before and during their execution, the suspension of civil works as required.”

73. The EIA suggests that the process to obtain the CIRA had not yet been initiated,<sup>108</sup> and so it was necessary to submit the Research Project for the Archaeological Survey. Up to the suspension of the EIA, it was unknown whether there existed any archaeological remains in the area.

## **5. Mine**

74. In order to conduct mining operations, Bear Creek is required to have a Certificate of Mining Operation issued by the Ministry of Energy and Mines. This certificate is necessary for Bear Creek to subsequently obtain other permits and comply with prior requirements for operating the mine, such as the use of explosives, accessories, and blasting agents.<sup>109</sup> The requirements for the issuance of the Certificate of Mining Operation are as follows: prior approval of the EIA and the Mining Plan, demonstration by Bear Creek that it is the holder or concessionaire of the mining concessions, and submission of projected works plans, among others.

75. Since January 1, 2011, it has been a mining operation stage requirement that not only the EIA be approved, but also that the Mining Plan be approved by the mining authority

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<sup>108</sup> 2010 Environmental Impact Assessment, Chapter 2: Description of the Project Area, Section 2.5.3 [Exhibit R-196]. “The inspection conducted has identified eight archaeological sites in the area of impact as defined by mineral exploration works. Thus, it is recommended that an “Archaeological Survey Project with excavations” be conducted and submitted to the Ministry of Culture for approval in accordance with current rules in the event that the client needs to begin the mineral deposit exploitation stage.” 2010 Environmental Impact Assessment, Chapter 5: Management Plan, Section 5.4.7 [Exhibit R-199]. “Pursuant to applicable archaeological heritage protection regulations, a Certificate of Inexistence of Archaeological Remains (CIRA) must be obtained for all major infrastructure development works before commencing construction works. (...) Accordingly, BCMC will take all relevant steps to obtain the CIRA (...)”

<sup>109</sup> Law Declaring Emergency on the Use of Explosives for Civil Purposes, Law No. 25707 (“Law on the Use of Explosives”), Art. 5 [Exhibit R-161]: “Article 5: The Ministry of Energy and Mines shall assume the following responsibilities: a) To issue the mining operation certificate for global authorization of explosives use. b) To issue opinions on the acquisition of explosives and/or related materials by individuals or legal entities involved in the mining industry.”

before commencement of operations.<sup>110</sup> Therefore, prior approval of the Mining Plan is required in order to initiate mineral extraction activities. Thus, only then may the initiation/resuming of mining operations be communicated. The Mining Plan for open-pit operations, as is the case of the Santa Ana project, must contain the following documents: (i) a general map of all project facilities with UTM coordinates; (ii) a pit design with final exploitation limits; (iii) detailed geomechanical studies in support of the slope angles; (iv) a detailed design of dump sites and their filling sequence; (v) a detailed design of the powder magazine, hazardous substance storage houses, and electrical substations; (vi) an implementation schedule, among others.<sup>111</sup> The Ministry of Energy and Mines has the authority to review the Mining Plan and, if it finds any shortcomings, it has the power to request that Bear Creek make any necessary changes or adaptations. It is not possible to ascertain whether Bear Creek submitted a Mining Plan that met the Ministry of Energy and Mines' criteria and requirements. Approval or rejection of this Mining Plan is within the scope of the Ministry of Energy and Mines' discretionary power, subject to compliance by Bear Creek with technical requirements under Peruvian mining regulations. Unless the Mining Plan is approved, Bear Creek cannot commence project operation. What is more, in the case of open-pit mining operations as explained in the EIA, the relevant permits for use, transportation, storage in specially-authorized powder magazines, and handling

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<sup>110</sup> Article 29 of the Regulations on Occupational Health and Safety in the Mining Industry, cited above, entered into force on January 1, 2011, according to Article 7 thereof, and is applicable to all applications for commencement of mining activity submitted as of such date. Undoubtedly, such provision would have applied to Bear Creek, since the latter estimated that operations at the Santa Ana project would commence in the fourth quarter of 2012 (according to para. 5 of the Claimant's Memorial). Regulation on Health and Safety in the Mining Industry, Art. 29 [Exhibit R-156].

<sup>111</sup> On June 6, 2012, the Regulations on Mining Procedures were amended by Supreme Decree No. 020-2012-EM and new requirements were introduced for the commencement of mine construction works. Now, the Mining Plan for mine development and preparation (i.e., for mine construction) requires prior approval. To such end, the EIA must be consented to, supporting technical information must be submitted, authoritative documents for land surface use must be obtained, and an authorization from the transportation authority must be obtained if any right of way is affected. Once the Mining Plan is approved, mine construction can begin. Upon completion of construction works, an inspection must be conducted, and if its results are favorable, authorization is granted for exploitation activities to begin.

(individualized for each operator) of explosives, blasting agents, and accessories are required to initiate mine construction, which consists of earthmoving works to grade the land and pre-mining and clearing operations, and to build any necessary access roads, regardless of whether these activities are to be conducted directly or by contractors.

76. To this end, a Permit for Occasional Use of Explosives will be necessary during this construction stage.<sup>112</sup> Once in possession of the Certificate of Mining Operation, and not before this, it will be possible to apply with the office now known as the National Oversight Authority for Security Services, Weapons, Ammunitions and Explosives for Civil Uses (SUCAMEC) for a Global Authorization for Use of Explosives, Inputs and Related Materials that allows for the procurement of explosives and blasting agents and accessories after a favorable opinion from the Joint Command of the Armed Forces has been obtained.<sup>113</sup>

77. In order to store the explosives and the blasting agents and accessories, an Operating License for the magazine is necessary. This, in turn, requires submitting, among other documents, a map of the structures and location of the facilities and the contracts with the registered security companies in charge of their safekeeping. The ammonium nitrate that Bear Creek would use needs to be stored in a separate, authorized magazine. Additionally, workers handling explosives (either those of Bear Creek or a specialized, authorized company) will need an Explosive Handling License; this is an individual license applicable to each worker.

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<sup>112</sup> Regulation for the Control of Use of Explosives by Individuals that Regulates the Global and Annual or Eventual Purchase for Use of Explosives, Supreme Decree No. 019-71/IN, Art. 85 [Exhibit R-191]. “Article 85: A permit from the DICAMEC or any of its Agencies shall be necessary to purchase explosives. The DICAMEC shall issue Annual (Global) and/or Occasional Permits; its Agencies shall only issue Occasional Permits.” [Note: As of 2012, the DICAMEC is the National Oversight Authority for Security Services, Weapons, Ammunitions and Explosives for Civil Uses (SUCAMEC), and its Agencies are now the District Offices.]

<sup>113</sup> Law on the Use of Explosives, Art. 6 [Exhibit R-161]. “Article 6: The Joint Command of the Armed Forces—CCFFAA—shall exercise control over explosives and related items from the standpoint of national security. It shall have the following duties: a) To issue favorable opinions for the operation of industrial plants and the sale of explosives for civil uses (...).”

78. Similarly, the construction stage requires constructing and maintaining the access roads between the mine and/or the crusher and/or the various warehouses, and also between the different facilities involved in the project, which will require having the surface rights. As described earlier, the area for the project is partitioned among several owners and holders, and each of them will have a strong negotiating position in granting the surface rights to Bear Creek for mining purposes. I believe that it is very likely that Bear Creek would have faced great difficulties in negotiating and obtaining all the surface rights necessary for operating the Santa Ana project.

79. As explained above, it may take some time before the pending permits—some of which are of a technical nature—are approved. As regards the permits for mining activities, most of them are contingent on the approval of the Mining Plan, which, in turn, is contingent on the approval of the EIA. Bear Creek had yet to reach the stage for submitting a Mining Plan, and during the EIA evaluation process, Bear Creek could have been asked to modify certain procedures that could have affected its mining plans and designs. Thus, it is clear to me that Bear Creek had yet to complete several significant steps before it might construct or operate the mine.

## **6. The Plant (Crushing, Leaching and Processes)**

80. An application for a beneficiation concession must be submitted to the General Mining Division of the Ministry of Energy and Mines before works for construction of the components connected with the processing of minerals may initiate—that is, the processes concerned with crushing, leaching, the process pits, and the process plant.<sup>114</sup>

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<sup>114</sup> Regulations on Mining Procedures, Arts. 35 and 37 [Exhibit R-155]. “Article 35: Applicants for beneficiation concessions shall file a request with the Bureau of Mining. To this end, they shall meet the same requirements set forth in subparagraphs a), b), c), and i) of paragraph 1) and subparagraphs a) and b) of paragraph 2) of Article 17 of these Regulations. (...)” “Article 37: (...) The Bureau of Mining shall evaluate whether the application is in conformity with security, housing, mining welfare, and environmental impact rules and shall issue a Resolution within a period not exceeding thirty (30) business days. The Resolution issued by the Bureau of Mining authorizing the construction of the plant (...)”

81. At the time when the EIA was under evaluation, applications concerning the concessions had to be accompanied by the following documents:<sup>115</sup> (i) a descriptive account of the plant and any principal, auxiliary, and supplemental facilities; (ii) a license for use of water issued by the appropriate authority; (iii) the relevant document evidencing the applicant's authority to use the land where the plant will be built; among others.<sup>116</sup>

82. It is only after the technical verifications of the application have been performed and notices have been published making the application publicly known that the authority may issue the construction permit. In order to issue the construction permit, the EIA must be approved. That is to say, under the rules in effect in May 2011, in order for the mining authority to be able to authorize the construction of the plant, the surface rights, the water use rights, and the approval of the EIA were necessary.

83. To obtain the approval concerning the concession—which constitutes the approval of the operating license—from the General Mining Division of the Ministry of Energy and Mines, this authority must conduct an on-site inspection to verify that works have been executed in accordance with the construction license.<sup>117</sup> Beginning on March 29, 2011, on-site

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<sup>115</sup> Regulations on Mining Procedures, Art. 35 [Exhibit R-155]. “Article 35: Applicants for beneficiation concessions shall (...) submit the following accompanying technical information: a) A brief descriptive Account of the Plant and any principal, auxiliary, and supplemental facilities in accordance with the format established by the Bureau of Mining of the Ministry of Energy and Mines; b) A copy of the Acknowledgment of the Filing of the Environmental Impact Assessment with the General Environmental Affairs Office of the Ministry of Energy and Mines, made by any of the entities registered with the Registry of the last said Office pursuant to Ministerial Resolution No. 143-92-EM/VMM; c) A license for use of water issued by the Ministry of Agriculture; and d) The relevant document evidencing the applicant's authority to use the land where the plant will be built, if such land is privately owned.”

<sup>116</sup> Under Supreme Decree No. 020-2012-EM of June 5, 2012, this requirement became more stringent and a copy was required of the record of the registration entry whereby the owner of the whole land authorized the use of the land (or, if not available, a certified copy of the notarial instrument) where the plant will be built, indicating the UTM coordinates of each vertex. Reckoning that Bear Creek intended to start the construction in the second half of 2011, as mentioned in paragraph 54 of its Brief, this obligation may not have been enough. [Exhibit R-236]. Thereafter, Supreme Decree No. 001-2015-EM of January 5, 2015 eliminated a part of this requirement, and this obligation became more flexible.

<sup>117</sup> Regulations on Mining Procedures, Art. 38 [Exhibit R-155]. “Article 38: After the construction and installation of the plant have been completed, the interested party shall notify the Bureau of Mining so that it may order an inspection be carried out to verify whether they have been carried out in accordance with the original project in

inspections must be accompanied by a Favorable Technical Opinion on the works for the plant sent by the Ministry of Energy and Mines to the National Water Authority.<sup>118</sup>

Prior to the on-site inspection, the applicant must have submitted the disposal of treated waste water permit issued by the Bureau of Environmental Health (DIGESA).<sup>119</sup> Before the approval concerning concession is granted, the applicant must demonstrate that the National Water Authority has granted the License for Use of Water for Mining Purposes (to this end, the authorized works must be complete by the time of the application for the license for a construction for water use, in accordance with a procedure described further below).

84. The processing of crushed minerals requires a series of reagents and inputs whose acquisition and consumption are controlled by the authority.<sup>120</sup> This control extends to other inputs that will also be used in the laboratory. Because of all these items, Bear Creek needed to obtain a Certificate for User of Chemical Inputs and Controlled Products (IQPF) from the Anti-

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terms of mining safety and hygiene and environmental impact. Further, the interested party shall include the relevant industrial waste disposal permit. Such inspection shall be conducted within sixty (60) calendar days from the day after the date of request. If the inspection is favorable, the Bureau of Mining shall grant the concession. Such resolution shall authorize the operation of the plant as well as the use of the requested water and the system for the disposal of industrial and domestic liquids (...).”

<sup>118</sup> They issue directions in connection with the satisfaction of the requisite permit for the use of water in the application procedure for beneficiation concessions set forth in Chapter V of the Regulation on Mining Proceedings, Supreme Decree No. 014-2011-EM (“License for Use of Water for Beneficiation Concessions”), March 29, 2011, Art. 1 [Exhibit R-162]. “Article 1: (...) 1.3. In order to obtain the operating permit for the beneficiation plant referred to in the third paragraph of Article 38 of the Regulations on Mining Procedures, the holder of the mining license shall submit to the Bureau of Mining or the regional government, as the case may be, the following documents: 1) The administrative resolution granting the license for use of water for mining purposes issued by the National Water Authority; such resolution shall require the prior issuance of the favorable technical reports on: i. The completion of the construction of the works for water use, issued by the same National Water Authority; and ii. The completion of the construction of the works for the mining-metallurgical project, issued by the Bureau of Mining or the Regional Government, as the case may be; and 2) The administrative resolution granting the disposal of treated waste water permit, also issued by the National Water Authority.”

<sup>119</sup> Regulations on Mining Procedures, Art. 38 [Exhibit R-155]. “Article 38: After the construction and installation of the plant have been completed, the interested party (...) shall include the relevant industrial waste disposal permit (...).”

<sup>120</sup> In May 2015, mercury and sodium cyanide were added as controlled substances.

Drug Unit of the National Police.<sup>121</sup> Applying for this certificate requires complying with a large number of conditions and submitting a variety of documents, including instruments authorizing the use of storage facilities, documents with the technical specifications on the storage facilities, descriptions of processes, and keeping detailed records of income, expenses, uses, storage, and transportation. Once the Certificate of User is obtained from the police, Bear Creek would need to register with the Sole Registry for the Control of Chemical Inputs and Controlled Chemical Products<sup>122</sup> of the Ministry of Production (PRODUCE).<sup>123</sup>

85. In addition to the additional permits, licenses, authorizations, records, and certificates necessary for the construction or operation of the mine and the plant described above, there are others that are also necessary in connection with the supplemental facilities, any required services, any used goods, and the handling and disposal of any generated waste.

## **7. Fuels**

86. According to the EIA, during the operation stage, the Santa Ana project will mostly use Diesel 2 as fuel, but it may also use gasoline.<sup>124</sup> During construction, Diesel 2 will

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<sup>121</sup> Law on the Control of Chemical Substances and Controlled Products, Law No. 28305, July 6, 2004 (“Law on the Control of Chemical Substances and Controlled Products”), Art. 7 [Exhibit R-163]. “Article 7: The conduct of any of the controlled activities set out in this Law shall require having been added to the Sole Registry for the supervision of chemical materials and controlled products. To be added to the Sole Registry for the supervision of chemical materials and controlled substances, it shall be necessary to obtain a certificate of user, which shall be granted by the Specialized Anti-Drug Units of the Peruvian National Police, following a summary investigation, with the involvement of a representative of the Office of the Prosecutor General, within a maximum period of thirty (30) business days (...).”

<sup>122</sup> Law on the Control of Chemical Substances and Controlled Products, Art. 6 [Exhibit R-163]. “Article 6: There is hereby created the Sole Registry for the Control of Chemical Inputs and Controlled Products, which shall contain all the information related to users, activities, and chemical materials and controlled products. The Ministry of Production, following coordination with the government institutions in charge of actions for the supervision of chemical inputs and controlled products, shall be entrusted with the implementation, development, and maintenance of the Sole Registry (...).”

<sup>123</sup> Under Legislative Decree No. 1126, beginning in October 2012, the competent authority for the maintenance of the Registry for the Supervision of Controlled Goods is the National Tax Authority (SUNAT). This register superseded the Sole Registry of PRODUCE and eliminated the need for an IQPF Certificate of User.

<sup>124</sup> Environmental Impact Assessment, Chapter 3: Description of the Project, Section 3.3.13 [Exhibit R-197]. “3.3.13. The mine’s mobile equipment is intended to use diesel as fuel. In the event that the mine’s mobile

mainly be used. It has been planned that fuels depots and a filling station to supply them will be installed. It has also been contemplated that fuels will be transported by authorized third parties. Storing the fuels necessary for the construction and operation stages will require a Favorable Technical Report for Direct Consumers of Liquid Fuels and also registration with the Registry of Hydrocarbons of Direct Consumers with Mobile Facilities.<sup>125</sup>

87. The construction of the fixed and mobile fuel storage depots to be used during the operation stage will require a Works Design Certificate. This requires submitting a series of documents in connection with the technical specifications of the works to be performed, plans and diagrams, and the rights owned.<sup>126</sup> After the Works Design Certificate has been obtained, construction may begin. After the work is completed, it will be necessary to obtain a Favorable Technical Report for Direct Consumers of Liquid Fuels from the Supervisory Board for Investment in Energy and Mining (OSINERGMIN). This certificate and this technical report will be necessary for each facility separately and for each type of fuel. Bear Creek will need to be registered with the Registry of Hydrocarbons of Direct Consumers with Fixed Facilities.<sup>127</sup>

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equipment requires the use of gasoline, the permits required by the competent authority will be necessary for the storage and delivery of such fuel (...).”

<sup>125</sup> Regulation on the Hydrocarbon Registry OSINERGMIN, Resolution of the Board No. 091-2010-OS/CD, April 26, 2010, Exhibit 2 [Exhibit R-164]. “Exhibit No. 2 Administrative Applications with the Registry of Hydrocarbons of OSINERGMIN. APPLICATION No. IH05 Registration with the Registry of Hydrocarbons of Direct Consumers, Packaging Plants and Selling Stores. (...) General Requirements (All Industries): a) Application Forms – Affidavit; b) A copy of the favorable technical Report on use and operation issued by OSINERGMIN and a Resolution of the Management Office approving it (...).”

<sup>126</sup> Regulation on Liquid Fuel and Other Hydrocarbon Derivatives Trade, Approved by Supreme Decree No. 045-2001-EM, Art. 68 [R-192]. “Article 68: After the Municipal License has been obtained, the interested party shall request the Acknowledgment of Registration from MEM or DREM, as the case may be. To this end, the interested party shall submit a copy of the Favorable Technical Report, a copy of the License issued by the Municipality and a copy of the Insurance Policy for Tort Liability. (...) Once the documents have been submitted, the MEM or DREM, as the case may be, shall issue the relevant Acknowledgment of Registration (...).” [Note: The MEM is the Ministry of Energy and Mines and the DREM is the Regional Mining Bureau of each of the country’s regions.]

<sup>127</sup> Beginning in October 2012, the competent authority responsible for the Registry of Hydrocarbons is the SUNAT.

## **8. Electricity Generation**

88. The energy necessary for the operation of the various pieces of equipment and facilities will be obtained from the national network. To this end, a new transmission line and several substations will be constructed. According to the EIA, the facilities to be built would have been qualified in the same way as those of an Electricity-Free User because their 6,000-kW annual demand capacity would have largely exceeded 200 kW.<sup>128</sup> In this regard, in order to connect to the National Interconnected Electrical System (SEIN) and receive electric power, Bear Creek needed to construct a transmission line and its corresponding substation, as set forth in the EIA.

89. Thus, it had to apply before the Ministry of Energy and Mines for the following permits: (i) Definitive Concession of Transmission, which requires having a copy of the Environmental Impact Assessment on the transmission line, among other requirements; and (ii) Electrical Transmission Line Easement in the area of the transmission line and for the installation of the transformation substations and related civil works. Without prejudice to the permits described here, the municipal construction permits and the CIRA Certificate for the zone for the construction of the transmission line were also necessary.

90. Power-generating sets will be used during construction, which will require having fuels with their respective permits, as indicated above.

## **9. Water Supply**

91. According to the EIA, a source of underground water has been identified in the

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<sup>128</sup> Environmental Impact Assessment, Chapter 3: Description of the Project, Section 3.3.12 [Exhibit R-197]. “3.3.12. The electrical power for Santa Ana’s facilities will be supplied by the Peruvian network (National Interconnected Electrical System – SEIN) through a new line to be built, connecting the Pomata substation located in the village of Pomata with Santa Ana’s substation. Moreover, there will be 10-kV primary lines and distribution substations. The electrical transmission line will supply the necessary energy for Santa Ana’s future operations at an output of 6 MW (...).”

Challacollo basin at a distance of 7 kilometers, from which up to 35 L/s of water may be extracted.<sup>129</sup> Also explored was the need to obtain permits for water facilities in order to obtain the Beneficiation Concession;<sup>130</sup> that is to say, before any construction works commences. The same permits are necessary for the rest of the Santa Ana project's components.

92. If the EIA had been approved within the periods set forth in the applicable laws, the application procedures for the water use licenses would have required submitting a resolution issued by the National Water Authority approving the water use studies.<sup>131</sup> To this end, Bear Creek would have needed to (i) evidence the availability of the water resource in an amount, at a time, and with a quality suitable for the Santa Ana project;<sup>132</sup> (ii) that the exploitation plan that must be submitted when making this application does not affect the rights of third parties to use water, including the rights of rural and native communities; and (iii) that the water system of the Santa Ana project has been sized in accordance with its demand for water as far as the works for the collection, use, and return of water are concerned. Failure to evidence the availability of this

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<sup>129</sup> Environmental Impact Assessment, Chapter 3: Description of the project, Section 3.2.11.2 [Exhibit R-197]. "3.2.11.2. The main source of water supply for the project will come from underground water formed in the basin found in the Challapollo zone adjacent to the Challacame River, which is located 7.8 kilometers away from the project's facilities. The results of the tests on the aquifer were favorable and indicated that it could be possible to produce around 35 L/s or more in the area it area without a significant impact either on the underground or on the superficial aquifer (...)."

<sup>130</sup> License for Use of Water for Beneficiation Concessions, Art. 1 [Exhibit R-162]. "Article 1: (...) 1.3. To obtain the operating permit for the beneficiation plant (...) the holder of the mining license shall submit to the Bureau of Mining (...) the following documents: 1) The administrative resolution granting the license for the use of water for mining purposes issued by the National Water Authority; such resolution shall require the prior issuance of the favorable technical reports on: i. The completion of the construction of the works for water use, issued by the same National Water Authority; and ii. The completion of the construction of the works for the mining-metallurgical project, issued by the Bureau of Mining or the Regional Government, as the case may be (...)."

<sup>131</sup> License for Use of Water for Beneficiation Concessions, Art. 1 [Exhibit R-162]. "Article 1: (...) 1.2. After the competent mining authority has granted the appropriate environmental certification for the mining-metallurgical project, the holder of the mining license shall submit to the competent mining authority the administrative resolution authorizing the performance of works for water use, issued by the National Water Authority. Thereafter, the mining authority shall grant the construction permit for the beneficiation plant referred to in the second paragraph of Article 37 of the Regulations on Mining Procedures (...)."

<sup>132</sup> Beginning on December 27, 2004, the availability of water may also be evidenced by a Favorable Technical Opinion on the Availability of Water contained in the environmental assessment.

resource will result in the need to submit a hydrologic or hydrological study. This resolution does not grant any authority to use the water; it only grants the authority to apply for the construction of a beneficiation plant;<sup>133</sup> however, the works for this plant may only be thereafter authorized to commence upon the filing of a resolution with the mining authority whereby the National Water Authority, in turn, authorizes the performance of the works for water exploitation based on the previously approved study.

93. After the plant has been constructed, the permit concerning the concession will be contingent on the filing with the mining authority of the resolution issued by the National Water Authority approving the License for Use of Water for Mining Purposes. To this end, the National Water Authority must have verified that the works were performed in accordance with the authorization for the commencement of the works for the use of water, and a favorable technical report must be issued.<sup>134</sup>

94. In addition to the License for Use of Water for Mining Purposes authorizing the use of water for the concession, a License for Use of Water for Mining Purposes will also be necessary in order to supply water to the equipment and facilities used in extractive activities,

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<sup>133</sup> Regulation of the Law on Water Resources, Supreme Decree No. 01-2010-AG, March 23, 2010 (“Regulations on the Water Resources Act”), Art. 80 [Exhibit R-165]. “Article 80: 81.1 Applications for the approval of water use studies shall be subject to automatic denial in the event of failure by the authority to respond to the application. In order to be approved, the study shall meet the following conditions: a) Evidencing the availability of the water resource in an amount, at a time, and with a quality suitable for a particular project in a place of interest. b) That the exploitation plan does not affect the rights of third parties to use water, including the rights of rural and native communities. c) That the water system of the Santa Ana project has been sized in accordance with the project’s demand for water as far as the works for the collection, use, and return of water are concerned. 81.2 The approval of the water use study is not exclusive and may be granted to more than one applicant in respect of one single source in accordance with the competition rules set forth in the Regulations. 81.3 It shall not be necessary to submit any hydrologic or hydrogeological study where the availability of the resource concerned has been properly evidenced by the National Water Authority.”

<sup>134</sup> License for Use of Water for Beneficiation Concessions, Art. 1 [Exhibit R-162]. “In order to obtain the operating permit for the beneficiation plant (...), the holder of the mining license shall submit to the Bureau of Mining (...), the following documents: 1) The administrative resolution granting the license for the use of water for mining purposes issued by the National Water Authority; such resolution shall require the prior issuance of the favorable technical reports on: i. The completion of the construction of the works for water use, issued by the same National Water Authority; and ii. The completion of the construction of the works for the mining-metallurgical project, issued by the Bureau of Mining or the Regional Government, as the case may be (...).”

e.g., drillers. Additionally, a License for Use of Water for Domestic Purposes will also be necessary in order to be able to use water at camp sites, offices, kitchens, laundries, workshops, and other supplemental facilities.

95. In the construction stage, Bear Creek had anticipated acquiring the water supply by municipal tank trucks.<sup>135</sup>

## **10. Disposal**

96. As with the water supply, in order to obtain the approval concerning the concession, it is necessary to obtain a Disposal of Treated Waste Water Permit<sup>136</sup>; however, operations at the Santa Ana project will generate acid mine drainage and domestic waste water at almost all the other supplemental facilities, in view of which it is also necessary to apply for permits for the disposal of acid mine drainage and waste water for each facility. In addition, it is necessary to obtain permits to install and operate the treatment plants at each facility in order to treat the water before its disposal (the EIA provides for up to five such plants for the disposal of domestic water and water of the plant, and an additional one for the treatment of acid mine drainage<sup>137</sup>).

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<sup>135</sup> Environmental Impact Assessment, Chapter 3: Description of the Project, Section 3.2.13.1 [Exhibit R-197]. “3.2.13.1. (...) The water supply required for the construction stage is minimal, being restricted to the requirements for the particulate matter during the preliminary access works and civil works. The water will be acquired from the municipal and/or communal system, taking into account the applicable legal regulations, and it will be transported to the work site on tank trucks. Bottled water will be used for human consumption.”

<sup>136</sup> Regulations on Mining Procedures, Art. 38 [Exhibit R-155]. “Article 38: Upon completion of the plant’s construction and installation, the interested party shall inform the Bureau of Mining so that it may proceed to order an inspection to verify that the work has been carried out in accordance with the original project in relation to mining health and safety and environmental impact. Furthermore, it will attach the corresponding industrial waste water disposal permit. The inspection shall be carried out within sixty (60) calendar days after the date on which it was requested. If the inspection proves favorable, the Bureau of Mining will grant the concession. Said resolution will authorize the plant’s operation and the use of the requested waters, as well as the disposal of industrial and domestic liquid (...).”

<sup>137</sup> Environmental Impact Assessment, Chapter 3: Description of the Project, Section 3.2.11 [Exhibit R-197]. “3.2.11.1. (...) The project’s acid drainage treatment plant considers the following components: Catchment tank, neutralization-oxidation tank, and clarification tank, as well as their respective systems for the preparation and dosage of limestone, reagents (if necessary), and flocculant; air supply system; pumping systems and their respective pipelines, including the civil, mechanical, electrical, and instrumentation works. (...) 3.2.11.2 (...) The Project’s

97. The Disposal Permit requires prior registration for treatment purposes, prior to the disposal of water, and having presented a descriptive report on the industrial processes, the annual water balance, and the raw material and inputs' balance; a descriptive report on the treatment system, an environmental impact assessment on this matter, indicating the waste water characteristics with laboratory results; a hydrobiological study of the receiving body; and a historical hydrological study of the receiving body.<sup>138</sup> Having built the treatment plant, it is necessary to carry out an on-site inspection to verify that it was built according to the presented information, and only if a favorable report is obtain shall the disposal be authorized.

98. In the project's construction stage, the use of chemical toilets is proposed, which also requires a Septic Tank Sanitation Permit.<sup>139</sup>

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buildings are separated from one another, in view of which the use of five independent sewage collection systems is anticipated, which are to collect and channel said waste to its own waste water treatment and disposal system within the Project Site Area (PSA) (...)."

<sup>138</sup> Regulations on the Water Resources Act, Art. 137 [Exhibit R-165]. "Article 137: 137.1 The National Water Authority grants treated waste water disposal permits upon receiving the favorable technical opinions of the Bureau of Environmental Health of the Ministry of Health and of the competent sectoral environmental authority according to the procedure established for such purpose by said Authority. 137.2 The general requirements for the granting of a permit for disposal into a natural inland body of water or sea are: a) Receipt of registration of the waste water treatment system, issued by the National Water Authority; b) Descriptive Report on the industrial process, including a Flowchart, Annual Water Balance, Raw Material and Inputs' Balance; c) Descriptive Report of the waste water treatment system; d) copy of the waste water treatment system plans signed by a certified and licensed Sanitation, Civil, or Environmental Engineer; e) Treatment System Operation and Maintenance Manual signed by a certified and licensed professional; f) The environmental management instrument that includes the assessment of the effect the disposal has on the receiving body; g) characterization of the waste water to be disposed of and of the receiving body; and h) payment of the processing fee (...)."

<sup>139</sup> Unified Text for Administrative Proceedings (TUPA) for the General Direction on Environmental Sanitation (DIGESA), Supreme Decree No. 013-2009-SA as amended by Supreme Decree No. 002-2010-SA, January 15, 2010 ("TUPA of DIGESA"), Procedure 8 [Exhibit R-166]. "Septic Tank Sanitation and Land Infiltration Permit. Requirements: 1. Application addressed to the Executive Director of Basic Sanitation, in the form of an Affidavit containing the RUC (Tax ID) No. or DNI (National Identity Card), and signed by the Legal Representative or Owner. 2. Receipt of Registration of the Domestic Waste Water Treatment System, available on the website of the DIGESA. On physical or magnetic media. 3. Map showing the location of the dwelling at a scale of 1:5000. On physical or magnetic media. 4. Layout plan at a scale of 1:100, indicating the location of the septic tank within the property, signed by a Certified and licensed Sanitation Engineer. On physical or magnetic media. 5. Descriptive report on the septic tank and final disposal system on the property, including the calculation sheet. On physical or magnetic media. 6. Plans of the septic tank and final disposal system on the property, at a scale of 1:50, signed by the Certified and licensed Sanitation Engineer. On physical or magnetic media. 7. Operation and maintenance manual of the treatment system signed by a Certified and licensed Sanitation Engineer. On physical or magnetic media. 8. Environmental assessment on the effect of the final disposal of domestic waste water on the aquifer and its probable impact, signed by a Certified and Licensed Sanitation Engineer. On physical or magnetic media. 9.

## 11. Solid Waste and Hazardous Materials

99. The EIA warns of the use of materials considered hazardous or that certain materials, after their use, may become hazardous, requiring special handling and disposal.<sup>140</sup>

100. At different stages throughout the mining and treatment process, and at supplemental facilities such as maintenance workshops, warehouses, gas stations, medical centers, kitchens, laundries, laboratories, or water treatment plants, hazardous materials will be used or generated, which shall at least require an agreement with a Solid Waste Service Provider (EPS-RS) authorized for the transportation and final disposal of solid waste. Other solid waste – whether hazardous or not– will also be subject to EPS-RS agreements.

101. In the particular case of cyanide, the EIA considers the installation of an Auxiliary Cyanide Destruction Plant, which is to be prepared for contingencies where the main destruction process may be exceeded by its operating capacity.<sup>141</sup>

102. In the construction stage, the sale of solid waste that may have a commercial value is anticipated. For solid waste with no commercial value, such waste will be buried in tranches for which it is necessary to obtain a Land Infiltration Sanitation Permit.<sup>142</sup>

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Percolation test at the final disposal area (with photographic record). 10. Copy on physical or magnetic media of the environmental impact assessment or environmental management and adaptation program or similar study, including the evaluation of the domestic waste water treatment system approved by the competent sector, attaching a scanned copy of the sector-specific directorial resolution that approves said study (with the exception of single-family residences and multi-family dwellings). 11. Processing Fee Receipt (...).”

<sup>140</sup> Environmental Impact Assessment, Chapter 3: Description of the Project, Section 3.3.16 [Exhibit R-197]. “3.3.16. The project will have a special site for the handling of solid waste, with recycling and reuse areas, temporary storage areas for domestic and industrial solid waste, and for hazardous waste. (...) 3.3.16.3. (...) The hazardous waste related to the Santa Ana Project in general will be collected and temporarily stored at the point of generation before being transferred to the central storage facility. All such hazardous waste shall be sold or disposed of at safe landfills authorized by the competent authority through an EC-RS or EPS-RS (...).” [Note: An EC-RS is a Solid Waste Commercial Enterprise and an EPS-RS is a Solid Waste Service Provider.]

<sup>141</sup> Environmental Impact Assessment, Chapter 3: Description of the Project, Section 3.3.9 [Exhibit R-197]. “3.3.9. Although this project plans to have a catchment tank for major events, which also form part of said closed circuit, if an extreme rain event occurs that exceeds the capacity of the aforementioned tank, a sodium cyanide destruction treatment plant with a capacity of 120 m<sup>3</sup>/h has been considered (...).

<sup>142</sup> TUPA of DIGESA, Procedure 8 [Exhibit R-166]. “Septic Tank Sanitation and Land Infiltration Permit.

## 12. Mine Closure Plan

103. Upon approval of the EIA for the Santa Ana Project, Bear Creek had one year to submit the Mine Closure Plan for approval, which is required to be prepared by a consultant authorized on a feasibility level, to be progressively implemented throughout the mine's projected 11 years of useful life.<sup>143</sup> The aim of the Mine Closure Plan is to ensure the long-term physical stability and chemical stability of the site area, the restoration of the affected areas, the possible alternative use of areas or facilities, and the determination of possible future uses of said areas. In addition, the Closure Plan must contain the estimates for the progressive closures, possible temporary suspensions, final closure, and post closure, which must be prepared by a specialized consultant.

104. The Mine Closure Plan is required to go through a community participation process, in view of which it is necessary to inform the local and regional authorities of such plan, and it must be submitted to the opinion of any competent authorities, such as the Bureau of Environmental Health.<sup>144</sup>

105. Bear Creek should have then begun to deposit –within the first twelve days of the year after the approval of the Mine Closure Plan– the necessary guarantees for the corresponding

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Requirements: (...).”

<sup>143</sup> Law Regulating Mine Closing, Law No. 28090, October 13, 2003 (“Mine Closure Act”), Art. 7 [Exhibit R-167]. “Article 7: The mining operator shall submit the Mine Closure Plan to the competent authority within the maximum term of one year as from the approval of the Environmental Impact Assessment (EIA) and/or of the Environmental Management and Adaptation Program (PAMA), respectively.”

<sup>144</sup> Regulation on Mine Closing, Supreme Decree No. 033-2005-EM, August 14, 2005, Art. 16 [Exhibit R-168]. “Article 16: All individuals or legal entities may go before the Office of Mining Environmental Affairs of the Ministry of Energy and Mines, Regional Office of Energy and Mines, Regional Government seat, Provincial or District Municipalities, and the town hall of the corresponding community, in order to learn of the Mine Closure Plan, subject to the procedure set forth in Article 13 of these Regulations. Any observations, recommendations, or documentation related to the Mine Closure Plan, subject to evaluation, which any person wishes to present to the Ministry of Energy and Mines within the established community participation process, shall be sent in writing to the Office of Mining Environmental Affairs or the corresponding Regional Offices of Energy and Mining within the maximum term indicated in the published announcement mentioned in subsection 13.3 of section a) of Article 13. The submitted observations shall be evaluated and considered by the Office of Mining Environmental Affairs during the Mine Closure Plan evaluation process.”

compliance. The guarantee should be based on the estimate and deposited annually in terms of the mine's estimated useful life.

106. Although the regulations of the Law Governing the Closure of Mines state that “a holder of a mining concession that does not have an approved Mine Closure Plan is impeded from starting mining operations,” it understood this to mean that such impediment applies to extraction and processing activities and not activities for the construction of the facilities. In fact, mines are built while the Mine Closure Plans are prepared and processed for approval.

### **13. Pending Permits**

107. In summary, apart from the acquisition of the surface rights –which is a significantly complex process– in light of the information on the project's components and the characteristics of the operational processes contained in the EIA, the Santa Ana project had pending a considerable number of licenses, permits, authorizations, registries, opinions, inspections, reports, concessions, easements, certificates, and certifications, some of which were necessary for the commencement of any construction work. Namely:

1. For Mining:
  - a. Construction Stage:
    - i. Permit for Occasional Use of Explosives
    - ii. License for Use of Gunpowder
    - iii. License for Use of Gunpowder (specifically for ammonium nitrate)
    - iv. Individual Explosive Handling License
    - v. Archaeological Reconnaissance Survey Project
    - vi. Certificate of Inexistence of Archaeological Remains (CIRA)
  - b. Operation Stage:
    - i. Authorization for Start/Restart of Mining Activity
    - ii. Mining Plan
    - iii. Certificate of Mining Operation (COM)
    - iv. Global Authorization for Use of Explosives, Inputs and Related Materials
    - v. License for Use of Gunpowder
    - vi. Individual Explosive Handling License

- vii. License for Use of Water for Mining Purposes (for mining operations)
  - viii. Disposal of Treated Waste Water Permit (for the Acid Drainage Treatment Plant)
  - ix. Approval of the Mine Closure Plan
2. For the Plant:
- a. Construction Stage:
    - i. Construction Permit
    - ii. Approval of Water Use Studies
  - b. Operation Stage:
    - i. Inspection of construction work compliance
    - ii. Disposal of Treated Waste Water Permit (for water from the leaching and Merrill-Crowe process)
    - iii. Favorable Technical Opinion on the execution of mining-metallurgical works of the Ministry of Energy and Mines to the National Water Authority
    - iv. License for Use of Water for Mining Purposes (for plant operations)
    - v. Certificate for User of Chemical Inputs and Controlled Products
    - vi. Sole Registry for the Control of Chemical Inputs and Controlled Chemical Products
    - vii. Land Infiltration Sanitation Permit
3. For Supplemental Facilities:
- a. Construction Stage:
    - i. Authorization of Water Use Studies
    - ii. Authorization for the Execution of Works for Water Use
    - iii. Favorable Technical Report for Direct Consumers of Liquid Fuels
    - iv. Registry of Hydrocarbons of Direct Consumers with Mobile Facilities
    - v. Septic Tank Sanitation Permit (for chemical toilets)
    - vi. Sanitation Permit for Land Infiltration (for unsalable waste)
  - b. Operation Stage:
    - i. Favorable Technical Opinion on Completion of Works for Water Use
    - ii. Works Design Certificate for Favorable Technical Report for Direct Consumers of Liquid Fuels

- iii. Favorable Technical Report for Direct Consumers of Liquid Fuels
- iv. Registry of Hydrocarbons of Direct Consumers with Fixed Facilities
- v. Definitive Concession of Electricity Transmission
- vi. Electrical Transmission Line Easement
- vii. License for Use of Water for Domestic Purposes (for offices, campsite, and others)
- viii. Permit for Waste Water Treatment and Sanitary Disposal of Domestic Waste Water System (for Domestic Waste Water Treatment Plant)
- ix. Disposal of Treated Waste Water Permit (for laboratory water)
- x. Sanitation Permit for Land Infiltration (for sump drains for laboratory materials)

108. Assuming that Bear Creek were to have acquired the necessary surface rights and obtained the approval on the EIA within the terms established by law, and given the numerous pending steps to be able to begin construction of the Santa Ana project, together with the fact that, in many cases, they are drawn out processes, it would have been very difficult, if not impossible, for Bear Creek to have been able to begin construction of the Santa Ana project facilities during the second semester of 2011, as stated in its Memorial,<sup>145</sup> or to have been able to begin production in the fourth quarter of 2012, as is also mentioned in its Memorial.<sup>146</sup>

#### **IV. REVOCATION AS A CAUSE FOR EXTINCTION OF MINERAL RIGHTS**

109. The extinguishment of mining concessions must be declared by the competent authority.<sup>147</sup> One form of extinguishment is revocation, which applies to cases where the concessionaire has failed to comply with any of the necessary obligations in order to maintain

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<sup>145</sup> Claimant's Memorial, para. 54.

<sup>146</sup> Claimant's Memorial, para. 5.

<sup>147</sup> LGM, Art. 66 [Exhibit R-008]. "By Resolution of the Office of the Public Registry of Mining the revocation shall be declared (...) of concessions and applications, in each case or collectively, making the corresponding entry in said Registry." [Note: The Geological, Mining and Metallurgical Institute (INGEMMET) now exercises the functions of the Public Registry of Mining.]

the validity of the concession, such as failure to pay the annual concession fees for two years or failure to pay, for two consecutive years, the fines incurred due to failure to meet the minimum annual investment or minimum annual production. Once the revocation has been declared and recorded, this implies that the concession returns to the State.<sup>148</sup>

110. At the moment the General Mining Law was enacted, the 1979 Constitution of Peru was in force, which imposed on the holders of mining concessions the obligation to operate concessions,<sup>149</sup> known as “protection through work”. In order to comply with this precept, the General Mining Law established that the mining concession obliges its operation or to prepare it for operation,<sup>150</sup> changing the “protection through work” into a “protection through investment.” The current constitution makes no provision on this point. Considering the importance given to this obligation provided in the constitution, it represents the primary obligation of the concessionaire, in view of which its non-fulfillment constitutes a cause of revocation.

111. Upon presenting the applications for the Santa Ana project mining concessions in May and November 2004, this obligation to operate the concessions meant that they had to produce no less than they equivalent of USD 100.00 (One Hundred and 00/100 United States Dollars) per year and per hectare under the concession, which was necessary to be achieved by the end of the sixth year as from the year the title to the concession was granted, at the latest.<sup>151</sup> In other words, the production of the Karina 9A concession of the Santa Ana project (granted in 2006) should have

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<sup>148</sup> LOASRN, Art. 30 [Exhibit R-142]. “(...) Revocation results in the concession being returned to the State from the moment the cancellation of the corresponding title is recorded.”

<sup>149</sup> Political Constitution of 1979, July 12, 1979, Art. 122 [Exhibit R-031]. “The State promotes and stimulates mining activity. (...) The mining concession obliges its operation and confers upon its concessionaire a right *in rem*, subject to the conditions of law.”

<sup>150</sup> LGM, Art. IV [Exhibit R-008]. “The mining concession obliges its operation, where said obligation includes the investment for the production of mineral substances.”

<sup>151</sup> LGM, Art. 38 [Exhibit R-008]. “Article 38: (...) The production must be no less than the equivalent in national currency of USD 100.00 per year and per hectare under concession, in the case of metallic substances (...). The production must be obtained by the end of the sixth year at the latest, counted as from the year when the concession title was granted” (...).

started at the end of 2012. If the minimum annual production were not achieved by such date, the concessionaire was required to pay a penalty to the State within the first semester of 2013 equal to USD 6.00 (Six and 00/100 United States Dollars) per year and per hectare, and if this non-compliance were to persist until the end of 2018, the penalty to pay within the first semester of 2019 would increase to USD 20.00 (Twenty and 00/100 United States Dollars) per year and per hectare.<sup>152</sup> Failure to pay this penalty for two years would constitute a cause of revocation of the mining concession.<sup>153</sup>

112. These obligations for the holders of mineral rights were amended in 2008, and all holders of valid mining concessions were required to begin production within a period of 10 years, to be counted as from the first business day of 2009; therefore, they were required to meet the minimum annual production by the start of 2019.<sup>154</sup> The minimum annual production would be one (1) Tax Unit (UIT)<sup>155</sup> per year and per hectare.<sup>156</sup> The concessionaire that fails to meet this production will be liable to a penalty equal to 10% of the corresponding amount it should

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<sup>152</sup> LGM, Art. 40 [Exhibit R-008]. “Article 40: In case of failure to comply with the provisions of Article 38, as from the first semester of the seventh year, counted as from the year when the title to the mining concession was granted, the concessionaire shall pay a penalty of USD 6.00 or its equivalent in national currency per year and per hectare, up until the year in which the minimum annual production is met. (...) If the non-compliance continues, from the twelfth year the penalty shall be USD 20.00 or its equivalent in national currency per year and per hectare (...).”

<sup>153</sup> LGM, Art. 59 [Exhibit R-008]. “Article 59: Failure to pay the concession fee or the penalty, as the case may be, for two (2) consecutive years is cause of revocation of mining claims, applications and concessions (...). In case of failure to make one year’s payment, it may be rectified with the payment and deposit of the current year within the term provided in Article 39 of this Law. In any event, the payment shall apply to the previous past-due and unpaid year (...).”

<sup>154</sup> Supreme Decree No. 054-2008-MEM, October 10, 2008 [Exhibit R-169]. “Sole Transitional Provision: Pursuant to Complementary Transitional Provision One and Two of Legislative Decree No. 1010 on mining concessions in effect, the following provisions will apply: 1. For mining concessions in effect on the publication date of this Regulation, the periods established to reach and demonstrate the minimum production amounts per year and per hectare, or the payment of the penalty pursuant to Legislative Decrees No. 1010 and No. 1054, shall be counted as from the first business day of 2009 (...).”

<sup>155</sup> UIT is the unit of reference established by the Government of Peru at the start of each calendar year.

<sup>156</sup> Legislative Decree No. 1054 of June 27, 2008, Art. 1 [Exhibit R-170]. “Article 1: The amendment is ordered of articles 38, 40, and 41 of the General Mining Law (...) in accordance with the following texts: Article 38: (...) The production must be no less than the equivalent to one Tax Unit per year and per hectare under concession (...). The production must be obtained by the end of the tenth year at the latest, counted as from the year when the concession title was granted (...).”

have produced, annually.<sup>157</sup> If the minimum annual production is not met by the end of the fifteenth (15th) year, the revocation of the concession will be declared. The revocation may be avoided for a maximum period of five additional years if the concessionaire demonstrates that events not attributable thereto impeded it from meeting the minimum annual production and it pays the aforementioned penalty and demonstrates that it has made investments equal to no less than ten (10) times said penalty.<sup>158</sup> With the amendment we see the return of the “amparo por el trabajo” [protection through work] imposed by the 1979 Constitution.

113. The Organic Law for the Sustainable Use of Natural Resources binds concessionaires to make the payment imposed by the law in order to maintain the validity of their concessions.<sup>159</sup> The General Mining Law binds the holders of mineral rights to pay a concession fee to maintain the validity of mining concession applications or concessions equal to USD 3.00 (three and 00/100 United States Dollars) per year and per hectare. Failure to pay the concession fee for two years constitutes cause of revocation of the mineral right.<sup>160</sup> The

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<sup>157</sup> Legislative Decree No. 1054 of June 27, 2008, Arts. 1 and 40 [Exhibit R-170]. “Article 1: The amendment is ordered of articles 38, 40, and 41 of the General Mining Law (...) in accordance with the following texts: (...) Article 40. In case of failure to comply with the provisions of Article 38, as from the first semester of the eleventh year, counted as from the year after the title to the mining concession was granted, the concessionaire shall pay a penalty equal to 10% of the required minimum annual production per year and per hectare, up until the year in which the minimum annual production is met. (...) If the non-compliance continues until the end of the fifteenth year after the mining concession was granted, its revocation shall be declared.”

<sup>158</sup> Legislative Decree No. 1054 of June 27, 2008, Arts. 1 and 41 [Exhibit R-170]. “Article 1: The amendment is ordered of articles 38, 40, and 41 of the General Mining Law (...) in accordance with the following texts: (...) Article 41: The concessionaire will not incur in the cause of revocation after the end of the fifth year stipulated in Article 40 and up to a maximum non-extendable period of five years if the failure to meet the minimum production is due to an act of God or force majeure, or to any event not attributable to the holder of the mining concession, duly sustained and approved by the competent authority. Likewise, the concessionaire may be exempted from revocation, within the term set forth in the above paragraph, if it pays the penalty and demonstrates investments of no less than ten times the amount of the penalty it is required to pay (...). If the non-compliance continues until the end of the twentieth year, counted as from the year after the concession was granted, its revocation will inevitably be declared.

<sup>159</sup> LOASRN, Art. 29 [Exhibit R-142]. “Article 29: The conditions for the sustainable use of natural waters on the part of the holder of a right of use, without prejudice to the special laws, are: (...) d) Payment of the corresponding financial consideration in accordance with the modalities established by the special laws. e) Timely payment of the concession fee as determined in the applicable legal provisions.”

<sup>160</sup> LGM, Art. 59 [Exhibit R-008]. “Article 59: Failure to pay the concession fee or the penalty, as the case may be, for two (2) years, whether consecutive or not, is cause of revocation of mining claims, applications, and

Constitutional Court of Peru has deemed that the concession fee is the consideration the individual is required to pay to the State in order to be granted the concession, and that it must be paid annually in order to renew it.<sup>161</sup> Thus, as opposed to the mining royalty, which is a payment to the State for the extracted minerals and therefore related to production, the concession fee is a consideration for the granting of the mining concession and therefore related to its preservation, and which must be paid even when the concession is not in production.

114. Given the importance of both these obligations, namely that the payment of the consideration for the concession is made to the State, and that the minimum work is carried out, both are two unique causes due to which the revocation of the mining concessions may be declared. The causes of revocation are the most frequent causes of extinguishment of mineral rights.

## V. CONCLUSIONS

115. Mineral resources are national property, and their exploitation by private parties is carried out through the concession system. Mining concessions provide concessionaires with the exclusive right to explore and exploit the mineral resources under concession, with the restrictions established in the corresponding concession and subject to prior compliance with the requirements to obtain the necessary permits.

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concessions, as well as beneficiation concessions. In case of failure to make one year's payment, it may be rectified with the payment and deposit of the current year within the term provided in Article 39 of this law. In any event, the payment shall apply to the previous past-due and unpaid year (...)."

<sup>161</sup> Decision of the Constitutional Tribunal 0048-2004-PI/TC, April 01, 2005, Art. 55 [Exhibit R-171]. "55. In agreement, we have previously indicated that we are faced with two different types of financial considerations. The mining royalty –as previously mentioned– is a financial consideration or compensation for the usufruct of the extracted material. In turn, the concession fee is a financial consideration for maintaining the concession, and failure to pay such fee renders the concession itself without effect, constituting a cause of revocation of the mining concession. Furthermore, this difference can be seen in the way each one is calculated; thus, the concession fee, to be paid on an annual basis, takes into account the number of hectares granted or applied for in the concession, as opposed to the obtained production, as is the case of the royalty."

116. Failure to register mining contracts in the mining registry does not affect their validity.

117. Registration in the mining registry does not validate the mining contracts, which may be invalid.

118. The publication of an order of the Registry Tribunal in the El Peruano Official Gazette does not in itself concede the condition precedent of mandatory observance if the other conditions imposed by the registry regulations are not complied with.

119. Mining explorations are subject to the acquisition of an environmental certification, which depends on the estimated impacts, the area that will be affected, and the amount of anticipated drilling platforms. Upon applying for environmental certifications for the explorations in the Santa Ana project, they all required an express pronouncement by the authority before commencing the explorations. Jenny Karina Villavicencio Gardini, as the holder of mining concessions for the Santa Ana project, initiated the procedures to acquire the necessary environmental certification.

120. The acquisition of sufficient rights to use the surface for such purpose was an indispensable requirement to begin explorations.

121. For the commencement of construction works of the facilities for the exploitation and treatment of minerals, it is necessary to have previously and formally acquired the rights of use on the entire surface where the different components of the project are to be installed. The lack of surface rights impedes the approval of a significant number of permits. According to the information provided by Bear Creek, the negotiation process with the three land-owning communities and with no less than 94 holders of the 351 hectares for which surface rights were required were in the initial stages.

122. For the commencement of construction works of facilities for the exploitation and treatment of minerals, it is necessary to have the prior and express approval of an environmental assessment. In the case of the Santa Ana project, the corresponding environmental assessment is the Environmental Impact Assessment (EIA). Without an approved EIA, no work may be carried out at the Santa Ana project.

123. In many cases, the EIA approval constitutes the starting point for the processing of other necessary permits for the construction of the Santa Ana project.

124. The commencement of mineral exploration and treatment operations, and the implementation of processes and the commencement of works on supplemental facilities, is subject to the prior acquisition of additional permits.

125. According to the information on the components and processes of the Santa Ana project derived from the EIA submitted to approval by the authority for the Santa Ana project, the number of pending permits required for Bear Creek to start the construction works –and then operate the mine, plant, and other supplemental facilities– was considerable, whose applications involve, in many cases, complex and drawn out processes.

126. In order to begin the evaluation of the EIA, it is necessary to first comply with a community participation process. Bear Creek submitted its Citizen Participation Plan (PPC) for approval. The approval of the PPC by the authority does not constitute a statement of conformity in relation to the actions of Bear Creek in its relations with the communities in its area of influence and does not reflect the nonexistence of eventual social conflicts in the zone. The PPC must be discussed in at least one public hearing.

127. The minutes that reflect the development of the public hearing convened within the community participation process contain an inconsistency and they do not contain the fulfillment of certain requirements to corroborate the validity of the act.

128. The mining law lays down the causes due to which a mineral right may be extinguished, such as revocation due to failure to pay the mining concession fees for two consecutive years or failure to pay the penalty imposed for failure to meet the minimum annual production for two years.

This opinion is based on my professional experience, and I certify that its content is according to the best of my knowledge.

[signature]

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Luis Rodríguez-Mariátegui Canny

Date: October 6, 2015

**Luis Rodríguez-Mariátegui Canny**

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Luis Rodríguez-Mariátegui Canny, PhD, is an expert in Mining Law, Environmental Law, Natural Resources Law and Corporate Law.

He has continuously practiced the specialty of mining for over 25 years. His practice is focused on the negotiation of mining contracts for the direct or indirect acquisition or disposal of investors' interests in mineral rights as well as consulting services to mining companies during the activity phase, including the processing of environmental certifications and permits. He is also engaged in the defense of investors in legal and administrative actions in mining and environmental proceedings and processes. He also provides consulting services to companies engaged in providing services to mining companies, including drilling, explosives and blasting companies, testing laboratories and companies dealing in minerals, mining equipment manufacturers, among others.

He has served as a member of the Board of Directors and the Executive Committee of the National Society for Mining, Petroleum and Energy (SNMPE), and he held the posts of chair of the Legal Affairs Committee and chair of the Legal Mining Committee of the SNMPE. He was a member of the First Advisory Board (2000-2001) and the Third Advisory Board (2006-2007) of the Mining Area of the Registry Zone IX-Lima Headquarters. He has also held the post of president of the National Institute of Law on Mining, Petroleum and Energy (INDEMIPE) and he is the past-president of the Institute of Mining Energy Studies (IDEM). He also served as a member of the Board of Directors of the Peruvian Association of Maritime Law.

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