

RWS-003

Witness Statement of César Zegarra

October 6, 2015

English Translation

**BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT  
DISPUTES**

***Bear Creek Mining Corporation***  
**(Claimant)**

**Against**

***Republic of Peru***  
**(Defendant)**

**Case No. ARB/14/21**

**Witness Statement of César Zegarra**  
**General Director, Office of the Legal Advisor, Ministry of Energy and Mines (2007-**  
**present)**

**October 6, 2015**

**I. INTRODUCTION**

1. My name is César Zegarra, and I have been the General Director of the Office of the Legal Advisor at the Ministry of Energy and Mines (“MINEM”) since April 2007. I have been an employee of MINEM since 2004. Between August 2004 and April 2007, I was Legal Consultant at the Office of Legal Affairs. Prior to joining MINEM, I held various positions in the Ministry of Justice and in the Ministry of Transportation, Communications, Housing and Construction. I have a law degree from the Pontificia Universidad Católica of Peru, and I have an LL.M. from George Washington University (Washington, D.C., USA).

2. As General Director of the Office of the Legal Advisor, I participated in the process of drafting Supreme Decree No. 032 of 2011 (“Supreme Decree No. 032”). Among my functions as General Director, I have to: i) analyze the applicable law for the sector as well as that of other sectors whose implementation may have implications for the development of the Energy and Mining Sector; ii) develop and propose drafts of legislative bills so that the

applicable laws to the Sector are in accordance with national and international requirements to promote investment and sustainable development; (iii) advise and issue legal opinions to the High Directorate of the Ministry on the legal matters referred to it; iv) formulate and/or approve drafts and bills that the High Directorate of the Ministry issues, as well as analyze and issue an opinion, when appropriate, on those prepared by other bodies of the Ministry, bodies of the Sector and entities of the Public Sector in Peru; v) issue opinions on motions for appeal, complaints and objections filed against final administrative decisions where appropriate; and vi) compile, harmonize and systematize legislation within the jurisdiction of the Ministry and the Sector, among others.

3. In this witness statement I will respond to the allegations submitted by Bear Creek Mining Corporation (“Bear Creek” or the “Claimant”) in its Memorial on the Merits dated May 29, 2015.<sup>1</sup> In particular, Claimant alleges that it had properly obtained the public necessity declaration required by Article 71 of the Constitution of Peru.<sup>2</sup> This is incorrect. Also, Bear Creek alleges that the decision of the Government to repeal the public necessity declaration was arbitrary and without any basis.<sup>3</sup> This is also incorrect.

4. First I will explain the process for approval of an application for public necessity declaration, required by Article 71 of the Constitution so that foreigners may acquire or possess—directly or indirectly—mining concessions within 50 kilometers of the borders. Second, I will provide a brief review of the conflicts that arose in Puno between March and June of 2011. These conflicts created an extremely unstable and insecure situation in the region. Third, I will explain the process of dialogue that took place with the protesters. Finally, I will

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<sup>1</sup> See Claimant’s Memorial on the Merits, May 29, 2015 (“Claimant’s Memorial”).

<sup>2</sup> See Claimant’s Memorial, para. 42.

<sup>3</sup> See Claimant’s Memorial, para. 80.

explain the measures adopted by the government to restore peace in the area. In particular, I will explain the motives for adopting Supreme Decree No. 032, among them the Puno conflict and the concerns that arose with respect to the legality of the acquisition of Bear Creek's public necessity declaration.

## **II. APPROVAL OF THE PUBLIC NECESSITY DECLARATION**

5. In accordance with Article 71 of the 1993 Constitution of Peru, any foreigner that wishes to carry out a mining project within 50 kilometers of Peru's national borders must first obtain a public necessity declaration granted through a Supreme Decree.<sup>4</sup> Specifically, Article 71 provides that aliens may not acquire or possess, under any title, whether directly or indirectly, land, mining concessions, among others, within 50 kilometers of the national borders, unless she obtains a public necessity granted through a Supreme Decree endorsed by the Council of Ministers.<sup>5</sup> The application for a public necessity declaration with respect to mining concessions is submitted to MINEM.

6. Once the interested party submits the application for a public necessity declaration to MINEM, it is reviewed by the Ministry and other government entities. MINEM analyzes what type of benefits the project can bring to the region. The Ministry of Defense ascertains the national security risks that the development of a mining project in a sensitive zone, like the border area, may present. The Foreign Affairs Ministry also reviews whether the project presents a risk to the country's international relations, including with neighboring countries. After these entities review the proposal submitted by the interested party and they issue their opinion on it, the file goes to the Council of Ministers to be evaluated. The public necessity

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<sup>4</sup> See Political Constitution of Peru, December 29, 1993 ("Constitution of Peru"), Article 71 [Exhibit R-001].

<sup>5</sup> See Constitution of Peru, Article 71 [Exhibit R-001].

declaration must be approved by the President of the Republic with a vote of approval by the Council of Ministers.

7. A public necessity declaration is not issued automatically. The issuance of a public declaration is a discretionary analysis of the state with respect to the public interest. The competent entities must issue a favorable opinion on the project; if they do not, the application will be denied.

8. Bear Creek alleges that due to fear of losing the mining concession where it would develop the Santa Ana Project, it had to ask the Peruvian citizen Jenny Karina Villavicencio to initiate the process of application for the concessions while Bear Creek was obtaining the public necessity declaration.<sup>6</sup> However, contrary to what Claimant has stated, Bear Creek never had to resort to a Peruvian citizen to process the mining concessions.

9. There is nothing in Peruvian law that indicates that a foreign company may not initiate a mining concession application if it has not obtained a public necessity declaration. On the contrary, the law prohibits the direct or indirect acquisition of mining concessions without first obtaining a public necessity declaration. Therefore, Bear Creek did not need to use a Peruvian citizen—in this case Mrs. Jenny Karina Villavicencio—in order to initiate mining concession applications. Bear Creek should have initiated the mining concession applications for the Santa Ana Project in its own name. In that case, MINEM would have put the mining concession applications on hold until Bear Creek obtained the necessary public necessity declaration. Bear Creek would not have lost its place in the application queue, as it alleges in its Brief; and it would not have risked losing its priority while the application for the public

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<sup>6</sup> See Claimant's Memorial, para. 21, 25; Witness Statement of Andrew Swarthout, May 28, 2015, para. 16.

necessity declaration was in progress. The use of a Peruvian citizen to evade the constitutional provision was inappropriate.

10. If Bear Creek had applied for the mining concessions directly subject to obtaining the public necessity declaration, the mining concession application would have been suspended and the mining concessions reserved in favor of the company while it obtained said declaration. However, during this suspension period, Bear Creek would not have been able to begin the necessary formalities to obtain licenses for mining exploration on the ground. The inappropriate use of the Peruvian citizen allowed it to begin these formalities. This does not justify in any way the inappropriate arrangement pursuant to which a Peruvian citizen was used to evade the constitutional provision.

11. In 2007, when Bear Creek applied for the public necessity declaration, I understand that there was no social conflict in Puno that could affect the development of the Project in the border zone, which was one reason why the public necessity declaration was approved by way of Supreme Decree No. 083 of 2007.<sup>7</sup> However, it was in 2011 when the area experienced a critical situation, caused in part by Bear Creek's activities on the Santa Ana Project, as I will explain below.

### **III. THE POLITICAL AND SOCIAL CRISIS IN PUNO IN 2011**

#### **A. THE PROTESTS IN PUNO IN 2011**

12. Between March and June 2011 three fronts of social and political conflict had a profound effect on the Department of Puno. The situation in the region was critical. The protests lasted more than a month and a half and resulted in deaths, people injured and immeasurable damage to property. In general, the people were protesting due to the mining

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<sup>7</sup> See Supreme Decree No. 083 of 2007, November 29, 2007, Art. 1 [Exhibit C-004].

activities in the area. Neither my department nor I participated in the events that occurred between March and May of 2011. However, after a review of the aide memoire written about the events and MINEM's press releases, I have general knowledge about them.

13. Two of these fronts originated in the north of the Department and one in the south. First, in the area of the Melgar Province (North), the principal claims were against the mining companies in the area that were contaminating water supplies.<sup>8</sup> Second, in the area of the Ramis River basin (North – Azángaro Province), the inhabitants claimed that illegal mining activities in the area were contaminating the basin and that the government should take the necessary measures to get the situation under control.<sup>9</sup> Finally, in the Chucuito Province of (South), the Aymara residents complained mainly about the activities of Bear Creek in the Santa Ana Project; and they demanded the cessation of all mining and oil drilling activities in the area.<sup>10</sup> It is clear that the experiences with contamination of water supplies on account of mining activities in the north probably influenced the perceptions and concerns about the risks and dangers that the Santa Ana Project could cause. I should note that from the beginning the protests in the southern area of Puno were directly related to the activities of Bear Creek in the Santa Ana Project, contrary to what Claimant alleges.<sup>11</sup>

14. Between May and June 2011, as a result of the protests of the Aymara communities in the south of the Department of Puno, the cities of Puno and Desaguadero (two of the main cities of Puno) experienced a period of deep crisis and paralysis. The protestors staged a strike of more than 30 days. During this time, the protestors set fire to a number of public

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<sup>8</sup> See Aide Memoire “Actions Done by the Executive Power Regarding Conflicts in the Puno Department,” July 2011, (“2011 Aide Memoire”), p.11 [Exhibit R-010].

<sup>9</sup> See 2011 Aide Memoire, p.15 [Exhibit R-010].

<sup>10</sup> See 2011 Aide Memoire, p. 4 [Exhibit R-010].

<sup>11</sup> See Claimant's Memorial, para. para. 65-79; 2011 Aide Memoire, pp.4-5 [Exhibit R-010].

institutions and committed acts of vandalism; and they blocked the Desaguadero bridge, a main transportation route between Peru and Bolivia. These acts caused immeasurable damage to property and blocked cross-border commerce. In addition, several people died or were gravely injured.<sup>12</sup> The situation was extremely worrisome.

15. The central government had to intervene in order to guarantee the safety of the citizens and to find a solution to the conflict. In the following section I describe the discussions that were held with the protesters in order to understand the conflict and bring it to an end.

## **B. DISCUSSIONS WITH THE PROTESTERS**

16. Discussions with the protesters took place from the beginning of May 2011 to mid-June 2011. The participants in these discussions changed as the conflict escalated. I did not participate in the discussions that were held in Puno; but, because of my position, I was aware of the results obtained in each meeting. I did participate in the discussions in Lima.

17. As a result of the meeting between the Vice-minister of Mines and the Regional President of Puno on May 6, 2011, a committee from MINEM was sent to Puno to explain to the population the approval process for the Environmental Impact Study for the Santa Ana Project.<sup>13</sup> I was informed that this meeting failed because of the protests and demands of those present.<sup>14</sup> As a result of this failure, the Prime Minister created a High Level Commission that would travel to Puno and begin discussions with the representatives of the local communities. The Vice-

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<sup>12</sup> See “Aymara Rage is Out of Control in Puno,” *La República Newspaper South Edition*, May 27, 2011 [Exhibit R-073]; “Strike Affects Bolivian Exports,” *La República Newspaper South Edition*, May 26, 2011, [Exhibit R-071]; “Tensions Due to Aymara Protests is Back,” *La República Newspaper South Edition*, May 9, 2011, [Exhibit R-062]; “Community Members Close Border,” *La República Newspaper South Edition*, May 1, 2011, [Exhibit R-063].

<sup>13</sup> See MINEM, “Santa Ana Project May Not Do Any Mining Activities Because It Does Not Have the Environmental Permit,” May 6, 2011 [Exhibit R-019].

<sup>14</sup> See 2011 Aide Memoire, p.5 [Exhibit R-010].



ministers of *ç* of Mines, Interior and Agriculture and a representative of the Presidency of the Council of Ministers constituted this High Level Commission.<sup>15</sup>

18. The High Level Commission held three sessions of meetings with the protesters in Puno, one in the city of Puno and two in the city of Juliaca at the Army's headquarters.<sup>16</sup> During these working sessions, the government listened to the concerns of the residents and suggested possible solutions to the demands of the protesters. For example, regulations were issued to protect the Khapia Hill (a sacred place for the Aymaras), and a multi-sector committee was created to study the petition to terminate all mining projects in the area, among them the Santa Ana Project.<sup>17</sup> However, the final session failed due to an imminent risk to the physical integrity of the members of the High Level Commission.

19. Given that the conflict was rapidly escalating, and especially the violent acts, the Prime Minister called for a meeting in Lima with the representatives of the local and regional governments to reach an agreement and bring the strike to an end. This meeting took place on May 28, 2011. The Prime Minister and the Vice-minister of Mines participated in this meeting as representatives of the central government.<sup>18</sup> In view of these events, the environmental authority decided to suspend the approval process for the Environmental Impact Study as a provisional measure.<sup>19</sup> Considering the grave situation in the Department of Puno, particularly in the southern region, at that time the social conditions required for potential approval of the Environmental Impact Study no longer existed. Furthermore, it was deemed necessary to put the

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<sup>15</sup> See MINEM, "High Level Commission from the Executive Power Travels to Puno to Initiate Dialogue," May 15, 2011 [Exhibit R-021].

<sup>16</sup> See 2011 Aide Memoire, pp.5-6 [Exhibit R-010].

<sup>17</sup> See 2011 Aide Memoire, pp.5-6 [Exhibit R-010].

<sup>18</sup> See 2011 Aide Memoire, p. 6 [Exhibit R-010].

<sup>19</sup> See Resolution Suspending Environmental Impact Study of Santa Ana Project, Directorial Resolution No. 162-2011.MEM-AAM, May 30, 2011[Exhibit C-098].

Study on hold in order to restore calm in the region and to consider the conflict in a reasonable way. As stated in the Legal Report in support of the suspension of the Environmental Impact Study:

Currently there is social unrest, violence and instability in the districts of Huacullani and Kelluyo, province of Chucuito, Puno department, which are areas of impact and influence of the Santa Ana project, consisting of an undefined strike as well as the threat of acts of violence to public and private property in opposition to the processing of the environmental impact study of the Santa Ana mining project. This is due to the fact that a large part of the population of the southern zone of Puno Department are uninformed about the scope of the mining project and are threatening the future efficacy of the administrative procedure to evaluate the environmental impact study of the aforesaid project.<sup>20</sup>

For this reason it was necessary to suspend the process of potential approval of the Environmental Impact Study.

20. In addition, Supreme Decree No. 026 of 2011 was issued as a result of this meeting.<sup>21</sup> By means of this decree, the admission of new mining concession applications was suspended in the Province of Chucuito, among others.<sup>22</sup> In other words, from this date forward MINEM would not receive new applications to acquire mining concessions in the region. This is a measure that does not affect the Santa Ana Project which is located in that Province, but it demonstrates the impact that the anti-mining protests, in part related to the Santa Ana Project, had in the region.

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<sup>20</sup> Resolution Suspending Environmental Impact Study of Santa Ana Project, Directorial Resolution No. 162-2011.MEM-AAM, May 30, 2011, p.3 (3.5) [Exhibit C-098].

<sup>21</sup> See Decree Suspending Admissions of New Mining Requests in the Department of Puno, Supreme Decree No. 026-2011-EM, May 29, 2011 [Exhibit R-025].

<sup>22</sup> See Decree Suspending Admissions of New Mining Requests in the Department of Puno, Supreme Decree No. 026-2011-EM, May 29, 2011 [Exhibit R-025].

21. As a result of the agreements that resulted from this meeting of May 28, 2011, the strike was suspended until June 8, 2011.<sup>23</sup> This suspension allowed the second round of presidential elections to take place peacefully, guaranteeing the electoral process. Despite the efforts of the State to put an end to the conflict, the strikes started again with greater intensity on June 8, 2011. By June 19 the protests in the North had joined.<sup>24</sup> In this new wave of protests several people were wounded and a group of protesters took over the airport of Juliaca, the main airport of the Department of Puno.<sup>25</sup> The situation was critical.

22. On June 16, 2011, the Prime Minister convened three round table discussions in Lima to find a solution to the three fronts of protest.<sup>26</sup> As a result of these three meetings, the government issued several decrees addressing the demands and concerns of the protesters. The situation in Puno was critical, and the State had the obligation to act in the best possible way to find a solution to the conflict. Below I explain the measures adopted by the government.

#### **IV. MEASURES ADOPTED BY THE STATE TO RESOLVE THE SITUATION IN PUNO**

23. The government adopted several measures to close the round table discussions with the protesters of the three fronts of conflict in Lima. Decree No. 032 was not the only measure adopted. In these round table discussions, the government reached agreements with the

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<sup>23</sup> See 2011 Aide Memoire, p. 7 [Exhibit R-010].

<sup>24</sup> See 2011 Aide Memoire, p. 15 [Exhibit R-010].

<sup>25</sup> See 2011 Aide Memoire, pp. 11-12, 15-16 [Exhibit R-010]; see also "Protesters Threat To Reinitiate Protests," *La República Newspaper South Edition*, June 8, 2011 [Exhibit R-078]; "Tension Due to Aymara Protests is Back," *La República Newspaper South Edition*, June 9, 2011 [Exhibit R-062]; "Melgar Also Rejects Mining," *La República Newspaper South Edition*, June 15, 2011 [Exhibit R-079]; "The Strike Has Become Violent," *La República Newspaper South Edition*, June 24, 2011 [Exhibit R-084]; "Antimining Protesters Block the Highland Region," *La República Newspaper South Edition*, June 22, 2011 [Exhibit R-083]; "Strike Results With 6 People Dead," *La República Newspaper South Edition*, June 25, 2011 [Exhibit R-085].

<sup>26</sup> See 2011 Aide Memoire, pp. 7, 13, 17 [Exhibit R-010].

protestors and achieved peace in the region. The primary concern of the government in taking these measures was to restore security in the area, since the protests had spiraled out of control.

24. The government issued four supreme decrees to put an end to more than a month of protests: Supreme Decrees 032, 033, 034 and 035 of 2011.

25. Supreme Decree No. 032 withdrew the declaration of public interest for Bear Creek's Santa Ana Project and prohibited all types of mining activities in the districts of Huacullani and Keyullo—the two districts in which the Santa Ana Project is located.<sup>27</sup> Supreme Decree No. 032 was issued principally for two reasons. First, the public interest of the Santa Ana Project ceased to exist at the time when the continuance of the Project in the area caused a critical situation in the region. It is a paramount duty of the State to protect the safety of citizens. Therefore, the State had to take the measures necessary to restore order in the region and to overcome this conflict.

26. Second, in the process of dialogue with the representatives of the Aymara indigenous communities documents came to light that indicated that Bear Creek had operated in the area prior to obtaining the public necessity declaration through a Peruvian citizen (Jenny Karina Villavicencio). In other words, the documents indicated that Bear Creek had violated Article 71 of the Constitution, since it had acquired indirectly mining concessions in the border region of the country.<sup>28</sup> If Bear Creek acted through a Peruvian citizen in order to acquire the mining concessions for the Santa Ana Project that are located in the border region, the State had to withdraw the public necessity declaration it had granted. At that time we had no reason to

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<sup>27</sup> See Decree Annuling Supreme Decree No. 083 of 2007, Supreme Decree No. 032-2011-EM, June 25, 2011, Art. 1 and Supplemental Provisions [Exhibit C-005].

<sup>28</sup> See Constitution of Peru, Art. 71 [Exhibit R-001].

doubt the veracity of the documents, and we had to withdraw the public necessity declaration until the issue was clarified.

27. Concerning knowledge with respect to the activities in the area through Mrs. Villavicencio, Bear Creek alleges that the MINEM knew that Bear Creek had signed some option contracts with Mrs. Villavicencio.<sup>29</sup> According to Bear Creek, when it applied to obtain the public necessity declaration, it presented a copy of these contracts to MINEM.<sup>30</sup> I understand that in that declaration Bear Creek also submitted a document in which it was stated that Mrs. Villavicencio had powers of attorney to represent Bear Creek in certain situations.<sup>31</sup> At that time I was not aware of these documents. In any case, at that time we did not have detailed knowledge of the relationship between Mrs. Villavicencio and Bear Creek, let alone the plan between the company and the Peruvian citizen used to evade the provisions of Article 71 of the Constitution. We only became aware of this plan in June 2011, as I described previously.

28. Supreme Decree No. 033 of 2011 was issued as a result of the round table discussions with the protesters of the Melgar Province, but it affects the entire Department of Puno.<sup>32</sup> As a result of this Decree, the admission of new mining concession applications was suspended throughout Puno; and a previous consultation with the communities in the area was established as a basic requirement prior to commencement of any mining or oil drilling operations. The Previous Consultation requirement is governed by the International Labor

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<sup>29</sup> See Claimant's Memorial, para. 39

<sup>30</sup> See Claimant's Memorial, para. 39

<sup>31</sup> See Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, December 4, 2006, Exhibit VI, p. 80 [Exhibit C-017].

<sup>32</sup> See Supreme Decree on the Adjustments of Mining Petitions and Suspension of Admissions of Mining Petitions, Supreme Decree No. 033-2011-EM June 25, 2011 [Exhibit R-011; *see also* 2011 Aide Memoire, p. 12 [Exhibit R-010].

Organization Convention No. 169.<sup>33</sup> According to this Convention, the communities have the right to decide what activities may or may not be carried out in their territories. Therefore, even though it is a matter of consultation, the Previous Consultation requirement in practice turns into a requirement to get the consent of the communities to continue with the Project. Without this consent, the project is destined to fail.

29. Supreme Decree No. 034 of 2011 also resulted the round table discussion with the protesters of the southern region of Puno. In this Decree, the previous consultation requirements in Supreme Decree No. 033 of 2011 were supplemented. According to this Decree, existing projects in the Department of Puno had to go through the process of Prior Consultation.<sup>34</sup>

30. Supreme Decree No. 035 of 2011 resulted from the round table discussion with the inhabitants of the Ramis River basin region.<sup>35</sup> This Decree issued rules supplementing Emergency Decree No. 028, issued on June 17, 2011.<sup>36</sup> Emergency Decree No. 028 had declared the recovery of Ramis River basin a matter of public necessity and general interest. To this end, Supreme Decree No. 035 regulated the financing and implementation of projects that would be carried out for the environmental recovery of the basin.<sup>37</sup>

The priority of the government in adopting these measures was to maintain security and peace in the region. Without these measures, the situation could have been more unfortunate.

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<sup>33</sup> See International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No. 169, September 5, 1991, Art. 15 [Exhibit R-029].

<sup>34</sup> See Decree that Issues Provisions With Respect to Mining and oil Activities in the Puno Department, Supreme Decree No. 034-2011-EM, June 25, 2011, Arts. 1-2 [Exhibit R-027].

<sup>35</sup> See Decree that Complements Emergency Decree No. 028 of 2011, Supreme Decree No. 035-2011-EM, June 26, 2011 [Exhibit R-014]; see also 2011 Aide Memoire, p. 17 [Exhibit R-010].

<sup>36</sup> See Decree that Declares the Recovery of the Ramis River a National Interest and an Environmental Priority, Emergency Decree No. 028-2011, June 17, 2011, Art. 1 [Exhibit R-013]; Decree that Complements Emergency Decree No. 028 of 2011, Supreme Decree No. 035-2011-EM, June 26, 2011 [Exhibit R-014].

<sup>37</sup> See Decree that Complements Emergency Decree No. 028 of 2011, Supreme Decree No. 035-2011-EM, June 26, 2011 [Exhibit R-014].

The information contained in this declaration is true to the best of my knowledge and understanding.

[signature]

César Zegarra

Date: October 6, 2015