

RWS-001

Witness Statement of Fernando Gala

October 6, 2015

English Translation

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

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

**vs.**

***Republic of Peru***  
**(Respondent)**

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

**Witness statement of Luis Fernando Gala Soldevilla**  
**Vice-Minister of Mines and Energy of Peru (June 2009-July 2011)**

**October 6, 2015**

**I. INTRODUCTION**

1. My name is Luis Fernando Gala Soldevilla and I am currently the President of the Mining Council under the Peruvian Ministry of Energy and Mines ("MINEM"). I am a Mining Engineer from the Pontifical Catholic University of Peru with an MBA from the Graduate School of Business (*Escuela Superior de Negocios para Graduados* - "ESAN") in Lima, Peru. I also completed a graduate program in Finance from the ESAN.

2. I have been with the MINEM for 14 years. I was Vice-minister of Mines from June 2009 to July 2011. In addition, I was involved in the Mining Council from 2004 to 2009 and from 2011 to the present, serving as its President from 2007 to 2008 and from 2014 to date. Moreover, I was General Director of Mining at the MINEM in 1992 and also from 1999 to 2000.<sup>1</sup> I have a total of more than 30 years experience in mining-related areas, having also worked at the Financial Development Corporation (*Corporación Financiera de Desarrollo*) COFIDE (1987-2004) and at the Mining Bank of Peru (*Banco Minero del Peru*) (1982-1987), mainly evaluating mining projects.

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<sup>1</sup> My curriculum vita is attached to this statement in Annex 1.

3. I had first-hand knowledge of the events related to the anti-mining protests that took place in Puno in 2011, because, as Vice-minister of Mines, I took part in the discussions with the protests leaders. I was part of the High Level Commission created by the Presidency of the Council of Ministers that traveled to Puno to hold discussions with the protesters and find solutions to the conflict. In addition, I participated in the discussions held in Lima with the protests leaders that ultimately led to the end of the protests and the violent activities.

4. In this witness statement, I will respond to certain allegations raised by Bear Creek Mining Corporation ("Bear Creek" or the "Claimant") in its Memorial on the Merits filed on May 29, 2015.<sup>2</sup> First, I will explain the social and political crisis that developed in Puno in the first half of 2011. Second, I will explain the actions taken by the government to start discussions with the protesters in order to understand the origins of the conflict and the concerns of the people. Lastly, I will explain the measures adopted by the government that resulted from the discussions with the Puno protestors.

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

### **A. THE THREE PROTEST FRONTS IN THE PUNO REGION**

5. In its Memorial, Claimant contends that the protests in Puno were unrelated to its activities in the Santa Ana Project and were simply protests of a political nature.<sup>3</sup> However, the Claimant's account of the events and its characterization of the conflict in Puno in the first half of 2011 are inaccurate.<sup>4</sup> First, the Puno protests, specifically those in the south, were directly related to the Santa Ana project from the start. Second, the anti-mining protests in the region were caused by widespread social discontent.

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<sup>2</sup> See Claimant's Memorial on the Merits, May 29, 2015 ("Claimant's Memorial").

<sup>3</sup> See Claimant's Memorial, paras. 65-79.

<sup>4</sup> See Claimant's Memorial, paras. 65-79.

6. The first half of 2011 was a critical time for the Puno Department, which was experiencing a deep social and political crisis. The situation resulted in various violent actions and in the loss of human lives. The authorities in Puno had their hands tied and the central government had to take the reins to manage the situation.

7. The Puno Department crisis had three different fronts. In the north, in Melgar Province, Quechua communities started protesting in the Orurillo District on May 30, 2011 for the alleged pollution of their water resources as a result of mining activities in the area.<sup>5</sup> Also in the north, in the area of the Ramis River basin, Azángaro Province, local Quechua communities began protesting pollution of the Ramis River on June 19, 2011.<sup>6</sup> In the south, in the Chucuito and Puno Provinces, Aymara communities started protesting on April 22, 2011, demanding that actions be taken against mining the area, including Bear Creek's Santa Ana Project.<sup>7</sup> I will explain each of the fronts of the Puno crisis in greater detail below.

### **1. Northern Zone 1 (Melgar Province)**

8. The conflict in the Melgar Province started when people from the Orurillo District (in northern Puno) invaded the Poderosa mine owned by the Resurrección mining company on May 30, 2011.<sup>8</sup> The protesters claimed that the mining company was polluting the water resources in the area and demanded that it stop its operations.<sup>9</sup> In response to the protests, MINEM officials suspended the mining company's activities because it did not have the required permits, and in order to organize a discussions table with the protesters and guarantee the safety

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<sup>5</sup> See Aide Memoire "Actions Done by the Executive Power Regarding Conflicts in the Puno Departmentt," July 2011 ("2011 Aide Memoire"), p. 11 [Exhibit R-010].

<sup>6</sup> See 2011 Aide Memoire, p. 15 [Exhibit R-010].

<sup>7</sup> See 2011 Aide Memoire, p. 4 [Exhibit R-010].

<sup>8</sup> See 2011 Aide Memoire, p. 11 [Exhibit R-010].

<sup>9</sup> See 2011 Aide Memoire, p. 11 [Exhibit R-010].

of the area.<sup>10</sup> Despite the efforts made by MINEM officials, on June 14, 2011, the people of the Melgar Province called an indefinite strike. Their main requests were: (i) the shutdown and cancellation of all mining concessions in the Melgar Province; (ii) the immediate withdrawal of the mining companies that were operating in the area; and (iii) the repeal of Supreme Decree No. 069 of 2007 related to the signing of a contract for oil concessions.<sup>11</sup>

9. At that time, the Puno regional government was already facing a deep crisis due to the anti-mining strikes that had started in southern Puno, which were related to Bear Creek's activities. For this reason, and under the understanding that the strike could rapidly escalate, in my capacity as Vice-minister, I invited the Provincial Mayor of Melgar and representatives of civil society to Lima to find a joint solution to the protesters' petitions. Discussions initiated on June 21, 2011, presided by the Minister of Agriculture.<sup>12</sup> I did not participate in those discussions because I was meeting with the protesters from southern Puno, which I will describe later.

10. As a result of those discussions with the representatives from the Melgar Province, the government adopted two measures.<sup>13</sup> First, taking into account the great number of anti-mining strikes that were occurring in Puno, which included the one against the Santa Ana Project, the government issued Supreme Decree No. 033 of 2011.<sup>14</sup> This Decree: (i) established mandatory previous consultations with the indigenous peoples located in the areas of influence in

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<sup>10</sup> See 2011 Aide Memoire, pp. 11-12 [Exhibit R-010].

<sup>11</sup> See 2011 Aide Memoire, p. 11 [Exhibit R-010].

<sup>12</sup> See 2011 Aide Memoire, p. 12 [Exhibit R-010].

<sup>13</sup> See 2011 Aide Memoire, pp. 12-13 [Exhibit R-010].

<sup>14</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 "Supreme Decree No. 033 of 2011" [Exhibit R-011].

which mining concessions had been granted as a pre-condition for the start of mining activities;<sup>15</sup> (ii) suspended the admission of new applications for mining concessions in the Puno department for a period of three years;<sup>16</sup> and (iii) provided that, before starting any activity, the holders of mining concessions had to have an express agreement for the use of the surface land with the landowner.<sup>17</sup> Second, the government adopted Resolution No. 162-2011-PM creating a multi-sectoral committee to study and propose actions with respect to the mining concessions granted in Melgar Province in Puno, and determine the effects they were having on the environment.<sup>18</sup> The strike was lifted on June 23, 2011.

## **2. Northern Zone 2 (Ramis River basin/Azángaro Province)**

11. The conflict in the Ramis River basin area started in 2007.<sup>19</sup> This conflict had its origin in illegal gold mining in the Ananea District.<sup>20</sup> The illegal mining was being done with heavy machinery which generated pollution by suspended solids in the middle Ramis River basin.<sup>21</sup> This pollution caused damage in the agricultural sector and health damage in the Crucero, San Antón, Asillo and Azángaro districts, all in the Azángaro Province in the north of the Puno Department.<sup>22</sup>

12. In response to the grievances that were presented, a multisectoral committee was created in 2007 consisting of various Executive Branch institutions and the Puno regional

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<sup>15</sup> See Supreme Decree No. 033 of 2011, Arts. 1-2 [Exhibit R-011].

<sup>16</sup> See Supreme Decree No. 033 of 2011, Art. 3 [Exhibit R-011].

<sup>17</sup> See Supreme Decree No. 033 of 2011, Art. 4 [Exhibit R-011].

<sup>18</sup> See Resolution that Creates Multi-Sectorial Committee for the Melgar Province, Resolution No. 162-2011-PCM, June 24, 2011, Art. 1 [Exhibit R-012].

<sup>19</sup> See 2011 Aide Memoire, p. 15 [Exhibit R-010].

<sup>20</sup> See 2011 Aide Memoire, p. 15 [Exhibit R-010].

<sup>21</sup> See 2011 Aide Memoire, p. 15 [Exhibit R-010].

<sup>22</sup> See 2011 Aide Memoire, p. 15 [Exhibit R-010].

government.<sup>23</sup> The committee made some progress, but between 2009 and 2011, illegal mining increased.<sup>24</sup> On June 15, 2011, the Minister of Energy and Mines agreed to issue an ordinance to eradicate the heavy machinery used by illegal mining in order to reduce this activity. To fulfill that commitment, Emergency Decree No. 028-2011 was published declaring environmental recovery of the Ramis River basin to be of national interest.<sup>25</sup>

13. Despite the government's efforts, on June 19, an indefinite strike was called in the Azángaro Province, northern Peru, to demand more specific actions on illegal mining.<sup>26</sup> This strike started around the same time the anti-mining protests initiated in Melgar Province (northern Puno) and in the Chucuito and Puno Provinces (southern Puno), the area related to Bear Creeks' Santa Ana Project. Therefore, its effects could have been dramatic to maintain security and governability in the Puno Department.

14. On June 23, a w meeting was held in Lima with the area's mayors and representatives of civil society. This meeting had to be extended until June 24 because of the discussions with the representatives of civil society and due to the violent events that were occurring in Juliaca (the most populous city in the Puno Department).<sup>27</sup> While these meetings were taking place in Lima, the people in the northern area were protesting in Juliaca, committing violent acts of vandalism. For example, the people of Azángaro took over the Juliaca airport (Puno's main

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<sup>23</sup> See 2011 Aide Memoire, p. 15 [Exhibit R-010].

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

<sup>25</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].

<sup>26</sup> See 2011 Aide Memoire, p. 15 [Exhibit R-010].

<sup>27</sup> See 2011 Aide Memoire, pp. 15-16 [Exhibit R-010].

airport) and, unfortunately, five people were killed.<sup>28</sup> The strike was finally lifted on June 26, after the discussions in Lima concluded.<sup>29</sup>

15. The government issued Supreme Decree No. 035-2011-EM on June 26, 2011 in an attempt to find solutions to the Ramis River basin conflict.<sup>30</sup> This Decree was issued to supplement the measures adopted by Emergency Decree No. 028 of June 17, 2011 that declared recovery of the Ramis River to be of national interest.<sup>31</sup> Supreme Decree No. 035 established programs to finance the remediation of the Ramis River basin and adopted measures for financing these programs.<sup>32</sup>

### **3. Southern Area (Bear Creek)**

16. The third front of the conflict in Puno was in the Chucuito, El Collao, Yunguyo and Puno Provinces in the south of the Puno Department. These conflict zones were related to Bear Creek's Santa Ana Project.

17. The protests in southern Puno started in March 2011 and ended on June 25, 2011. The protesters initially demanded that the Puno regional government sign several ordinances to end all mining activity in the area, including the Santa Ana Project. I will next provide an account of these protests. I had first-hand knowledge of the events starting on April 22, 2011. Before that date the situation was being handled by the appropriate MINEM offices. Nevertheless, when I got involved, I learned of the events that had been occurring.

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<sup>28</sup> See 2011 Aide Memoire, p. 16 [Exhibit R-010].

<sup>29</sup> See 2011 Aide Memoire, p. 16 [Exhibit R-010].

<sup>30</sup> See Decree that Complements Emergency Decree No. 028 of 2011, Supreme Decree No. 035-2011-EM, June 26, 2011 [Exhibit R-014].

<sup>31</sup> See 2011 Aide Memoire, p. 17 [Exhibit R-010].

<sup>32</sup> See 2011 Aide Memoire, p. 16 [Exhibit R-010].



**B. THE PROTESTS IN THE SOUTHERN ZONE WERE DIRECTLY RELATED TO THE SANTA ANA PROJECT**

18. Bear Creek alleges that the protests which took place in Puno in 2011 were not directly related to their Santa Ana Project mining activities.<sup>33</sup> That is untrue. I will next give an account of all the events, to the best of my knowledge and belief. Based on this account, there can be no doubt that these protests in the southern zone were related to the company's activities in the south of the Puno region.

19. On February 23, 2011, Bear Creek held the required public hearing in the Environmental Impact Study review process. Despite the fact that I was not present at this hearing, I was informed that it was generally peaceful. However, I was also informed that at the end of the hearing, one sector of the population voiced its disagreement with the Project. In my experience, these hearings are not always an absolute indication of the communities' approval of a project. A peaceful hearing does not mean that the population involved is in agreement with the project. Moreover, a project's environmental feasibility does not necessarily imply its social feasibility.

20. On March 2, 2011, various Aymara representatives met to issue a number of petitions, which they submitted to the Peruvian Congress, the President of the Republic and the Ministry of Energy and Mines on March 10, 2011. In those petitions, the Aymara representatives, particularly from the Kelluyo district communities (adjoining the Santa Ana project), expressly requested that the Santa Ana Project be cancelled, that Bear Creek leave the area, and that all mining and oil activities in the area stop.<sup>34</sup>

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<sup>33</sup> See Claimant's Memorial, paras. 65-79.

<sup>34</sup> See Memorial submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to Congress, Memorial No. 0005-2011-CO-FDRN-RSP, March 10, 2011, p. 1 [Exhibit R-015]; Memorials submitted by the Frente de Defensa and Kelluyo's *Comunidades Campesinas* to the President of Peru, Memorial No. 0001-2011-CO-FDRN-RSP, March 9, 2011, p. 1 [Exhibit R-016]; Memorials submitted by the Frente de Defensa and Kelluyo's

21. On March 20, 2011, the Puno Regional Council approved an ordinance banning all mining concessions in the Puno Department. This ordinance never went into effect and, in any event, would have had no legal value. The Regional Government does not have that authority according to law, because in the cases of medium- and large-scale mining, it falls to the Central Government.

22. On March 30, 2011, two thousand people took over the streets in the city of Puno and marched to the Main Square to demand that the Regional President sign the ordinance approved by the Puno Regional Council on the area's mining concessions.

23. On April 25 and 26, 2011, the social conflict intensified, and as a result of the regional protests, several people were injured and one person died.<sup>35</sup> On April 26, the population blocked the entrance to the city of Desaguadero, one of the biggest cities in the Puno Department and the main border city with Bolivia. Desaguadero is in the same province as the Santa Ana Project and is relatively close to the Project.

24. On April 26, the Puno Regional President asked the MINEM for its collaboration to “contribute to governability, tranquility and social peace.”<sup>36</sup> In response, the Puno Regional President was called to a meeting at the MINEM headquarters in Lima on May 6. I took part in this meeting. At the meeting, the Puno Regional President outlined the protesters' requests, which included the suspension of the Santa Ana Project mining activities. The Regional President also explained that there was a great deal of misinformation in the region about the review and approval processes for mining project's Environmental Impact Studies, in particular with respect to the one for

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*Comunidades Campesinas* to Minister of Energy and mines, Memorial No. 0002-2011-CO-FDRN-RSP, March 10, 2011, p. 1 [Exhibit R-017].

<sup>35</sup> See “Antiminning Strike Results in Violence,” *La República Daily Newspaper, South Edition*, April 27, 2011 [Exhibit R-060].

<sup>36</sup> Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR, April 26, 2011, p. 2 [Exhibit R-018].

the Santa Ana Project. For this reason, the members of the local communities were protesting against them.<sup>37</sup> This was probably due to the fact that Bear Creek did not take sufficient measures and actions to familiarize the entire population within its area of influence and beyond with the Project, so that they could learn about it and the effects it might have on them. At the meeting, we explained to the Regional President that the Santa Ana Project could not commence mining activities because it had not yet obtained the approval of the Environmental Impact Study, which was still being processed and under study. At the Regional President's request, on May 9, a commission of MINEM's officials was sent to Puno to explain the status of the Santa Ana Project. However, this meeting had to be suspended due to the population's protests.<sup>38</sup>

25. Despite the MINEM officials' efforts to attempt to prevent the start of a strike, on May 9, 2011, an indefinite strike was called in the city of Desaguadero, which lasted until May 31. The protesters once again demanded the cancellation of the Santa Ana Project, as well as all mining concessions in southern Puno. During this strike, the people of southern Puno committed several violent acts of vandalism that seriously affected the safety of the people in the Puno Department and national and international trade. For example, they blocked, burned and looted several public institutions in the city of Puno, capital of the Puno Department.<sup>39</sup> A large part of Puno was completely paralyzed.

26. In view of this critical situation, on May 15, 2011, Prime Minister Rosario Fernández created a High Level Commission to travel to Puno and meet with the Aymara leaders

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<sup>37</sup> 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>38</sup> See 2011 Aide Memoire, pp. 4-5 [Exhibit R-010]; see also MINEM, "Dialogue Is Initiated to Discuss Mining Activities in the Puno Region," May 9, 2011 [Exhibit R-020].

<sup>39</sup> See "Aymara Rage is Out of Control in Puno," *La República Daily Newspaper South Edition*, May 27, 2011 [Exhibit R-073]; "Strike Affects Bolivian Exports," *La República Daily Newspaper South Edition*, May 26, 2011 [Exhibit R-071]; "Tension Due to Aymara Protests in Back," *La República Daily Newspaper South Edition*, May 9, 2011 [Exhibit R-062]; "Community Members Close Borders," *La República Daily Newspaper South Edition*, May 11, 2011 [Exhibit R-063].

to find a solution to the conflict. This Commission was comprised of the Vice-Minister of Agriculture Luis Sánchez, Vice-Minister of the Interior Jorge Luis Caloggero, the director of the Conflicts Office of the Presidency of the Council of Ministers Ronald Ibarra and me, as Vice-Minister of Mines, to undertake discussions with the population and put an end to the strikes.<sup>40</sup>

27. The High Level Commission held three sessions with the Aymara leaders. The first one took place on May 16 and 17.<sup>41</sup> Even though the Aymara protestors initially demanded that the meetings be held in the city of Desaguadero, this session was held in the city of Puno due to security reasons for the High Level Commission members. At this meeting, the Aymara leaders initially raised nine demands, which we managed reduce to four main ones. These four were:

- (i) The cancellation of all mining and oil concessions in southern Puno;
- (ii) The shutdown and cancellation of the Santa Ana Project;
- (iii) The repeal of Supreme Decree No. 083-2007, which had granted Bear Creek the declaration of public necessity for carrying out the Santa Ana Project; and
- (iv) The protection of Cerro Khapia peak, which is considered a sacred place by the Aymaras.<sup>42</sup> Cerro Khapia is partially located in the same Santa Ana Province as the Santa Ana Project, to the Project's northeast.

28. The second session was held on May 19 and 20, 2011.<sup>43</sup> Given that the city of Puno could not guarantee the High Level Committee members' safety because there were around six thousand people protesting at the Main Square, the second session was held at the Army's

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<sup>40</sup> See MINEM, "High Level Commission from the Executive Power Travels to Puno to Initiate Dialogue," May 15, 2011 [Exhibit R-021].

<sup>41</sup> See 2011 Aide Memoire, p. 5 [Exhibit R-010].

<sup>42</sup> See 2011 Aide Memoire, p. 5 [Exhibit R-010].

<sup>43</sup> See 2011 Aide Memoire, p. 5 [Exhibit R-010].

headquarters in the city of Juliaca.<sup>44</sup> During this session, the Commission put forth two points for putting an end to the conflict. First, it was explained that on May 13, the Khapia Hill was declared part of the Nation's cultural heritage through Vice Ministerial Resolution No. 589-2011-VM-PC-IC-MC, which limited activities on the hill.<sup>45</sup> Second, a proposal was presented to create a multi-sectoral commission that would study various actions to be taken with respect to the mining concessions in southern Puno. The latter proposal was not accepted by the Aymara leaders, because they wanted the cancellation of all mining concessions and they therefore left the meeting. In any event, Supreme Resolution No. 131-2011 PCM was issued on May 21, 2011 creating a multisectoral commission to study possible actions to be taken in various provinces in the south of the Puno Department, including the Chucuito Province where the Santa Ana Project was located.<sup>46</sup>

29. The third session was held on May 25 and 26, 2011.<sup>47</sup> Once again, for safety reasons, the session had to be held at an Army's headquarters, this time at the Army's EP Francisco Bolognesi headquarters in the city of Juliaca.<sup>48</sup> At this meeting, we agreed to create two technical commissions: one to guarantee the protection of the Khapia Hill and another to analyze the demands related to the cancellation of the mining concessions and the Santa Ana Project. In particular, at that meeting, I proposed, in coordination with the Administration, that the government issue a Supreme Decree suspending the processing of new applications for mining concessions in southern Puno and ordering a precautionary measure that would suspend

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<sup>44</sup> See MINEM, "For Lack of Security Dialogue Between High Level Commission and Leaders Failed," May 19, 2011 [Exhibit R-022].

<sup>45</sup> See Resolution Declaring Cultural Heritage, Vice-ministerial Resolution No. 589-2011-VM-PC-IC-MC, May 13, 2011 [Exhibit R-023].

<sup>46</sup> See Resolution Creating Multi-sectoral Committee, Supreme Resolution No. 131-2011-PCM, May 21, 2011 [Exhibit R-024].

<sup>47</sup> See 2011 Aide Memoire, p. 6 [Exhibit R-010].

<sup>48</sup> See 2011 Aide Memoire, p. 6 [Exhibit R-010].

the review of the Environmental Impact Study for the Santa Ana Project. The Aymara leaders did not accept any of the proposals and we the members of the High Level Committee had to leave because of an imminent threat to our physical safety.<sup>49</sup>

30. After the abrupt termination of the meetings in the city of Juliaca, Puno Department, the Prime Minister, the Minister of Energy and Mines and the Minister of the Interior called for a meeting with the mayors from the southern Puno area and the Regional President of Puno.<sup>50</sup> The meeting was held in Lima on May 28, 2011. I was also present at that meeting. At this meeting, the Administration proposed three measures, which were accepted by the Puno authorities in attendance. First, Supreme Decree No. 26-2011-EM was issued, suspending the admission of applications for mining concessions in the southern Puno area for a period of twelve months.<sup>51</sup> I should clarify that this suspension then had to be extended for another 24 months by Supreme Decree No. 033 in 2011 due to the fragility of the conflicts in southern Puno, and 3 more months (for a total of 27 months) by Supreme Decree No. 021-2014-EM.<sup>52</sup> Second, Supreme Resolution No. 142-2011-PCM was issued expanding the scope of Supreme Resolution No. 131 of May 21, 2011, which had created the Multisectoral Committee to study the actions to be taken with respect to the mining concessions in southern Puno. The Multisectoral Committee's actions would now include the El Callao and Puno Provinces.<sup>53</sup> Third, Directorial Resolution No. 162-2011-MEM-AAM was issued establishing the precautionary

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<sup>49</sup> See 2011 Aide Memoire, p. 6 [Exhibit R-010].

<sup>50</sup> See 2011 Aide Memoire, p. 6 [Exhibit R-010].

<sup>51</sup> See Decree Suspending Admissions of New Mining Requests in the Provinces of Chucuito, El Collao, Puno and Yunguyo in the Puno Department, the Admission of Applications for Mining Concessions in the territory of the Chucuito, El Collao, Puno and Yunguyo in the Puno Department, Supreme Decree No. 026-2011-EM dated May 29, 2011 [Exhibit R-025].

<sup>52</sup> See Supreme Decree No. 033 of 2011, Art. 3 [Exhibit R-011]; Decree that Extends the Suspension of Admissions of Mining Petitions, Supreme Decree No. 021-2014-EM, June 27, 2014, Art. 1 [Exhibit R-140].

<sup>53</sup> See Resolution that Extends the Scope of the Multi-Sectorial Committee, Resolution No. 142-2011-PCM, May 29, 2011, Art. 1 (Exhibit R-026).

measure of suspending evaluation of the Environmental Impact Study for the Santa Ana Project.<sup>54</sup>

31. The suspension of the Environmental Impact Study was not arbitrary and was necessary considering the critical social situation that Puno was experiencing. The measure was adopted because the social conditions required for an eventual approval of the Environmental Impact Study did not exist.<sup>55</sup> According to the Legal Report that served as a basis for the precautionary measure, considering the “social unrest, violence and instability instability in . . . [the] areas of impact and influence of the Santa Ana project . . . due to the fact that a large part of the population of the southern zone of Puno Department are uninformed about . . . the mining project,” the suspension of the Environmental Impact Study was necessary for the “future efficacy” of any resolution approving the Environmental Impact Study (if Bear Creek met the requirements).<sup>56</sup> In other words, due to the direct link between the protesters' violent actions and the processing of the Santa Ana Project's Environmental Impact Study, the suspension of those proceedings was necessary to guarantee the people's safety and protect the company's interests in the event that the Environmental Impact Study were to be approved—provided the company met with all the requirements.

32. Following this meeting between the Prime Minister and the representatives from Puno and after these resolutions were issued, the protesters temporarily suspended the protests from May 31 to June 8. This made it possible to hold the second round of presidential elections. For the government, it was very important to achieve this suspension of the protests in order to be

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<sup>54</sup> See Resolution Suspending the Environmental Impact Study for the Santa Ana Project, Directorial Resolution No. 162-2011-MEM-AAM, May 30, 2011 [Exhibit C-098].

<sup>55</sup> See Resolution Suspending the Environmental Impact Study for the Santa Ana Project, Directorial Resolution No. 162-2011-MEM-AAM, May 30, 2011, p. 3 (3.5) [Exhibit C-098].

<sup>56</sup> Resolution Suspending the Environmental Impact Study for the Santa Ana Project, Directorial Resolution No. 162-2011-MEM-AAM, May 30, 2011, pp. 2-4 [Exhibit C-098].

able to guarantee that the democratic process would be carried out peacefully. However, I should explain that the actions taken by the government to calm the protests were not motivated by political interests, but rather by the duty to guarantee the safety of the citizens in the region.

33. Despite the fact that the regional leaders who took part in the meeting with the Prime Minister had accepted the measures adopted by the government, the Aymara leaders refused to acknowledge the agreements reached between the government and the mayors.<sup>57</sup> For this reason, the protests resumed with greater intensity. Due to this critical situation, the Presidency of the Council of Ministers decided to call the Aymara leaders to meetings with the Minister of Energy and Mines and the Minister of the Interior in Lima. At the same time, the government also called representatives from the conflict's other two fronts (Melgar Province and the Ramis River basin) to Lima to hold discussions, as explained above. For greater control of the situation, the discussions for the three fronts were held in different locations in the city. I was present at the meetings with the representatives from the south.

34. The meetings with the Aymara leaders were held from June 17 to 23.<sup>58</sup> These were very long and intense sessions at which the Aymara leaders insisted on the shutdown of mining activities in southern Puno and the cancellation of the Santa Ana Project.

35. At these meetings, the participants also presented documents indicating that Bear Creek, a foreign company, obtained a mining concession in the border area through a Peruvian citizen (Jenny Karina Villavicencio) before having obtained the declaration of public necessity. In other words, Bear Creek had acquired the mining concessions in violation of Article 71 of the Constitution and had used a Peruvian citizen to obtain a mining concession where the Santa Ana Project would be developed before the company obtained the required declaration of public

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<sup>57</sup> See 2011 Aide Memoire, p. 7 [Exhibit R-010].

<sup>58</sup> See 2011 Aide Memoire, p. 7 [Exhibit R-010].



necessity. That was the first time I learned of these facts and of the relationship that existed between Ms. Villavicencio and Bear Creek.

36. Based on the knowledge of these new facts and the critical situation in which the Puno region was found, the Administration issued the following regulations:

- (i) Supreme Decree No. 032 of 2011 ("Supreme Decree No. 032") banning mining activities in the Huacullani and Kelluyo districts and repealing the declaration of public necessity for the Santa Ana Project.<sup>59</sup>
- (ii) Supreme Decree No. 034 of 2011 establishing the obligation to conduct a previous consultation with the rural communities before commencing mining activities for the mining concessions that had already been granted. This previous consultation requirement was established in the framework of the Rural Communities Law and International Labor Organization Convention 169, according to which the indigenous peoples must be consulted on the issues that directly affect them.<sup>60</sup> Ultimately, if the rural communities oppose the mining activities in their regions, their will must be respected. Despite the fact that the decree refers to a previous "consultation," in practice, the communities must give their consent to the mining activities.

37. In addition, it must be taken into account that, as a result of other discussions, the Administration decided to suspend the processing of all applications for mining concessions in the Puno department, as I explained above.<sup>61</sup>

38. With regard to the documents presented by the Aymara leaders indicating that Bear Creek had obtained the mining concessions in violation of Article 71 of the Constitution, on June 28, 2011, the Minister of Energy and Mines ordered that the pertinent legal actions be taken

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<sup>59</sup> See Decree Repealing Supreme Decree No. 083 of 2007, Supreme Decree No. 032-2011-EM, June 25, 2011, Art. 1 and Supplementary Provision [Exhibit C-005]

<sup>60</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>61</sup> See Supreme Decree No. 033 of 2011, Art. 3 [Exhibit R-011].

to annul the legal acts affecting the State's interests.<sup>62</sup> I understand that these legal actions were undertaken shortly thereafter and are still in progress.

39. All these decisions were essential for restoring order and public safety in Puno. The situation was critical and the government took the actions that were required based on the information available at that time. The strike by the people of southern Puno lasted over 30 days and resulted in the loss of human lives, various injury victims and inestimable damages to public and private properties. The State had the duty to take the actions needed to put an end to this situation.

40. Based on the facts related above, there can be no doubt that the Puno protests in 2011 were related to Bear Creek's activities with the Santa Ana Project. To a great extent, these protests were due to the company's failure to reach out to all the local communities within its area of influence and especially to the Amaya population that was beyond its direct area of influence. The Kelluyo district was one of the main participants in the protests, because it is a district that would be directly affected by the Santa Ana Project. As the Puno Regional President explained to us at one time, the population was profoundly ignorant on the effects that the Santa Ana Project would have on the region.

### **III. SUPREME DECREE NO. 032 OF 2011**

41. The Claimant has made a number of allegations with regard to the issuance of Supreme Decree No. 032 of 2011. In particular, it contends that Supreme Decree No. 032 was issued arbitrarily and without giving Bear Creek any opportunity to discuss the situation.<sup>63</sup> Bear

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<sup>62</sup> See Resolution that Orders Initiation of Legal Actions to Annual legal Acts, Ministerial Resolution No. 289-2011-MEM/DM, June 28, 2011, Arts. 1 [Exhibit R-028].

<sup>63</sup> See Claimant's Memorial, para. 80.

Creeks' allegations are incorrect, because in addition, at no time during the protests did the company ever propose an actual and effective solution to the Administration for solving them.

42. Supreme Decree No. 032 was neither arbitrary nor unconstitutional. The Decree was issued because there were no longer any grounds for supporting Bear Creek's declaration of public necessity. In weighing the State's public interests, protecting the safety of its citizens is a fundamental duty. On one hand, there was a critical security situation in Puno, which was directly linked to Bear Creek's activities in the area, which led to the loss of human lives. The protests were an indication of the population's discontent with Bear Creek's actions and the shortcomings in Bear Creek's programs for persuading the population about the benefits that those activities could bring. On the other hand, during the discussions with the protesters' representatives, they submitted documents which indicated that Bear Creek had obtained an indirect interest in the concessions before having requested and obtained the declaration of public necessity. In view of the information that was obtained, we Ministry officials concluded that the Santa Ana Project was not of public necessity and was not in the public interest. Therefore, we repealed the declaration of public necessity and the pertinent legal actions were undertaken.

43. The Claimant also contends that Supreme Decree No. 032 is unconstitutional and that I myself said that canceling the mining concessions that had already been granted was unconstitutional.<sup>64</sup> These allegations are taken out of context and in any event, those statements were made before the new facts were known.

44. First, the Claimant, and particularly Elisario Antunez de Mayolo, a witness for the Claimant, alleges that officials from Bear Creek met with me a few days before Supreme Decree

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<sup>64</sup> See Claimant's Memorial, paras. 69-70.

No. 032 was adopted.<sup>65</sup> They contend that at that meeting I purportedly confirmed that the "Government would protect Bear Creek's legally acquired rights to Santa Ana," so the government's decision to repeal the declaration of public necessity was "disturbing."<sup>66</sup>

45. I must clarify that when we issued Supreme Decree No. 032, we did not believe that we were violating rights legally acquired by Bear Creek. First, because we had information indicating that Bear Creek had acquired the concessions in violation of Article 71 of the Peruvian Constitution. Second, as of the date on which Supreme Decree No. 032 was issued, Bear Creek had still not obtained all the authorizations for operating the mine because the approval of the Environmental Impact Study was in progress. In other words, the company had no guarantee that the MINEM would approve the Environmental Impact Study or even that it would be able to meet all other necessary requirements to start mining operations. As I explained to the Puno Regional President at the time, "their project is not approved just because they submit an EIA and hold a public hearing, that is not so; moreover, granting a concession does not automatically mean an authorization to operate and whoever says so is lying."<sup>67</sup>

46. Second, the Claimant also contends that I stated that annulling Bear Creek's mining concessions was not possible because the company had complied with all the requirements and submitted an Environmental Impact Study.<sup>68</sup> However, the date of the publication cited by the Claimant should be taken into account: May 21, 2011. At that time, I did not have any knowledge of Bear Creek's alleged constitutional violation and the company's

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<sup>65</sup> See Witness Statement of Elisario Antunez de Mayolo, May 29, 2015 ("Witness Statement of Mr. Antunez de Mayolo"), para. 20.

<sup>66</sup> See Witness Statement of Mr. Antunez de Mayolo, para. 20.

<sup>67</sup> 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>68</sup> Claimant's Memorial, para. 70; *Huelga antiminera en Puno sigue sin solución*, LA REPUBLICA, May 21, 2011 [Exhibit C-094].

Environmental Impact Study was still being processed. However, even though the Environmental Impact Study for operation of the Santa Ana Project was being processed, that did not mean that it had been approved or that it was going to be approved, thus Bear Creek still did not have all the authorizations for operating the mine.

47. Third, the Claimant also contends that I have stated that the actions taken by the State, particularly the issuance of Supreme Decree No. 032, are unconstitutional.<sup>69</sup> That is incorrect. In May 2011, I said that the measure adopted by the Regional Council in an effort to annul the mining concessions by regional ordinance was unconstitutional. This measure was unconstitutional because the Regional council did not have the authority to issue this measure. In any event, the ordinance was never published, so it never took effect. In addition, Decree No. 032 did not annul the mining concessions; it repealed the declaration of public necessity, which the Ministry had full authority to do. It was precisely because we were aware that the concessions could not be cancelled except by court order that we ordered the start of the legal actions needed to restore the State's public interests. In other words, we believed that we were acting according to the law at all times.

48. Lastly, in his witness statement, Mr. Andrew Swarthout claims that at a meeting Bear Creek held with members of the government (including me) days after Supreme Decree No. 032 was issued, we stated that we had no reasons to believe that Bear Creek had obtained the concessions irregularly.<sup>70</sup> This assestion is untrue and surprising. First, I do not remember participating in such meeting. Second, even if I was present at the meeting, it is unlikely that I would have made the alleged statements, because the MINEM would not have ordered taking

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<sup>69</sup> See Claimant's Memorial, para. 69.

<sup>70</sup> See Witness Statement of Andrew Swarthout, May 29, 2011, para. 58.

legal action to annul the legal acts through which Bear Creek had obtained the mining concessions.

The information contained in this statement is true to the best of my knowledge and belief.

\_\_\_\_\_ [signature] \_\_\_\_\_

Luis Fernando Gala Soldevilla

Date: October 6, 2015

## **CURRICULUM VITAE**

**Luis Fernando Gala Soldevilla**

### **Academic Degrees**

- ✓ Mining Engineer with a degree from the Pontifical Catholic University of Peru, Peruvian Professional Engineers' Association membership number 41291.
- ✓ MBA from the Graduate School of Business.
- ✓ Associate's Degree in Finance from the Graduate School of Business.

### **Work Experience**

- ✓ President of the Mining Council at the Ministry of Energy and Mines (2014 to date).
- ✓ Mining Council Member (2011-2014).
- ✓ Vice Minister of Mines (June 2009-July 2011)
- ✓ President of the Mining Council (2007-2008)
- ✓ Mining Council Member (2004-2009)
- ✓ Director General of Mining at the Ministry of Energy and Mines (1999-2000)
- ✓ Director General of Mining (1992)
- ✓ Advisor to the Vice Ministry of Mines (1991)
- ✓ Corporación Financiera de Desarrollo S.A. - COFIDE (1987-2004)
- ✓ Banco Minero del Peru (1982-1987)

### **Teaching Experience**

- ✓ Professor at the Faculty of Sciences and Technology of the Pontifical Catholic University of Peru.
- ✓ Post-Graduate Instructor at the Faculty of Geological, Mining and Metallurgical Engineering of the San Marcos National University.
- ✓ Instructor at the GERENS School of Management and Economy of various courses on mining management.
- ✓ Instructor in various areas of Mining Law at the Pacific University.

### **Areas of Specialization**

Professional with more than 30 years' experience in the mining sector and renowned specialist in mining policy, mining law and the evaluation of mining projects. Areas of specialization include:

- ✓ Mining Policy
- ✓ Mining Economics
- ✓ Preparation and Evaluation of Mining Projects
- ✓ Mine Appraisal
- ✓ Mining Law



## **Institutions**

- ✓ Currently a member of the Steering Committee for the Associate's Degree Program in Mining Economics, Management and Regulation at the Postgraduate School of the Pontifical Catholic University.
- ✓ Director of the Peruvian Institute of Mining Engineers for the 2012-2013 period.
- ✓ President of the Mining Engineering Chapter of the Lima Departmental Council of the Peruvian Professional Engineers' Association (2009-2010)
- ✓ Member of the Mining Chapter of the CD-Lima Professional Engineers' Association (2005-2009).

**October 2015**