

RWS-007

Second Witness Statement of Cèsar Zegarra

April 8, 2016

English Translation

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

Bear Creek Mining Corporation
(Claimant)

v.

Republic of Peru
(Respondent)

ICSID Case No. ARB/14/21

Witness Statement of Cesar Zegarra
Managing Director of the Legal Department of the Ministry of Energy and Mines (2007-
present)

April 8, 2016

I. INTRODUCTION

1. My name is Cesar Zegarra, and I am the Managing Director of the Legal Department of the Ministry of Energy and Mines (“MINEM”) since April 2007. I have been an official of MINEM since 2004. As Managing Director of the Legal Department, I participated in the process of drafting Supreme Decree No. 032 of 2011 (“Supreme Decree No. 032”). This statement is in addition to my first witness statement presented on October 6, 2015.

2. In this witness statement I will respond to certain arguments presented by Bear Creek Mining Corporation (“Bear Creek” or the “Claimant”) in its Reply brief dated January 8, 2016.¹ Particularly, the Claimant argues: (i) that the declaration of public necessity is an administrative action of the State that lacks a discretionary component; (ii) that the means used by the company to acquire the mining concessions were necessary to mitigate risks and were legal and proper; (iii) that Decree No. 032 of 2011 (Decree No. 032) lacks grounds; and (iv) that government officials confirmed on repeated occasions the alleged illegality of Decree No. 032.

¹ See Claimant’s Reply on the Merits and Counter-Memorial on Jurisdiction, January 8, 2016 (“Claimant’s Reply”).

All these arguments are incorrect, and at times the Claimants misrepresent my statements and take them out of context. I will respond to these arguments below.

II. APPROVAL PROCESS OF THE DECLARATION OF PUBLIC NECESSITY

A. THE DECLARATION OF PUBLIC NECESSITY IS A DISCRETIONARY ACT OF THE STATE

3. Article 71 of the Peruvian Constitution provides that foreign citizens cannot directly or indirectly acquire mines within 50 kilometers of Peruvian borders, unless they have a declaration of public necessity. The same article establishes that such declaration must be granted by Supreme Decree approved by the Council of Ministers.²

4. In its Reply, the Claimant and its experts argue that the declaration of public necessity of an investment in mines in a border zone is an administrative action that does not allow for any discretionary element on the part of the administration.³ The Claimant argues the fact that the process to obtain a declaration of public necessity is regulated by Peruvian law and is provided in the Consolidated Law of Administrative Procedures (“TUPA”) of the MINEM proves that it is an administrative action.⁴ This is incorrect.

5. The declaration of public necessity is a completely discretionary act of the State. As I explained in my first witness statement, the declaration of public necessity is not issued automatically, since it is a discretionary action of the State in which the Council of Ministers evaluates the needs of the population and makes a decision based on the public interests of the Nation. The declaration of public necessity will be issued only if the government considers that development of the activity will contribute to the general well-being of the population and is in

² See Constitution of Peru, December 29, 1993 (“Constitution of Peru”), at Art. 71 [Exhibit R-001].

³ See, e.g., Claimant’s Reply at para. 39.

⁴ See, e.g., Claimant’s Reply at paras. 39-40; Second Expert Report of Alfredo Bullard González, January 6, 2016 (“Bullard Second Report”), at paras. 13, et seq.

accord with the public interests of the Nation. The Constitution itself establishes that the declaration must be issued ultimately by the Council of Ministers, which is the entity that makes strictly policy decisions and has the authority to evaluate and determine the needs and priorities of the State. If such a declaration were automatic, instead of being discretionary, it would not make any sense to involve the Council of Ministers in the approval process. Therefore, the declaration is issued if the highest entity of the Executive Branch, weighing the factors, deems that it will generate the common good of the population.

6. The fact that the process for obtaining a declaration of public necessity is included in the TUPA of the MINEM does not mean that the aforesaid declaration is an administrative action. The TUPA is a document that lists the regulations applicable to a sector and summarizes the requirements needed to carry out a procedure with a public entity. By law, all public entities must have a TUPA. The TUPA is the result of an effort of the State to establish clear and transparent procedures that are easily understood by citizens. However, the fact that a procedure is within the TUPA of an entity does not mean that the action that is a result of said procedure lacks a discretionary component. In the case of the Supreme Decree that approves a declaration of public necessity, the TUPA informs the applicant about the process to be followed and the documentation that must be presented with the application, because there is a standard process for presenting the application. But the fact that the TUPA provides such a procedure does not classify the legal nature of the decree as such. Consequently, the conclusion of Bear Creek about the exclusively administrative nature of the declaration of necessity is mistaken.

7. The State can deny a declaration of public necessity when said public necessity does not exist. If the circumstances on which the declaration of necessity was based cease to exist, the State has the capacity to repeal said declaration of public necessity in the exercise of its

discretionary power. For example, if an investment project that had been declared of public necessity results in massive demonstrations that, instead of creating economic benefits, causes material and human losses, the State has the capacity to reassess the factors that allowed the declaration of public necessity and to repeal it. The Claimant also argues that I have affirmed that a declaration of public necessity must remain in effect for 20 or 30 years.⁵ However, the Claimant is taking my statements out of context. Of course, when the State evaluates whether or not to issue a declaration of public necessity to an investment project, it expects said project to be long term in order to generate a greater benefit for the population. This does not mean, nor does the law provide, that the declaration is issued for a specific term, much less that it will last for 20 to 30 years. If the factors on which a declaration of public necessity is based cease to exist, the State may reassess its decision and decide that the declaration of public necessity must be repealed.

B. THE MEANS USED BY BEAR CREEK TO ACQUIRE THE MINING CONCESSIONS WERE UNNECESSARY

8. Bear Creek argues that the means used to obtain the mining concessions for the Santa Ana Project (“Santa Ana concessions”) were proper and legal. In other words, the company considers that no constitutional violation occurred when it asked its representative, Ms. Jenny Karina Villavicencio, to apply for the Santa Ana concessions, sign option contracts for the Santa Ana concessions with the company and transfer the concessions to the company once the latter obtained the declaration of public necessity.⁶ The company’s assessment is incorrect, because Article 71 of the Peruvian Constitution was indeed violated because a

⁵ See Claimant’s Reply at para. 43.

⁶ See Claimant’s Reply at paras. 17-43.

Peruvian national was utilized to acquire mining concessions indirectly under it, for the benefit of a foreign citizen.

9. In addition, the Claimant argues that the company adopted this means for the purpose of minimizing the risk of losing the concessions while the company applied for and obtained the declaration of public necessity, which was necessary for the company to be able to acquire the mining concessions directly or indirectly.⁷ In my first witness statement, I explained that the constitutional violation by Bear Creek was not necessary, because the company was able to apply for the concessions directly, and the entity in charge would have reserved the concessions for Bear Creek until the company obtained a response to the application for the declaration of public necessity.⁸ In its Reply, Bear Creek, and particularly its expert Hans Flury, argue that Bear Creek would not have been able to apply directly for the concessions for two reasons: (i) due to an alleged risk that the Geological Mining and Metallurgical Institute (“INGEMMET” – the entity in charge of reviewing and approving the applications for mining concessions) would decide to change that procedure and lift the suspension of its application; and (ii) because INGEMMET is supposedly required to lift the suspension of the application 7 months after having been submitted, which is not sufficient time to obtain the declaration of public necessity.⁹ Neither of these reasons has any legal basis.

10. First, as explained in my first witness statement, there is nothing in Peruvian law that prohibits a foreign citizen from applying for a concession in a border zone before obtaining the declaration of public necessity. On the contrary, Article 71 of the Constitution expressly prohibits acquisition of mining concessions, directly or indirectly, before obtaining such

⁷ See Claimant’s Reply at para. 24.

⁸ See First Witness Statement of César Zegarra, October 6, 2015 (“Zegarra First Witness Statement”), at paras. 8-10 [Exhibit RWS-003].

⁹ See, e.g., Claimant’s Reply at para. 25; Expert Report Hans A. Flury, January 5, 2016 (“Flury Report”), at paras. 40-43).

declaration. Therefore, in cases in which the concessions have not been established of record (such as the Santa Ana case), the foreign citizen must apply directly to the INGEMMET to obtain the mining concession. When the application is received, the INGEMMET reserves the requested concessions (to ensure that they are not granted to other persons) and suspends the process, waiting for the foreign citizen to obtain the declaration of public necessity. There is no risk that the INGEMMET will decide to change its procedure, as Mr. Flury argues. I do not know of a single case in which the INGEMMET has done this, and in fact I understand that the INGEMMET continues this procedure. Moreover, I understand that this is not only a practice of the INGEMMET, but that the INGEMMET keeps a foreign citizen's application for border zone mining concessions active, provided that the application has not been expressly rejected, or that, after six (6) months have passed since the filing of the application, the applicant has not acknowledged the negative administrative silence (requested by the applicant itself) under the Regulation of Mining Procedures.¹⁰

11. Second, it is not true that the INGEMMET can only reserve mining concessions for a period of 7 months, as argued by Mr. Flury.¹¹ Mr. Flury argues that according to the Law of General Administrative Procedures ("LAPG"), an administrative procedure will be declared abandoned *ex officio* within 30 days of the request, if the latter is not in compliance with a formality, which causes suspension of the process.¹² In this case, I understand that according to Flury, noncompliance would consist of not having the declaration of public necessity when the concession was requested. Flury also argues that according to the Regulation of Mining

¹⁰ See Regulation on Mining Proceedings, Supreme Decree No. 018-92-EM, September 7, 1992 ("Regulation on Mining Proceedings"), at Art. 14B [Exhibit R-155]. "Article 14B: The following mining petitions will be declared inadmissible (...) and definitively archived without constituting precedent or entitlement for the formulation of others: (...) g. When they are requested by foreign citizens in a border zone, whose application is expressly rejected or that, six (6) months after said application, negative administrative silence is accepted, and the application considered denied and acknowledged."

¹¹ See Flury Report at para. 43.

¹² See Flury Report at para. 42.

Procedures, the INGEMMET can only suspend the process of granting mining concessions for a period of 6 months.¹³ Mr. Flury then seems to take these two provisions to argue that the INGEMMET can only reserve the request of the foreign citizen for 7 months, which would not be sufficient to obtain the declaration of public necessity.¹⁴

12. However, Mr. Flury's reasoning is based on a mistaken premise. Mr. Flury seems to understand that the application for a mining concession by a foreign citizen without a declaration of public necessity is a breach on the part of the foreign citizen. This is not correct. It would only be a breach if the foreign citizen applies with a declaration of public necessity that has been denied or if, in the process of applying for the concessions, the application for the declaration of public necessity is denied or declared to be abandoned. None of the terms cited by Mr. Flury begin to elapse if an application for a declaration of public necessity is being processed. In other words, if the application for a declaration of public necessity is under review and has not been denied or declared to be abandoned, the INGEMMET will maintain the suspension of the mining petition, reserving the mining concessions for the foreign citizen that requested them, until a decision is issued about the declaration of public necessity.

13. To conclude, the means used by Bear Creek were unnecessary to avoid the alleged risks in its application process (because such risk did not exist), and, on the contrary, it constituted a violation of Article 71 of the Peruvian Constitution.

C. THE MEANS USED BY BEAR CREEK TO ACQUIRE THE MINING CONCESSIONS WERE NOT LEGAL

14. The Claimant, and particularly expert Hans Flury, argue that the manner in which Bear Creek acquired the mining concessions was legal and consistent with mining industry

¹³ See Flury Report at para. 41.

¹⁴ See Flury Report at para. 43.

practices.¹⁵ This is incorrect. Bear Creek acquired the Santa Ana mining concessions indirectly, through a Peruvian citizen who was its legal representative and employee, before even applying to obtain the declaration of public necessity. This constitutes a violation of Article 71 of the Peruvian Constitution.

III. DECREE NO. 032 OF 2011

15. As I explained in my first witness statement, Decree No. 032 of 2011 was issued for a combination of two reasons: (i) the anti-mining protests in Puno at the beginning of 2011 created a critical social and political situation in the region; and (ii) it was discovered that Bear Creek had violated Article 71 of the Constitution by indirectly acquiring the Santa Ana concessions through a Peruvian citizen before having obtained the declaration of public necessity. However, the Claimant surprisingly argues in its Reply that the State is using the possible constitutional violation to conceal the real reason why Decree No. 032 was issued.¹⁶ The Claimant also argues that it is absurd that the State is using as an excuse the “discovery” of a relationship with Jenny Villavicencio and the conflict in Puno for having repealed the declaration of public necessity.¹⁷ Finally, the Claimant argues that Peru had multiple mechanisms at its disposal instead of resorting to the expropriation of the Santa Ana Project.¹⁸ All these affirmations are incorrect. The State did not attempt nor does it attempt to conceal the “real” reason for issuing Supreme Decree No. 032. I will explain below the two reasons that explain the repeal of the declaration of public necessity of the Santa Ana Project. The State acted appropriately in a critical situation.

¹⁵ See Claimant’s Reply at paras. 45-46; Flury Report at para. 59.

¹⁶ See Claimant’s Reply at para. 20.

¹⁷ See Claimant’s Reply at para. 107.

¹⁸ See Claimant’s Reply at para. 119.

A. THE PROTESTS IN PUNO IN 2011

16. As I explained in my first witness statement, the first half of 2011 was a critical period in the Puno region. Anti-mining protests paralyzed the Department and caused extensive injury to human life as well as material damages. These protests occurred in different parts of the north and in the south of the Department, but all had a common denominator: the population was protesting against the mining activities in the region. It was in the south that the protest lasted the longest (it began in March 2011), and it is precisely this protest that is related to the Santa Ana Project. The population of the south, from the beginning of the protests, demanded cancellation of Bear Creek's Santa Ana Project.

17. The situation was critical, and the government was obligated to intervene to avoid a major crisis. The city of Desaguadero was blockaded for over a month; the city of Puno was also blockaded, commerce was affected, there were acts of violence and vandalism, and the situation deteriorated exponentially in May and June of 2011. Although I did not participate in the discussions attempted by the Government in Puno in May 2011, I was involved in the meetings held in Lima between June 17 and 23 with representatives of the protesters from the south. During these meetings, the protesters again stated their anti-mining demands and insisted on the cancellation of the Santa Ana Project. Given the atmosphere, it was obvious that the Santa Ana Project did not have the support of the communities and that the residents would not suspend the protests until all the mining projects in the south were stopped, the mining petitions being processed were suspended and the necessary regulations were adopted to ensure a process of consultation and consent from the communities when initiating a mining project on their lands. The situation made it unsustainable to justify the declaration of public necessity of a project, taking into account that it was discovered that there were irregularities in the company's acquisition of the concessions, as described below.

B. CONSTITUTIONAL VIOLATION

18. The second reason why the declaration of public necessity of the Santa Ana Project was repealed was the possible constitutional violation by Bear Creek, of which we became aware on the last day of the discussions with the protesters in Lima. Until then, the government's position had been to try to maintain the Santa Ana concessions, given that it was our understanding that Bear Creek had acquired the mining concessions in the proper manner. However, when we became aware of the possible constitutional violation, we considered it more appropriate to repeal the declaration of public necessity.

19. The Claimant argues that the State cannot claim that it was not aware of the means used by Bear Creek to acquire the mining concessions before June 2011 to support the issuance of Decree No. 032. Particularly, Bear Creek claims that it had allegedly informed the MINEM when it applied for the declaration of public necessity that the owner of the concessions was Ms. Villavicencio, that Ms. Villavicencio was the company's legal representative and that the company had signed two option contracts with Ms. Villavicencio. Finally, the Claimant argues that the State, aware of all this, issued Decree No. 083 of 2007, with which it not only issued the declaration of public necessity for the Santa Ana Project, but also it approved the acquisition structure used by Bear Creek. These arguments of Bear Creek are mistaken.

20. I was not aware of the possible constitutional violation by Bear Creek until the last day of the discussions with the Puno protesters in Lima on June 23, 2011. This knowledge came about because the congressman for the Department of Puno, Yohnny Lescano, with other representatives of the protesters, delivered information that indicated that Bear Creek had acquired the Santa Ana concessions through Ms. Villavicencio before obtaining the declaration of public necessity, which violated Article 71 of the Constitution of Peru. With this information,

plus the critical situation in Puno, we considered that the most appropriate measure was to repeal the declaration of public necessity for the Santa Ana Project.

21. Nevertheless, even if Bear Creek provided all the necessary information to the MINEM, and I approved that documentation, this does not mean that the State knew of and was aware of the true relationship between Bear Creek and Ms. Villavicencio. First, in the process of reviewing the documents for approval of a declaration of public necessity, the officials assume the good faith of the requesting company and are not (nor should they be) looking for possible irregularities or illegalities in the application. Second, Bear Creek does not explain that the information that it allegedly provided was not clearly organized, nor was any special mention made of it. On the contrary, the information was submitted dispersed throughout the file, such that it was very difficult for the officials to connect all the facts and actually understand the illegal procedure used by Bear Creek. With the information that was provided, the State was not aware of Bear Creek's level of control over Ms. Villavicencio, nor was it aware of the real relationship between the company and Ms. Villavicencio.

22. Finally, Decree No. 083 did not approve the means of acquiring concessions adopted by Bear Creek. The Supreme Decree approved the declaration of public necessity. That approval does not preclude the State from assessing penalties against the company if it is discovered that the company committed irregularities before the declaration of public necessity was granted, as occurred in this case.

C. OTHER MEASURES ADOPTED BY THE STATE TO RESOLVE THE SITUATION IN PUNO

23. Although the Claimant does not focus on this point, it should be noted that Decree No. 032 was not the only measure adopted by the government in response to the critical situation unfolding in Puno in 2011. Bear Creek argues that Supreme Decree No. 032 was issued to

mollify political protests in the south of Puno, indicating that the State sacrificed the Santa Ana Project to calm the Puno situation.¹⁹ First, as I explained previously, the Santa Ana Project lost its declaration of public necessity for two obvious reasons—it was not a sacrifice to satisfy the alleged political intentions of Mr. Aduviri. Second, as I explained in my first witness statement, the government adopted several measures in response to the three areas of conflict: Supreme Decrees 032, 033, 034 and 035 of 2011.²⁰ All these decrees are in response to the concerns of the population regarding mining activities in the zone.

IV. MEETINGS WITH BEAR CREEK AFTER ADOPTING DECREE NO. 032 OF 2011

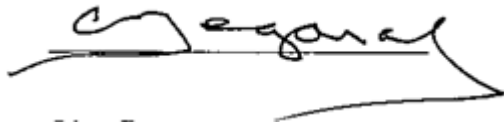
24. Finally, the Claimant argues that at a meeting in which I was accompanied by Vice Minister Shinno, both of us admitted that Bear Creek had obtained the concessions legally and that we declared that Supreme Decree 032 had no legal basis and that Peru would lose in an international arbitration.²¹ This is false. Although I remember being at a meeting with the representatives of the company discussing the case, I do not remember that we made any of the statements alleged by Bear Creek. Such statements would not make any sense, given that I participated in the drafting of Decree No. 032. If in June 2011 we had considered that Bear Creek had acquired the concessions appropriately, we would not have issued the Decree. As I mentioned previously, the State acted appropriately in a critical and unique situation.

¹⁹ See Claimant's Reply at para. 137.

²⁰ See Zegarra First Report at paras. 23-31.

²¹ See Claimant's Reply at para. 150; Second Witness Statement of Elsiario Antúñez de Mayolo, January 8, 2016, at para. 62.

The facts set forth in this declaration are true to the best of my knowledge.

A handwritten signature in black ink, appearing to read "César Zegarra". The signature is written in a cursive style and is positioned above a horizontal line that extends across the width of the signature.

César Zegarra

Date: April 8, 2015