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August 18, 2016

Ms. Mercedes Cordido-Freytes de Kurowski  
Secretary of the Tribunal  
International Centre for Settlement of  
Investment Disputes  
1818 H Street, NW  
Washington, DC 20433

Re: *Bear Creek Mining Corporation v. Republic of Perú* (ICSID Case No. ARB/14/21) – Respondent’s Comments to the Third Party Submission from the Asociación de Derechos Humanos y Medio Ambiente – Puno

Dear Ms. Kurowski:

Pursuant to Procedural Order No. 5 dated July 21, 2016, Respondent writes to submit its comments to the third party submission presented on June 9, 2016, by the *Asociación de Derechos Humanos y Medio Ambiente – Puno* (Association of Human Rights and the Environment – Puno, DHUMA) together with Dr. Carlos López, PhD of the International Commission of Jurists (“the DHUMA Submission”).

In its Procedural Order No. 5, the Tribunal concluded that the “combination of Dr. López’s legal expertise and DHUMA’s local knowledge of the facts may add a new perspective that differs from that of the Parties.”<sup>1</sup> The correctness of that conclusion is borne out by the content of the DHUMA Submission. It presents a new perspective that is also crucial to two central points of dispute between the Parties: (1) whether Claimant caused or contributed to the social unrest that engulfed the Puno region with its poor community outreach, and (2) whether Claimant failed to live up to established international norms for interactions with local, indigenous communities. DHUMA’s conclusion is unambiguous on both points: “Bear Creek not only did not obtain the approval of the population for its current and future operations, but also contributed through its own actions to create distrust, misinformation, and conflict in the communities . . . .”<sup>2</sup>

<sup>1</sup> Procedural Order No. 5, July 21, 2016, at para. 40. *See also id.* at para. 44 (“DHUMA has information and experience specific to the background and development of the Santa Ana Project which may contribute a new perspective . . .”).

<sup>2</sup> *Amicus Curiae* Brief Submitted by the Association of Human Rights and the Environment – Puno and Mr. Carlos López, PhD (Non-Disputing Parties), June 9, 2016 (“DHUMA Submission”), at p. 11.

Claimant has questioned whether DHUMA formally speaks on behalf of the Aymara communities.<sup>3</sup> But, whether any group of *comunidades campesinas* “officially” authorized DHUMA to speak on their behalf in this proceeding is wholly irrelevant. As DHUMA explained in its application to submit its third party submission, its perspective is honed through nearly 30 years of working directly with the Aymara communities of Puno “to promote the defense of life, based on respect for human dignity and the common good.”<sup>4</sup> DHUMA interacts daily with the Aymara communities in ways that make DHUMA uniquely qualified to understand—and allow it to explain to the Tribunal—the communities’ rejection of the Santa Ana project.<sup>5</sup> That experience, and not some delegation of power, gives DHUMA the *bona fides* to be a voice for the Aymara communities in this proceeding.

DHUMA also writes to the Tribunal having experienced first-hand the events at issue in this arbitration. DHUMA staff participated in the February 2011 public hearing where Bear Creek explained the project to the communities, which only served to increase community fears about contamination of community lands and irreparable harm to their way of life.<sup>6</sup> DHUMA’s president, Sister Patricia Ryan,<sup>7</sup> was in the city of Puno during the 2011 protests and was active in civic leaders’ efforts to keep the Aymara protests peaceful and non-violent.<sup>8</sup> The DHUMA Submission therefore melds together DHUMA’s “own observations and experience of the events as well as their expertise in human rights issues, community relations and corporate social

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<sup>3</sup> Claimant’s Comments on the *Amicus Curiae* Petitions, July 7, 2016 (“Claimant’s Comments on the *Amicus Curiae* Petitions”), at paras. 38, 43 (complaining that DHUMA has not specified “whose interests specifically the organization represents,” and which communities authorized DHUMA to speak on their behalf).

<sup>4</sup> Letter to the Tribunal from Derechos Humanos y Medio Ambiente – Puno, June 9, 2016 (“DHUMA Application”), at p. 1.

<sup>5</sup> DHUMA focuses its efforts to empower the most vulnerable people in Puno by educating Aymara community leaders about their rights and pursuing the enforcement of those rights in judicial or administrative process. Their strategy is to educate rising leaders to empower them to defend their communities’ rights and the environment and to increase political participation. As just one example, DHUMA organized the School of Indigenous Leaders of the Puno Region, a series of workshops designed to educate communities on subjects such as the right to consultation for indigenous populations and rights *vis-à-vis* extractive activities, including protection of water and other resources. See Selections from DHUMA’s Website, available at <http://www.derechoshumanospuno.org/> (last visited August 16, 2016) [Exhibit R-438].

<sup>6</sup> DHUMA Submission at p. 5 (“Several members of [DHUMA] . . . participated in this event, out of personal and professional interest.”).

<sup>7</sup> See Maryknoll Sisters Website, available at <https://maryknollsisters.org/mk-sister/sister-patricia-ryan/> (describing the nearly 50 years of service that Sister Patricia Ryan—President of DHUMA, and joint author of the DHUMA submission—has spent working on behalf of the Catholic Church to improve the lives of the local Aymara people in Puno, Perú).

<sup>8</sup> DHUMA Submission at p. 9 (“The president of amicus DHUMA – Puno formed part of a coordinating committee in a coalition (Coordinating Committee of the ‘Collective for Dignity and Social Peace’) that tried to promote peace and non-violence on both sides of the conflict.”).

responsibility”<sup>9</sup> to provide a reliable account of the purpose of and motivation behind the Aymara protests in Puno in 2011.

DHUMA’s conclusions, discussed next, are therefore highly material to the Tribunal’s analysis in this case. They show that Bear Creek failed to earn the trust and support (or even the minimum acquiescence) of the affected Aymara communities because Bear Creek did not adequately address concerns about environmental contamination and interference with the Aymaras’ agrarian way of life. To the contrary, the Aymara communities were so opposed to the Santa Ana project that they sacrificed their own well-being to protest for months against it. DHUMA’s submission also shows that Bear Creek did not comply with its international obligations to respect the local communities’ rights, and did not do enough to earn the social license needed to operate a major mining project. Because it failed to act according to the prevailing international norms related to interactions with indigenous communities in extractive projects, Claimant’s Santa Ana project was at grave risk from the outset.

### **I. The DHUMA Submission Shows that Claimant Caused the Social Unrest in Puno when It Failed to Alleviate Community Concerns about Environmental Degradation**

DHUMA explains clearly that Bear Creek was a key cause of the social unrest in Puno because it failed to alleviate community concerns about possible environmental degradation. The DHUMA submission confirms what Perú has argued throughout this arbitration<sup>10</sup>—and what Claimant has stubbornly denied<sup>11</sup>—that Bear Creek never achieved the social license necessary to operate a major mining project.<sup>12</sup> Instead, community opposition was manifest almost from the moment that Bear Creek’s intentions became clear. Then, Bear Creek’s 2011 public hearing failed to make up for years of insufficient community outreach, and instead inflamed community outrage that a large-scale mining project could be built on community land without the communities’ consent. Immediately after the public hearing, the communities’ outrage exploded into months of protests that threatened the very governability of the Puno region.<sup>13</sup> Bear Creek’s response was to pull back, watch, and wait.<sup>14</sup> As DHUMA makes clear,

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<sup>9</sup> DHUMA Submission at p. 2.

<sup>10</sup> See Respondent’s Counter-Memorial, October 6, 2015 (“Respondent’s Counter-Memorial”), at paras. 58-71; Respondent’s Rejoinder, April 13, 2016 (“Respondent’s Rejoinder”), at paras. 119 *et. seq.*

<sup>11</sup> See, e.g., Claimant’s Reply Memorial, January 8, 2016 (“Claimant’s Reply”), at paras. 66 *et. seq.* (claiming to have developed the Santa Ana project with the support of the local communities).

<sup>12</sup> See DHUMA Submission at p. 11 (“Bear Creek not only did not obtain the approval of the population for its current and future operations, but also contributed through its own actions to create distrust, misinformation and conflict in the communities, which in the end went against the company’s interests.”).

<sup>13</sup> See Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR, April 26, 2011, at p. 4 (The region-wide protest “poses a serious risk to the governability of the Puno region.”) [Exhibit R-018].

Bear Creek did not achieve the level of community support necessary to operate the Santa Ana project.

A. Claimant's Community Outreach Failed from the Start

DHUMA explains that, from the outset, Bear Creek created “a climate of misinformation and distrust in various groups of the Aymara communities in the area.”<sup>15</sup> This misinformation is evident from the record (*Acta de Acuerdo*) of a May 18, 2004 meeting that Bear Creek<sup>16</sup> had with the Huacullani authorities. According to the meeting record, Engineers César Ríos and Juan Contreras Cornejo met with the Huacullani authorities, purportedly as representatives of Ms. Jenny Karina Villavicencio Gardini.<sup>17</sup> (The Tribunal will recall that, according to Claimant's CEO, Mr. Andrew Swarthout, Mr. Ríos was the first person to discuss with Ms. Villavicencio the proposition that she acquire the Santa Ana concessions on Bear Creek's behalf.<sup>18</sup>). The timing of the meeting is curious, given that Ms. Villavicencio did not even apply for the concessions until 8 days later, on May 26, 2004, and was not granted any of the concessions until 2006.<sup>19</sup> The purpose of the meeting was to obtain community support in

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<sup>14</sup> See DHUMA Submission at p. 10 (“On 8 May 2011 Bear Creek announced that it was withdrawing its Santa Ana mining project.”); Letter from E. Antúnez de Mayolo to F. Ramírez, May 11, 2011 (notifying the DGAAM that the Office of Permanent Information, a tool of community outreach to give individuals an outlet for questions and complaints, would be moved from the Santa Ana project site to the Huacullani town center “given that we are currently leaving said facilities”) [Exhibit C-172]; Bear Creek Press Release, May 8, 2011 [Exhibit R-429].

<sup>15</sup> DHUMA Submission at p. 4.

<sup>16</sup> Although DHUMA states that “Yenny Karina Villavicencio Gardini[] requested and held a meeting with the [local authorities],” (DHUMA Submission at p. 3) the document itself does not state that Ms. Villavicencio was present. See Meeting Minutes of the Public and Communal Authorities and the General Population of the District of Huacullani, May 18, 2004, at p. 1 (The meeting was held “with participation from Engineers Cesar Ríos and Juan Contreras Cornejo, who proceeded in representation of Jenny Karina Villavicencio Gardini.”) [Exhibit R-421].

<sup>17</sup> Meeting Minutes of the Public and Communal Authorities and the General Population of the District of Huacullani, May 18, 2004, at p. 1 (The meeting was held “with participation from Engineers Cesar Ríos and Juan Contreras Cornejo, who proceeded in representation of Jenny Karina Villavicencio Gardini.”) [Exhibit R-421].

<sup>18</sup> See Witness Statement of Andrew T. Swarthout, May 28, 2015 (“Swarthout Witness Statement”), at para. 18 (“To that end, Cesar Rios spoke to Ms. Jenny Karina Villavicencio Gardini, a Peruvian citizen and Bear Creek employee, to determine if she would be interested in filing an application for the mineral rights over the Santa Ana area, and enter into an agreement whereby Bear Creek would have the option to acquire the mineral rights over Santa Ana once it obtained the requisite authorizations. Cesar told us that Karina was interested. I trusted Karina entirely so I believed this to be a good course of action.”). See also Claimant's Memorial on the Merits, May 29, 2015 (“Claimant's Memorial”), at para. 25 (describing the meeting, which took place “[i]n early May 2004”).

<sup>19</sup> See Directorial Resolution Granting Karina 1 Mining Concession to Jenny Villavicencio, No. 1856-2006-INACC/J, April 28, 2006, at p. 1 [Exhibit R-276]; Directorial Resolution Granting Karina 9A Mining Concession to Jenny Villavicencio, No. 2459-2006-INACC/J, June 13, 2006, at p. 1 [Exhibit R-277].

reducing the size of the Aymara Lupaca Reserve<sup>20</sup> because the yet-to-be requested Santa Ana concessions were located within the boundaries of the Reserve and could not be developed unless the boundaries of the Reserve were changed.<sup>21</sup> Although the engineers promised “work for the population of the district of Huacullani” and “projects of development and infrastructure,”<sup>22</sup> Bear Creek is not even mentioned in the document. Mr. Ríos and Mr. Contreras evidently did not inform the communities (as DHUMA confirms<sup>23</sup>) that Bear Creek was the real actor and that Ms. Villavicencio was merely the secretary of a mining company who would apply for and hold the concessions on behalf of her employer,<sup>24</sup> which planned to build a large-scale, open-pit mine if the exploration efforts succeeded.

The potential scope of the project would not have been apparent to the Huacullani communities, since they did not have any prior experience with mining projects; any knowledge of the possible consequences (positive or negative) of a mining project were based on second-hand accounts.<sup>25</sup> In DHUMA’s words, “the local population did not have full knowledge about the real situation and the implications of the mining concessions that had already been obtained and/or would be obtained or of the final beneficiaries of the ownership of these mining rights (in this case Bear Creek).”<sup>26</sup> Notably, although the communities may have been confused in 2004, Bear Creek made its presence in the area known as early as May 2006 (before it formally acquired the concessions) when it represented to the Condor de Ancocahua community in a written contract that Bear Creek “is the owner of the Karina, Karina 1, and Karina 2 Mining Concessions where the Exploration Studies will commence . . . .”<sup>27</sup>

Other communities, however, learned that Bear Creek had acquired the Santa Ana concessions only after Bear Creek exercised its option to acquire the concessions from

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<sup>20</sup> Meeting Minutes of the Public and Communal Authorities and the General Population of the District of Huacullani, May 18, 2004, at p. 1 [Exhibit R-421].

<sup>21</sup> DHUMA Submission at p. 3. The resolution changing the boundaries of the Reserve was issued March 8, 2006, after which, Ms. Villavicencio was granted the concessions. *See, e.g.* Directorial Resolution Granting Karina 9A Mining Concession to Jenny Villavicencio, No. 2459-2006-INACC/J, June 13, 2006, at p. 3 [Exhibit R-277].

<sup>22</sup> Meeting Minutes of the Public and Communal Authorities and the General Population of the District of Huacullani, May 18, 2004, at p. 3 [Exhibit R-421].

<sup>23</sup> DHUMA Submission at p. 4.

<sup>24</sup> *See* Swarhout Witness Statement at paras. 17-18.

<sup>25</sup> DHUMA Submission at p. 3 (“Although there have not been mining activities in this area and the population is not familiar with these types of activities, they know about the impacts this activity has had in the territory of the communities in other parts of the department of Puno and the country.”).

<sup>26</sup> DHUMA Submission at p. 4. *See also id.* at p. 5 (“Few people knew that the interests of Bear Creek lay behind Mrs. Yenny Karina Villavicencio’s initial approach.”).

<sup>27</sup> Agreement between Bear Creek and Local Communities, May 2006, at p. 134 [Exhibit R-043].

Ms. Villavicencio and registered the transfer agreement in February 2008.<sup>28</sup> According to DHUMA, several communities were unaware until after that transaction was registered publicly in *El Peruano* that their territory could soon be occupied by a mining company.<sup>29</sup>

DHUMA recounts that just months after Bear Creek's acquisition became known, in October 2008, thousands of members of the communities met in the main square of the town of Huacullani, seeking dialogue with Bear Creek representatives.<sup>30</sup> When Bear Creek ignored the protestors, the community members travelled to the Santa Ana campsite where they threatened Bear Creek employees and set fire to the camp site.<sup>31</sup> Claimant has tried to minimize the importance of that 2008 protest against Bear Creek,<sup>32</sup> but Bear Creek shut down its operations for months afterwards out of concerns over the safety of its employees.<sup>33</sup> As DHUMA explains, this showed that Bear Creek's initial outreach to the Aymara communities "lacked transparency" which "resulted in an increasing rejection of the Santa Ana mining project by the majority of inhabitants of the district of Huacullani, Kelluyo, and others."<sup>34</sup>

The DHUMA Submission makes clear that, from the outset, Bear Creek failed to assuage community concerns about the presence of a large-scale mine on community lands. This comes not from supposition or self-interested witness testimony like that of Bear Creek's officials, but rather from DHUMA's own observations based "on their own sources, conversations with the population itself. . . ." and their own research.<sup>35</sup>

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<sup>28</sup> DHUMA Submission at p. 5. *See also* SUNARP Registration Notice of Transfer Agreement for Santa Ana Concessions 9A, 1, 2, and 3, February 1, 2008 [Exhibit C-020].

<sup>29</sup> DHUMA Submission at p. 5.

<sup>30</sup> DHUMA Submission at p. 5. *See also* Respondent's Rejoinder at paras. 193-203 (describing the attack on Bear Creek's camp by thousands of opposition community members in the words of Mr. Swarhout and contemporaneous accounts by other Bear Creek personnel).

<sup>31</sup> DHUMA Submission at p. 5. *See also* Respondent's Rejoinder at para. 200 (describing how Bear Creek employees knew that the protest would take place in advance, but did not pause work on the project, and how the employees watched the protest unfold rather than engage with them to attempt to defuse the situation).

<sup>32</sup> *See* Claimant's Reply at para. 75 ("It is revealing of Peru's desperation that it would rely on this isolated incident to suggest that there were poor relations between Bear Creek and the local communities."); Swarhout Rebuttal Witness Statement at paras. 35-36 ("This sort of thing happens with some frequency . . .").

<sup>33</sup> Respondent's Rejoinder at para. 199 (citing Professor Peña's Second Expert Report at para. 36). *See also* Letter from Bear Creek to the DGAAM on the 2008 Campsite Burning, December 11, 2008, at p. 3 ("Because of [the incident], our company decided to slow down the exploration process to ensure the security and integrity of our personnel . . .") [Exhibit R-294].

<sup>34</sup> DHUMA Submission at p. 5.

<sup>35</sup> DHUMA Submission at p. 17.

B. Claimant's February 2011 Public Hearing Only Increased Community Concerns about the Santa Ana Project

Claimant has argued that the Santa Ana project received overwhelming support during the February 2011 public hearing.<sup>36</sup> However, several DHUMA representatives attended that hearing,<sup>37</sup> and DHUMA rejects Claimant's assertion that during the public hearing the communities accepted and approved of the Santa Ana project.<sup>38</sup>

As discussed in Perú's written pleadings, a public hearing is a necessary component of any mining project where the company is obliged to present its environmental impact assessment (EIA) and provide answers to community questions and concerns.<sup>39</sup> The public hearing is oftentimes the first opportunity for neighboring communities to learn about the scope of a proposed mining project. Completion of the public hearing is not a sign of support from the communities and, in the case of Bear Creek, it is clear that, to the contrary, the public hearing did nothing to assuage community concerns about the Santa Ana project and if anything enhanced those concerns.

Although Claimant trumpets the number of attendees at the public hearing—729—as some kind of affirmation that the surrounding communities supported Santa Ana, DHUMA explains that some community members attended only out of cultural obligation. According to one local authority (with whom DHUMA staff spoke on the way to the public hearing), Bear Creek gave gifts of bread and fruit to several community leaders. In the Aymara tradition, this act creates a moral obligation of reciprocity, such that the leaders were then obligated to attend the public hearing.<sup>40</sup> At the hearing, Bear Creek distributed a gift bag to attendees, containing a hat and poncho with the company's name on it, once again generating a sense of obligation to stay and listen.<sup>41</sup> In short, Bear Creek took advantage of the community leaders' and members' courtesy to create the illusion of support.

The reality, as DHUMA describes, was that “the population was very uneasy and worried about the development of the Santa Ana mining project,” and that unease manifested itself at the

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<sup>36</sup> See Claimant's Reply at para. 89 (“[T]he immense majority of the individuals present strongly supported the project . . . .”); Antúnez de Mayolo Rebuttal Witness Statement at para. 25 (“I observed first hand that the immense majority of the individuals present strongly supported the project . . . .”).

<sup>37</sup> DHUMA Submission at p. 5.

<sup>38</sup> DHUMA Submission at p. 6.

<sup>39</sup> See Respondent's Rejoinder at paras. 168-172; 204-212.

<sup>40</sup> DHUMA Submission at p. 5.

<sup>41</sup> DHUMA Submission at p. 6.

hearing.<sup>42</sup> All attendees were obliged to register at the entrance, but several hundred people could not fit into the Huacullani municipal theater (which only seats about 200<sup>43</sup>) and were therefore unable to participate in the public hearing.<sup>44</sup>

The hearing itself was fraught with problems. Once the hearing began, Bear Creek made a presentation in Spanish that was translated into Aymara, the primary language for the vast majority of attendees. However, the translation was inadequate and difficult to follow because the presentation was highly technical.<sup>45</sup> Once the presentation ended, the attendees were permitted to ask questions, but only in Spanish, not in their native Aymara tongue.<sup>46</sup> This likely suppressed the number of questions asked.

Of the questions that were asked, however, the DHUMA attendees recall that most of the questions related to community concerns about environmental contamination.<sup>47</sup> This could be expected considering the importance that the Aymara culture places on protecting its natural surroundings. In DHUMA's words, "the territory is not only a geographical space but represents a spiritual bond for the communities."<sup>48</sup> The Aymara consider the mother earth, or Pachamama, to be sacred, and it is the responsibility of all to protect her.<sup>49</sup> In particular, the sacred Khapia mountains bordering Lake Titicaca (less than 40 kilometers from the Santa Ana site<sup>50</sup>) "represent extremely important spiritual sanctuaries for all the population in the area."<sup>51</sup> The communities also raised concerns about the limited water resources in the area. Puno is a semi-arid climate

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<sup>42</sup> DHUMA Submission at p. 6.

<sup>43</sup> Second Peña Jumpa Report at para. 44. DHUMA's recollection that the hearing venue was too small matches with Bear Creek's own Citizen Participation Plan, which specified that the anticipated public hearing venue could hold 200 people. 2010 Environmental Impact Assessment Citizen Participation Plan, December 23, 2010, at p. 8 [Exhibit R-227].

<sup>44</sup> DHUMA Submission at p. 6.

<sup>45</sup> DHUMA Submission at p. 6.

<sup>46</sup> DHUMA Submission at p. 6.

<sup>47</sup> DHUMA's recollection also aligns with the written questions. See Questions Raised at the Santa Ana Public Hearing, February 23, 2011 [Exhibit R-054]. See also Respondent's Rejoinder at para. 210.

<sup>48</sup> DHUMA Submission at p. 7.

<sup>49</sup> DHUMA Submission at p. 8.

<sup>50</sup> See Map of Distances of *Comunidades Campesinas* Population Centers to the Santa Ana Area of Influence, 2011 (noting that the district of Zepita, which borders Lake Titicaca, is about 30km from the Santa Ana site) [Exhibit R-312].

<sup>51</sup> DHUMA Submission at p. 7.



and reduction or contamination of water sources could have a drastic impact on the communities' agricultural and ranching-based lifestyle.<sup>52</sup>

In addition to expressing environmental concerns, "several people commented that they did not trust what the company was saying" and were convinced that the project would cause harm.<sup>53</sup> Others were prevented from speaking entirely or received inadequate responses to their concerns.<sup>54</sup> To DHUMA's own attendees at the hearing (bearing in mind that those DHUMA representatives who attended speak Aymara, unlike, it would appear, any of Claimant's witnesses), "it was clear that [the communities] were against the project."<sup>55</sup> DHUMA's perspective on the hearing is further confirmed by the documentary record; several communities subsequently wrote to the regional and national authorities to express their concerns about the public hearing and their opposition to the Santa Ana project.<sup>56</sup>

It is therefore clear that the public hearing did not alleviate the communities' mistrust of Bear Creek that had been born of the company's lack of early community outreach. Instead, the hearing apparently served as a catalyst for Aymara community action *against* the Project: as DHUMA explained, "a number of communities decided to start a protest movement against mining in general, and particularly against the Santa Ana mining project," which resulted in "a deep social crisis in the region of Puno."<sup>57</sup>

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<sup>52</sup> DHUMA Submission at p. 8.

<sup>53</sup> DHUMA Submission at p. 7.

<sup>54</sup> DHUMA Submission at p 7. This is further supported by a letter dated March 11, 2011 from a Kelluyo community to the Association of Engineers of Perú. Letter from Kelluyo Community to the President of the Association of Engineers of Perú, at p. 1 ("[O]nly some of us were able to participate and we have provided our points of view, observations, questions, doubts, etc. and our questions have not been resolved or answered by the representatives of the Santa Ana Mine.") [Exhibit R-053].

<sup>55</sup> DHUMA Submission at p. 7.

<sup>56</sup> See, e.g., Letters from Kelluyo District on Santa Ana's Public Hearing, March 11, 2011 [Exhibit R-304]; Memorial Submitted by Frente de Defensa and Kelluyo's Comunidades Campesinas to Congress, Memorial No. 0005, March 10, 2011 [Exhibit R-015]; Memorial Submitted by Frente de Defensa and Kelluyo's Comunidades Campesinas to Ministry of Mines, Memorial No. 0002-2011-CO-FDRN-RSP, March 10, 2011 [Exhibit R-017]; Memorial Submitted by Frente de Defensa and Kelluyo's Comunidades Campesinas to the President, Memorial No. 0001-2011-CO-FDRN-RSP, March 9, 2011 [Exhibit R-016]; Letter from Zepita Community, March 2, 2011 [Exhibit R-412]; Letter from Desaguadero Community, February 23, 2011 [Exhibit R-411].

<sup>57</sup> DHUMA Submission at p. 8.

C. After the Public Hearing, Communities Resorted to Violent Protest to Oppose the Santa Ana Project

Claimant has argued that “the protests had nothing to do with Bear Creek’s actual operations” and that, instead, “Bear Creek had the support of the communities surrounding the Santa Ana Project.”<sup>58</sup> DHUMA—and specifically its President, Sister Patricia Ryan—played a role trying to maintain peace in the region during these protests, and thus knows well the protesters and their motivations.<sup>59</sup> DHUMA directly disputes Claimant’s claims: simply put, “the protests were directly related to the project.”<sup>60</sup>

The close connection between the protests and the Santa Ana project is evident first from the protestors’ demands—namely, suspension of mining concessions in the south of Puno (where Santa Ana was the only project); annulment of Supreme Decree No. 083-2007 (which granted Bear Creek its public necessity decree); and annulment of all mining concessions granted near the sacred Khapia Hill.<sup>61</sup> Although Peruvian authorities met with the protestors several times and attempted to alleviate their concerns through temporary measures,<sup>62</sup> the protests did not stop until Perú issued Supreme Decree No. 032 (among other measures) more than three months after protestors first pressed their demands by shutting down the Puno region’s major cities.

The fact that the protests took place in Puno and Desaguadero—the closest cities to the Santa Ana project site—rather than at the project site itself does not mean that they were not related to Santa Ana. As DHUMA explains, the protests took place in the largest cities of the Puno region in order to capture the attention of the regional and national authorities for maximum impact.<sup>63</sup> Nor is it relevant that Mr. Walter Aduviri, a local leader, participated in and even helped to coordinate the movement. As DHUMA explains, Mr. Aduviri was simply a spokesman for the communities’ broadly held anger at and mistrust of the Santa Ana project.<sup>64</sup> He may have helped to organize the community movement, but he did not create it. Broad community opposition to the Santa Ana project was the foundation of the protests.

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<sup>58</sup> Claimant’s Reply at para. 285.

<sup>59</sup> DHUMA Submission at p. 9.

<sup>60</sup> DHUMA Submission at p. 9.

<sup>61</sup> DHUMA Submission at p. 10.

<sup>62</sup> See Respondent’s Rejoinder at paras. 244-261 (discussing the several rounds of discussions that Peruvian authorities had with the protestors and the attempts to alleviate their concerns by suspending the Santa Ana EIA review, temporarily suspending new concessions in southern Puno, and other measures). See also Respondent’s Counter-Memorial at paras. 105-150.

<sup>63</sup> DHUMA Submission at p. 9 (“The aim was to capture the authorities’ attention. Desaguadero is the most important border town with Bolivia and Puno is the capital of the department.”).

<sup>64</sup> DHUMA Submission at p. 15.

Finally, DHUMA personnel experienced first hand and describe for the Tribunal's benefit the severity of the social conditions in the Puno region during the protests. After blocking the road to Desaguadero in April and instituting a general strike in Desaguadero on May 9, Aymara protestors travelled to the city of Puno on a "Sacrifice March," to make their voices heard. By May 23, approximately 15,000 protestors from all of the southern districts of the department of Puno, including Huacullani where the Santa Ana project was located, had shut down the city of Puno.<sup>65</sup> DHUMA notes that "[w]ith both cities [of Puno and Desaguadero] blockaded, business and everyday life were disrupted for over a month and the region's stability deteriorated."<sup>66</sup> Food and water shortages contributed to the disintegrating conditions. This unsustainable crisis in Puno was a critical reason for the Council of Ministers' eventual issuance of Supreme Decree No. 032.

## **II. The DHUMA Submission Shows that Claimant Failed to Comply with Prevailing International Standards for Social Outreach**

The second issue of significance for this case that is discussed in the DHUMA submission is Bear Creek's failure to live up to international standards for community engagement and its resulting failure to obtain the necessary social license for an extractive project of this nature. DHUMA<sup>67</sup> and Dr. Carlos López, PhD<sup>68</sup> are experts in public international law and international human rights. And, because DHUMA also works to put international human rights law into practice, it is uniquely qualified not only to expound upon the body of law in theory, but also to apply its knowledge to the case at hand. DHUMA's conclusion is therefore especially informative: "The actions that Bear Creek failed to carry out . . . correspond to international standards that Bear Creek should have known about and complied with but did not."<sup>69</sup>

DHUMA summarizes succinctly the social license that Bear Creek was required to obtain. The necessary social license requires "legitimacy, trust and consent."<sup>70</sup> More broadly, the requirement to obtain a social license is a "universal norm adopted by the international

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<sup>65</sup> DHUMA Submission at p. 10. *See also* Human Rights and Environment Association, Chronology: Antimining Protests in the South Region, 2011, at pp. 8-9 [Exhibit R-058].

<sup>66</sup> DHUMA Submission at p. 9.

<sup>67</sup> DHUMA Application at p. 1-2 ("DHUMA's mission is the promotion and protection of human rights and the environment of rural communities (indigenous groups) Aymara and Quechua in the Region of Puno.").

<sup>68</sup> DHUMA Application at p. 2 ("Dr. Carlos López-Hurtado is a Peruvian lawyer who works in the non-governmental organization International Commission of Jurists, coordinating the program on business and human rights.").

<sup>69</sup> DHUMA Submission at p. 17.

<sup>70</sup> DHUMA Submission at p. 16.

community” and it requires a company to undertake “human rights due diligence in a permanent and dynamic way with the aim of obtaining the consent of the local population . . . .”<sup>71</sup> Notably, the internationally-accepted concept of the social license aligns closely with the requirements under Peruvian law.<sup>72</sup>

The United Nations Human Rights Council in 2008 adopted a framework (“Protect, Respect and Remedy”—the “2008 UN Framework”<sup>73</sup>) that requires corporate responsibility independent of any formal legal obligations that a State may impose on a company acting within its borders.<sup>74</sup> In 2011, the Human Rights Council expanded upon the 2008 UN Framework by endorsing the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (the “Guiding Principles”).<sup>75</sup> The Guiding Principles “apply to all States and to *all business enterprises*”<sup>76</sup> and require those enterprises to “avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur.”<sup>77</sup> To ensure that its activities do not infringe upon the rights of others, a company should conduct human rights due diligence to assess “actual and potential human rights impacts, integrating and acting upon the findings,” which includes the impacts that the business “may cause or contribute to through its own activities, or which may be directly linked to its operations.”<sup>78</sup> That assessment and engagement process requires

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<sup>71</sup> DHUMA Submission at p. 12.

<sup>72</sup> See Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM, May 26, 2008, at Art. 3 (“Community participation is a public, dynamic, flexible process that, through the application of several mechanisms, allows for timely and proper information relating to projected or ongoing mining activities to be provided to the population concerned for; for promoting dialogue and consensus building; and for becoming familiar with and channeling opinions, positions, points of view, observations, or contributions regarding mining activities in order for the competent authority to make decisions in administrative procedures within its scope of authority.”) (emphasis added) [Exhibit R-159]; See also Respondent’s Rejoinder at paras. 130-135.

<sup>73</sup> See United Nations Human Rights Council, Resolution 8/7, June 18, 2008 [Exhibit R-430]. The substantive provisions of the framework are contained in a report by UN Special Representative of the Secretary General John Ruggie. See United Nations Human Rights Council, Document No. A/HRC/8/5, April 7, 2008 [Exhibit R-431].

<sup>74</sup> See DHUMA Submission at p. 12 (“[T]he corporate responsibility to respect all human rights is a core responsibility, additional to its duty to respect national laws and also independent of the obligations of the States.”); United Nations Human Rights Council, Document No. A/HRC/8/5, April 7, 2008, at paras. 23-25 [Exhibit R-431].

<sup>75</sup> See United Nations Human Rights Council, Resolution 17/4, July 6, 2011, at para. 1 [Exhibit R-433].

<sup>76</sup> United Nations Human Rights Council, Document No. A/HRC/17/31, March 21, 2011, at General Principles (emphasis added) [Exhibit R-432].

<sup>77</sup> United Nations Human Rights Council, Document No. A/HRC/17/31, March 21, 2011, at para. 13 [Exhibit R-432].

<sup>78</sup> See DHUMA Submission at pp. 13-14; United Nations Human Rights Council, Document No. A/HRC/17/31, March 21, 2011, at para. 17 [Exhibit R-432].

“meaningful consultation with potentially affected groups and other relevant stakeholders”<sup>79</sup> and must, in practice, also take into account the social context, including potential “ethnic tensions and the scarcity of critical resources like water.”<sup>80</sup> Thus, companies acting under the Guiding Principles must evaluate both the likely and possible impacts of their activities, must take into account the stakeholders’ own opinions, and must integrate those opinions into its operations. It appears that, at best, Bear Creek paid lip service to community concerns, but in fact it failed to take those concerns seriously or to actually work to address them.

The international business community, including the International Chamber of Commerce, the Business and Industry Advisory Committee to the OECD, and the International Council of Mining and Metals, has accepted and even welcomed the 2008 UN Framework.<sup>81</sup> Both Canada and Perú also approved the 2008 UN Framework as well as the Guiding Principles.<sup>82</sup> There can be no dispute that compliance with the principles above are expected of every company, Bear Creek included.

As DHUMA notes,<sup>83</sup> the United Nations also recognizes the importance of respecting the rights of indigenous groups in Convention 169 of the International Labor Organization (“ILO”),<sup>84</sup> and in the United Nations Declaration on the Rights of Indigenous Peoples.<sup>85</sup> Although the “consultation” with indigenous groups that forms the centerpiece of

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<sup>79</sup> United Nations Human Rights Council, Document No. A/HRC/17/31, March 21, 2011, at para. 18 [Exhibit R-432].

<sup>80</sup> DHUMA Submission at p. 14.

<sup>81</sup> See DHUMA Submission at p. 13; See also International Council of Mining and Metals, “ICMM welcomes Ruggie report,” available at <http://www.icmm.com/engb/news/icmmwelcomesruggiereport> (last visited, August 16 2016) [Exhibit R-435]; International Organization of Employers, International Chamber of Commerce, and Business and Industry Advisory Committee to the OECD, “Joint initial views of the International Organization of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eighth Session of the Human Rights Council on the Third report of the Special Representative of the UN Secretary-General on Business and Human Rights”, May 2008, available at <http://business-humanrights.org/sites/default/files/reports-and-materials/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf> (last visited August 16, 2016) [Exhibit R-434].

<sup>82</sup> DHUMA Submission at p. 15.

<sup>83</sup> DHUMA Submission at p. 15.

<sup>84</sup> See International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), September 5, 1991, at Art. 15 (requiring that “governments shall consult [indigenous] peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands.”) [Exhibit R-029].

<sup>85</sup> See United Nations Declaration on the Rights of Indigenous Peoples, September 13, 2007, at Art. 26 (“Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”) [Exhibit R-437].

Convention 169 is framed as an interaction between a State and the indigenous groups within its borders, the requirement for such consultations remains important here. Indeed, the government measures of which Bear Creek complains can be viewed as Respondent acting in the spirit of these international law consultation requirements. In response to the democratic outburst of protests in Puno, the Peruvian government officials held a series of meetings with community leaders, listened to the views of the Aymara people, and addressed their concerns with a series of measures, including suspension of the EIA review process and ultimately revocation of the public necessity decree issued to Bear Creek for the Santa Ana project.

It is clear that Bear Creek failed to comply with these internationally accepted norms. Although Claimant argues that the main concern of the communities was a dearth of job opportunities—of which Santa Ana would supply only a handful, and only to a few select communities—that is a mistaken premise. Bear Creek either failed to understand or willfully ignored the communities’ very strong cultural connection to the environment. This spiritual bond is explained in the DHUMA submission,<sup>86</sup> Professor Peña’s two expert reports,<sup>87</sup> and is apparent in the many questions that the community members asked about environmental concerns during the public hearing.<sup>88</sup>

In order to comply with the international standards just discussed, and if it wanted to have any hope of obtaining the necessary social license from the communities, it was incumbent upon Bear Creek to actually take those concerns into account and to work to address them. It is irrelevant whether the communities’ concerns were based in sound scientific or technical evidence; indeed, it would not have been reasonable to expect communities based on subsistence farming and raising livestock to have any level of technical mining expertise.<sup>89</sup> If the concerns were factually unfounded, then it was Bear Creek’s job to provide education and to correct misimpressions, and to do so in a manner that would actually persuade the communities in question. But whatever the concerns were, Bear Creek had to address them—not dismiss them. And its failure to do so had devastating consequences: In DHUMA’s words, the local communities “had doubts and fears regarding the possible damaging effects of mining on their land, water, livestock and sacred sites. The lack of information and transparency . . . meant that these fears turned into mistrust and rejection, which at times became violent.”<sup>90</sup>

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<sup>86</sup> DHUMA Submission at pp. 2, 3, 7-8,

<sup>87</sup> Peña First Report at paras. 9 *et. seq.*; Peña Second Report at paras. 53.

<sup>88</sup> See Questions Raised at the Santa Ana Public Hearing, February 23, 2011, at pp. 1, 2, 4, 7-16, 18, 20-22, 26, 35, 46, 47, 49-52, 64-67, 69, 72, 79 [Exhibit R-054].

<sup>89</sup> See DHUMA Submission at pp. 8, 16.

<sup>90</sup> DHUMA Submission at p. 15.

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Instead, even before the most serious protests erupted, Bear Creek abandoned its project site on May 8, 2011, announcing its decision in a public press statement in the main newspaper in Perú, *La República*.<sup>91</sup> It is clear that the company failed to adequately earn the consent or acceptance of the local communities. Certainly, had Bear Creek achieved the necessary social license, there would not have been tens of thousands of Aymara protesting in the streets to shut down the Santa Ana project.

### **III. Conclusion**

The DHUMA Submission, as a voice for the affected Aymara communities themselves, is a helpful resource for the Tribunal as it evaluates Claimant's conduct and its contributions to the events of 2011. DHUMA's Submission testifies directly to Claimant's insufficient social outreach and the dire consequences that that failure had for Claimant's Santa Ana project. From the beginning, Bear Creek's interactions with the communities have been defective, due to their myopic focus on delivering limited benefits to only those communities whose land Bear Creek needed to directly occupy for its project. Bear Creek ignored, or at the very least failed to address sufficiently, broadly held community concerns about environmental contamination and availability of scarce water resources. The DHUMA Submission makes it clear that Claimant failed to comply with international standards or to acquire the social license necessary to operate a large-scale mining project. DHUMA explains that the result of Claimant's conduct was that the Aymara communities rebelled violently against Bear Creek's presence in the Puno region. The DHUMA Submission is therefore a critical portion of the record before this Tribunal as it assesses Claimant's conduct.

Sincerely,



Stanimir A. Alexandrov  
Marinn Carlson  
*Counsel for Respondent*

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<sup>91</sup> DHUMA Submission at p. 10. Bear Creek Press Release, May 8, 2011 [Exhibit R-429].