

**INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES**

ICSID Case No. ARB/14/21

In the Matter of

BEAR CREEK MINING CORPORATION

Claimant,

v.

THE REPUBLIC OF PERU

Respondent.

BEAR CREEK'S REPLY TO THE *AMICUS CURIAE* SUBMISSION OF DHUMA AND DR. LOPEZ

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Pursuant to Procedural Order No. 1, Annex A, Claimant Bear Creek Mining Company (“Bear Creek”) hereby submits its Reply to the *Amicus Curiae* Submission of the Association of Human Rights and the Environment-Puno (“DHUMA”) and Dr. Carlos Lopez (jointly, the “*Amici*”).

I. INTRODUCTION

1. The *Amicus Curiae* Submission of DHUMA and Dr. Lopez (the “*Amicus* Submission”) portrays Bear Creek as violating international human rights norms, disregarding the rights of indigenous communities in the Puno region, and endangering their welfare, habitat, subsistence, and right to self-determination. The *Amici*’s account of the events surrounding the Government’s unlawful enactment of Supreme Decree 032 would have this Tribunal believe that Bear Creek—a company internationally recognized for its commitment to developing harmonious and respectful relations with the local communities neighboring its projects¹—elected not to engage meaningfully with the indigenous peoples of the Puno region and instead created an environment of misinformation and conflict.

2. The *Amici*’s account of the events is incomplete, unsupported by any credible, competent or even verifiable evidence, skewed by DHUMA’s radical anti-mining position, and therefore inaccurate (**Section II.A**). But even if the *Amici*’s version of the events were accurate (it is not), it implicates the conduct of the Government of Peru, not Bear Creek, and in fact complements Claimant’s position in this arbitration regarding Respondent’s shortcomings (**Section II.B**). In all events, Bear Creek complied with its obligations under Peruvian and international law, and to the extent DHUMA complains that these obligations do not satisfactorily promote the organization’s agenda, these accusations are properly leveled against the international community (and in this case, Peru in particular), not an individual investor like Bear Creek (**Section III**). As the irrefutable evidence shows, Bear Creek engaged meaningfully with local communities and obtained their informed support for the Santa Ana Project (**Section IV**).

¹ **Exhibit C-0230**, 2013 MacCormick Social Responsibility Index at 13 (ranking Bear Creek fourth in MacCormick’s 2013 Social Responsibility Index).

II. THE TRIBUNAL SHOULD DISREGARD THE *AMICI'S* ACCOUNT OF THE FACTS

3. In the *Amicus* Submission, DHUMA makes a number of allegations in support of its claim that “Bear Creek did not obtain the social license to develop its [Santa Ana] project at the time and at present still does not have it.”² Without disclosing any information on DHUMA’s membership, the Aymara communities with which it allegedly works, the individuals who allegedly witnessed the events to which DHUMA testifies, or the sources on which it relies, DHUMA purports to represent authoritatively the voice of the entire Aymara community. Section A, below, explains that DHUMA’s account of Bear Creek’s relations with the indigenous communities of the Puno region is inaccurate and tainted by its anti-mining agenda. Section B explains that even if DHUMA’s version of the facts were accurate (which is not the case), it demonstrates the dissatisfaction of the local communities with the conduct of the Government of Peru, not Bear Creek.

A. THE *AMICI'S* ACCOUNT OF EVENTS IS BIASED, INACCURATE, AND DOES NOT REFLECT THE VIEWS OF THE AYMARA COMMUNITIES

4. The policy objectives and anti-mining position of DHUMA clearly influenced the factual allegations contained in the *Amicus* Submission, which neither reflect reality nor the position of the Aymara population. DHUMA is a non-governmental organization with a radical anti-mining agenda, which it expresses publicly without reserve. To name but one example, in a public post on a social media site, DHUMA wrote that “mining infringes on rights and destroys communities.”³ DHUMA did not qualify this statement by reference to a particular mining project, but voiced its opposition to mining in general. It is impossible to assess DHUMA’s other political links or affiliations since it has failed to provide any information on its activities and membership. As Respondent has pointed out, DHUMA representatives have refused to appear as witnesses in these proceedings,⁴ depriving Claimant of the opportunity to cross-examine them and the Tribunal of the opportunity to assess the veracity of their claims. As a

² Amicus Curiae Brief Submitted by the Association of Human Rights and the Environment-Puno and Dr. Carlos Lopez, Jun. 9, 2016, p. 17 (“*Amicus* Submission”).

³ **Exhibit C-0327**, December 22, 2012 entry in DHUMA Facebook account (stating that “[T]he States always on the side of the companies instead of complying with their duty to protect human and collective rights.”).

⁴ Respondent’s Letter, July 7, 2016, n.12.

result, the Tribunal should not give any weight to the *Amicus* Submission. Nonetheless, Claimant responds to the *Amici*'s most egregious allegations.

5. The crux of DHUMA's accusations against Bear Creek is that the company did not make sufficient effort to engage meaningfully with the indigenous communities in the Puno region. DHUMA builds its thesis on the unsubstantiated mischaracterization of isolated events: (i) a May 18, 2004 meeting with the local communities in relation to the resizing of the Aymara-Lupaca Reserve Area⁵; (ii) Bear Creek's alleged failure to attend a meeting called by the local communities on October 14, 2008⁶; and (iii) the February 2011 public hearing Bear Creek held to engage the local communities with the Santa Ana Project. Although the *Amici*'s allegations regarding all three events are wholly unsubstantiated and lack any foundation,⁷ the *Amici*'s heavy focus on the February 2011 public hearing warrants a more fulsome response. For the reasons set forth below, DHUMA's account of that public hearing is both inaccurate and misleading.

6. The *Amicus* Submission asserts that several of DHUMA's members attended the February 2011 Santa Ana public hearing, which—the *Amici* allege—suffered from various problems or deficiencies. Without identifying its members who allegedly attended the public hearing or providing any contemporaneous documentation in support of its assertions, DHUMA levels seven serious accusations against Claimant regarding the February 2011 public hearing. According to DHUMA, (i) the location at which the hearing was held was too small, meaning that “hundreds of people could not enter the locale”; (ii) Bear Creek ignored the request of

⁵ The *Amici* allege that, at this May 18, 2004 meeting between Ms. Villavicencio, the “mayor of the municipality of the district of Huacullani and community authorities,” Bear Creek disseminated “confusing and misleading” information. *Amicus* Submission, pp. 3-4. However, the *Amici* do not provide any evidence in support of their mischaracterization of the meeting. They do not claim to have attended personally the meeting and cite only to the minutes of the “Agreement of political and communal authorities and general population of the district of Huacullani,” which are not attached to the *Amicus* Submission. In all events, the resizing and ultimate dissolution of the Reserve Area was based on the recommendations of a Technical Commission appointed by the Government of Peru, and was entirely within the purview of the Peruvian State. To the extent the *Amici* take issue with the resizing and dissolution of the Reserve Area, these matters are properly raised with Respondent, not Bear Creek.

⁶ The *Amici* allege that Bear Creek's failure to attend a meeting in the main square of the District of Huacullani on October 14, 2008 supposedly called by the local communities “to seek dialogue with representatives of Bear Creek” prompted the incident at the Santa Ana campsite on that same day. *Amicus* Submission, pp. 3-5. This assertion lacks any foundation. The *Amici* identify no basis for this statement—no documents, no witnesses—and DHUMA does not assert that its members attended this alleged meeting. Regardless, Bear Creek was never invited to a meeting with the local population on October 14, 2008, and therefore cannot be faulted for not attending it.

⁷ See *supra* n.5 and n.6.

“many residents” who “complained and suggested that the workshop be held in the Huacullani Plaza de Armas, so that everyone could participate”; (iii) the Spanish/Aymara translation was “very complicated and difficult to follow”; (iv) “the moderator requested that questions about the project on the part of participants be asked in writing and in Spanish”; (v) “there were many cases in which certain people were not allowed to speak”; (vi) “there was a deep feeling of nonconformity in most of the attendees”; and (vii) following the public hearing, “there were between 400 and 500 people in the square protesting against the Project[.]”⁸ As members of the indigenous communities who attended the meeting (and the Government of Peru itself⁹) affirm, these accusations are untrue. These allegations are also at odds with the detailed testimony of Elsiario Antunez de Mayolo, Bear Creek’s Chief Operating Officer, who attended the public hearing.¹⁰

7. The public hearing was held in the largest available locale—Plaza de Armas, which, according to DHUMA, was the locale requested by “many residents”—and Bear Creek made every effort to expand its size to ensure maximum participation.¹¹ Indeed, Peru’s list of participants at the Public Hearing shows that at least 729 community members attended.¹² As Braulio Morales Choquecachua, former Mayor of the District of Huacullani and Director of the Local Educational Management Unit of the Province of Chucuito, and Faustino Limatapa Musaja, former Governor of the District of Huacullani and former leader of the Challacollo community, who both attended the public hearing, state, “the public hearing regarding the Santa Ana project was to be held in another venue, but it was later thought that the best venue, the largest, was the one in the Governor’s Office of Huacullani, located in the district’s own Plaza de Armas, explaining why the hearing was held in that venue.”¹³ Sixto Vilcanqui Mamani, former

⁸ *Amicus* Submission, pp. 5-8.

⁹ **Exhibit C-0328**, Ministry of Energy and Mines, Press Release 093-2011, Mar. 2, 2011.

¹⁰ *See* Witness Statement of Elsiario Antunez de Mayolo, May 28, 2015, ¶¶ 13-16 (“Antunez de Mayolo Witness Statement”; Rebuttal Witness Statement of Elsiario Antunez de Mayolo, Jan. 8, 2016, ¶¶ 24-32 (“Antunez de Mayolo Rebuttal Witness Statement”).

¹¹ **Exhibit C-0329**, Letter from Braulio Morales Choquecachua and Faustino Limatapa Musaja, Aug. 8, 2016, p. 1; **Exhibit C-0330**, Letter from King & Spalding and Miranda & Amado, inviting Messrs. Morales and Limatapa to comment on the *Amicus* Submission, Aug. 3, 2016.

¹² **Exhibit R-55**, List of Participants at the Public Hearing, Feb. 23, 2011.

¹³ **Exhibit C-0329**, Letter from Braulio Morales Choquecachua and Faustino Limatapa Musaja, Aug. 8, 2016, p. 1.

Council Member of the District of Huacullani, who also attended the public hearing, confirms this and adds that “the mining company [Bear Creek] had set up a canopied area complete with chairs, giant screens and speakers, more than doubling the venue’s capacity, which allowed people who had not even registered or formally entered the Public Hearing to see and hear all presentations and questions being made and asked.”¹⁴ There were no requests to change the locale, and no indication that it did not provide sufficient capacity to accommodate all who wished to attend.¹⁵ In this regard, former Council Member Vilcanqui states:

[A]ll attendees could participate, even people coming from other districts and provinces, including that certain group of persons that opposed the project that came from other places, not from the area’s communities. Everyone participated. **At no point in time during the Hearing was it raised that it should be held in another venue—we have no idea why the Association assumes there was a disagreement in that respect.**¹⁶

8. DHUMA’s claim that the Aymara/Spanish translation was difficult to follow is similarly untrue. As community members who attended the hearing state, “[t]he translation (interpreting) services were provided by a well-known Aymara professional, who had provided very clear interpretation services in other workshops... He provided these simple explanations of technical issues in order to best explain the subject to all attendees. We are unaware of any complaints or grievances made with respect to the Aymara language, this was not an issue, and no one brought this up either during or after the hearing.”¹⁷ There were also no restrictions on

¹⁴ **Exhibit C-0331**, Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016, p. 1; **Exhibit C-0332**, Letter from King & Spalding and Miranda & Amado, inviting Mr. Vilcanqui to comment on the *Amicus* Submission, Aug. 3, 2016.

¹⁵ **Exhibit C-0329**, Letter from Braulio Morales Choquecachua and Faustino Limatapa Musaja, Aug. 8, 2016, p. 2 (“The Public Hearing held by the Santa Ana mine took place in the Plaza de Armas of Huacullani, in the Government’s Office’s venue, and giant canopies were installed outside of the venue with audio and video equipment so that anyone interested in the hearing could attend and participate. We do not understand the remarks made by DHUMA—how can one complain that a hearing should be held in a place where it was precisely being held? This makes no sense, unless they were misinformed of the facts, which seems to be the source of the error with respect to their affirmations.”); **Exhibit C-0331**, Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016, p. 2 (“The summons for the Public Hearing in connection with the environmental study for the Santa Ana mine were done in a timely manner, and there were no complaints made with respect to changing the venue... No authority was told that it was desired for the Public Hearing to be held somewhere else; on the contrary, the place where it was held offered all the conveniences so that everyone could attend.”); **Exhibit R-055**, List of Participants at the Public Hearing, Feb. 23, 2011 (recording 729 people in attendance).

¹⁶ **Exhibit C-0331**, Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016, p. 2 (emphasis added).

¹⁷ **Exhibit C-0331**, Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016, p. 1. *See also* **Exhibit C-0329**, Letter from Braulio Morales Choquecachua and Faustino Limatapa Musaja, Aug. 8, 2016, p. 2 (“We know that the interpreter was an Aymara native by birth, and spoke the language very well, providing many examples.”).

questions being asked orally or in writing, and questions were accepted in Spanish and Aymara, and translated accordingly.¹⁸

9. DHUMA’s claim that there were many cases in which certain individuals were not allowed to speak or ask questions is equally unfounded. The organization does not mention who was prevented from speaking or why, and Messrs. Morales and Limatapa correctly note that “[i]t would be extremely important for DHUMA to indicate who was not permitted to speak, because everyone that wished to intervene, whether against, doubtful, in favor, proposing or asking about the project, was allowed to participate.”¹⁹ It is unclear from where DHUMA has gathered its “facts” and it is similarly unclear what basis DHUMA has for alleging that “there was a deep feeling of dissatisfaction in most of the attendees [of the public hearing].”²⁰ To the contrary, community members confirm that:

We did not observe this sentiment of discontent [described by the Association] amongst the majority of the attendees. The communities from Huacullani wanted the Santa Ana project to be developed. If we hadn’t had [sic] wanted this, we wouldn’t have allowed [the company] to

¹⁸ **Exhibit C-076**, Minutes of the Public hearing – Mineral Subsector No. 007-2011/MEM-AAM – Public Hearing for the ESIA of the “Santa Ana” Project, Feb. 23, 2011 (indicating at least 20 questions posed orally during the public hearing); **Exhibit C-0331**, Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016, p. 1 (“We believe that the persons signing the *Asociación de Derechos Humanos y Medio Ambiente*’s Report were not well-informed, because the Public Hearing took place in several phases, which, as explained to us, was in compliance with legal regulations: there was a phase for written questions, another for oral questions, and another to submit documents or reports. Indeed, this is how the hearing proceeded—there were questions provided in writing, afterward there were oral questions, and even the authorities participated during this stage. This explains why the Hearing lasted for several hours even after the Santa Ana mine had made their presentation. When a question was asked in Spanish, it was translated into Aymara, and when the question was asked in Aymara, it was translated into Spanish, and the answers provided in Spanish were translated into Aymara—there were no complaints or grievances whatsoever in that regard[.]”); **Exhibit C-0329**, Letter from Braulio Morales Choquecachua and Faustino Limatapa Musaja, Aug. 8, 2016, p. 2 (“The hearing’s head committee, comprising representatives of the Ministry of Energy and Mines, indicated that there would be one phase for written questions, and another for oral questions... There were abundant questions, asked in the Aymara language. The Environmental Prosecutor himself, who signed the hearing’s minutes, had no problems in responding these questions and participated speaking in Aymara. All of this was filmed and can be verified with the audio and video recordings—we fail to understand why the DHUMA’s report says something else. It is likely that they were not present at the hearing and that their report is based on comments that are untrue.”).

¹⁹ **Exhibit C-0329**, Letter from Braulio Morales Choquecachua and Faustino Limatapa Musaja, Aug. 8, 2016, p. 3. **Exhibit C-0331**, Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016, p. 2 (“We know that the entire Hearing was recorded, and we do not recall anyone that was prevented from speaking up or expressing him or herself. The mayor of Desaguadero arrived long after the Hearing had begun, and even though he is not from the project’s zone, he [was allowed to] give a long speech. Thus, anyone who wished to intervene could. The Hearing ended only when there were no more interventions.”).

²⁰ *Amicus* Submission, p. 7.

conduct all that exploration work for several years. It was people outside of the communities that did not want the project to move forward, and they did not comprise the majority... **What the population wanted was to continue learning more about the project and continue with the programs that were being developed with Bear Creek’s Santa Ana mine. We fail to understand why the people from the Association speak of discontent; they do not know what the communities were thinking or wanted.**²¹

10. Regarding DHUMA’s contention that there was a demonstration of 400 or 500 people following the public hearing on the Santa Ana Project, there is simply no support for this assertion.²² Contemporaneous documents issued by the competent Peruvian State authority (the Ministry of Energy and Mines) confirm that the public hearing “ended satisfactorily.”²³

11. Finally, for the avoidance of doubt, it must be clarified that, contrary to DHUMA’s insinuations, Bear Creek did not bribe any members of the indigenous communities and did not offer gifts to create an obligation of reciprocity.²⁴ Former Council Member Mr. Vilcanqui clarifies the matter succinctly:

In addition to foregoing, it is important to note that the *Asociación de Derechos Humanos y Medio Ambiente*’s Report states that we the Authorities received bread and fruit in order to attend the Public Hearing—this is an outrageous lie. **No one received bribes or gifts, or ponchos, during the Hearing. To make such a statement about the**

²¹ **Exhibit C-0331**, Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016, p. 2 (emphasis added).

²² **Exhibit C-0331**, Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016, pp. 2-3 (“It is not true that there was a protest with 400 or 500 people, nor was there an enormous group comprising that amount of people that could not attend the Hearing. Anyone who desired to participate and hear the Hearing could do so thanks to the equipment that had been installed outside of the venue. The group of people that were not from the community—after the hearing ended and all documents were signed with the authorities from the Ministry of Energy and Mines—began shouting and haranguing, but that was contained within their group and amongst each other—the local inhabitants from the communities were not involved in that protest, albeit they were surprised by the aggressive tone with which the harangues were delivered. We do not know from where the Association obtained these numbers and facts.”); **Exhibit C-0329**, Letter from Braulio Morales Choquecachua and Faustino Limatapa Musaja, Aug. 8, 2016, p. 3 (“As indicated above, those who were located outside of the Governor’s Office’s venue could participate in the hearing because audio and video equipment had been installed. And a large majority of those persons were the area’s community members—it was not the community members who summoned or participated in any march—what took place was a march with a lot of yelling and with the participation of a small amount of people from other communities outside of the area, far from the 400 or 500 claimed by the DHUMA. Many of those marching were persons that had been inside the main room of the Governor’s Office and later stepped outside to participate in that march.”).

²³ **Exhibit C-0328**, Ministry of Energy and Mines, Press Release 093-2011, Mar. 2, 2011.

²⁴ *Amicus* Submission, pp. 5-6.

Authorities of the communities signifies a tremendous disrespect and ignorance that, rather, demonstrates a lack of respect toward human rights, contrary to what [the association's] name claims to represent.

We hope you can inform us with respect to these reports that we were unaware of and which are untrue. The Ministry of Energy and Mines that was present [at the hearing] can confirm that what the report claims is false, and we understand that it falls upon it to not permit the facts to be distorted and, with it, the good name of the communities.²⁵

12. It is thus unclear from where DHUMA derives its “facts” and whose views it represents, but what is clear is that the views presented in the *Amicus* Submission do not reflect those of the Aymara community at large and do not accurately describe the events surrounding the Santa Ana Project.

B. THE *AMICI*'S ACCOUNT OF EVENTS, IF BELIEVED, DEMONSTRATES THE COMMUNITIES' DISSATISFACTION WITH THE GOVERNMENT OF PERU, NOT BEAR CREEK

13. Even if the *Amici*'s mischaracterization of the facts surrounding the Santa Ana Project were deemed accurate (it is not), it only highlights Peru's shortcomings. Indeed, a common thread of dissatisfaction with the Government of Peru's conduct pervades the entire *Amicus* Submission. In the first paragraph, the *Amici* state:

During the 2000s, the Peruvian state granted a large number of mining concessions in the territories of Aymara and Quechua (indigenous peoples) peasant communities in the Department of Puno. ... This increase in the presence of mining in the department and region of Puno has led to an important movement of rejection by the population of Puno.²⁶

According to the *Amici*, it was the Government's grant of a large number of mining concessions in the territories of the indigenous communities that allegedly triggered an anti-mining sentiment in the population of Puno.

14. With respect to the Santa Ana Project, the *Amici* then complain that the local communities “only heard through third parties and through the news in the Official Gazette *El*

²⁵ **Exhibit C-0331**, Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016, p. 3 (emphasis added).

²⁶ *Amicus* Submission, pp. 1-2.

Peruano that rights had been granted over their lands[.]”²⁷ This purported lack of adequate communication with the local communities regarding the granting of mining concessions to Ms. Villavicencio or the issuance of Supreme Decree 083 is an unsupported allegation: the *Amici* do not cite any documentation or witness testimony, and offer no evidence in support of this claim.

15. Even if this allegation were true, this would be evidence of Peru’s failure as a State. Peru is responsible for informing its citizens of State decisions, acts of public administration, and their effects. If Peru was required but failed to consult with the local communities *before* granting rights over their lands—either by awarding the Santa Ana mining concessions to Ms. Villavicencio or by issuing Supreme Decree 083 in favor of Bear Creek—and if Peru failed to inform these communities *after* it granted these rights, then any resulting fall-out from this lack of communication and transparency falls on Peru, not Claimant. Ms. Villavicencio followed the procedures set forth under Peruvian law for applying for the mining concessions, and Bear Creek followed the mandated procedures for obtaining a declaration of public necessity.²⁸

16. The *Amici*’s discussion of what they refer to as the “Indigenous socio-environmental protest: the ‘Aymarazo’” also highlights the dissatisfaction of the local population with the Government although the *Amici* attempt to blame the events on Bear Creek instead.²⁹ According to the *Amici*, “[t]he protests were noisy in order **to capture the attention of the authorities** and they decided to carry out blockades in Desaguadero, and later decided to march to the city of Puno....”³⁰ The *Amici* repeat their position that the protests were intended to engage the Peruvian authorities several times in their description of the Aymarazo,³¹ and “emphasize[] that the Aymara population had carried out all possible actions including administrative procedures such as memorials, demands, draft laws, project profiles and others, through the regional government of Puno and the central government. These actions were

²⁷ *Id.* at 5.

²⁸ Claimant’s Reply on the Merits and Counter-Memorial on Jurisdiction, Jan. 8, 2016, Section II.B (“Claimant’s Reply Memorial”).

²⁹ *Amicus* Submission, pp. 8-11.

³⁰ *Id.* at 9 (emphasis added).

³¹ *Id.* (stating that the protesters sought “to be heard and capture attention in order to be attended by the authorities... [and that t]he demonstrations were mainly concentrated in the town of Desaguadero in the south of the department and in the city of Puno itself. The aim was to capture the authorities’ attention.”).

unsuccessful and the population therefore decided to begin protest actions.”³² On the *Amici*’s own account, the protests were spawned by the failures of the Peruvian State and sought to attract the attention of the Peruvian authorities.

17. The political, anti-Government nature of the protests is also confirmed by the looting and burning, on May 26, 2011, of various public institutions in the city of Puno, including SUNAT (the Peruvian tax authority), the *Controlería* (the State’s office of internal control), the *Gobernación* (the seat of the regional government), and *Aduanas* (the Customs office).³³ The protesters specifically targeted these Government buildings, and President Alan García himself confirmed that political interests were behind the protests.³⁴ Prime Minister Rosario Fernández also confirmed that the protests were political in nature and that extremists instigated them.³⁵

III. BEAR CREEK COMPLIED WITH ITS OBLIGATIONS UNDER PERUVIAN AND INTERNATIONAL LAW

18. The *Amici* allege that Bear Creek failed to comply with “[s]ocial responsibility norms for businesses regarding human rights issues and respect for the environment[,]”³⁶ in particular the obligation to carry out a process of human rights due diligence set forth in the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respondent and Remedy” Framework (the “UN Guiding Principles”) and the obligation to respect the human rights of indigenous communities recognized in Convention 169 of the International Labour Organization (“ILO Convention No. 169”) and in the United Nations

³² *Id.*

³³ **RWS-001**, Witness Statement of Fernando Gala, Oct. 6, 2015, ¶ 25; **Exhibit R-63**, “Community Members Close Borders,” *La República*, May 11, 2011; **Exhibit R-64**, “Protesters March towards Puno to Demand an Ordinance,” *La República*, May 12, 2011; **Exhibit R-71**, “Strike Affects Bolivian Exports,” *La República*, May 20, 2011; **Exhibit R-73**, “Aymara Rage Is Out of Control in Puno,” *La República*, May 27, 2011; **Exhibit R-78**, “Protesters Threat To Reinstate Protests,” *La República*, Jun. 8, 2011.

³⁴ **Exhibit C-0236**, *El diálogo primará en Puno*, *EL PERUANO*, May 27, 2011.

³⁵ **Exhibit C-0097**, Interview of Prime Minister Rosario Fernández, *Mira Quien Habla*, Willax TV, May 31, 2011.

³⁶ *Amicus* Submission, p. 11. The *Amici* maintain that Bear Creek is obligated to comply with “international standards with regard to social corporate responsibility” under the Canada-Peru Free Trade Agreement by virtue of Article 810, but this provision states only that Peru and Canada “should encourage” business enterprises operating in their respective territories “to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies[.]” **Exhibit C-0001**, Chapter Eight of the Free Trade Agreement between Canada and the Republic of Peru signed May 29, 2008 and entered into force on August 1, 2009, Art. 810.

Declaration on the Rights of Indigenous Peoples.³⁷ The *Amici*, however, do not allege any concrete violations of specific legal requirements or standards, and their blanket statement that Bear Creek failed to engage in a positive relationship with surrounding communities wholly ignores all of Bear Creek’s outreach programs and efforts, which the Government of Peru approved and certified as in compliance with applicable standards and legal requirements.³⁸ If the obligations and standards set forth in international and Peruvian law are insufficient to promote the *Amici*’s agenda, the present arbitration is not the appropriate forum to impose additional, new requirements on Bear Creek and fault the company retroactively for not complying with standards and requirements that did not exist at the relevant time.

19. Under Peruvian law, Supreme Decree No. 028-2008-EM (“Supreme Decree 028”) and Ministerial Resolution No. 304-2008-MEM/DM (“Resolution No. 304”) regulated the process by which Bear Creek was to develop and implement a citizen participation plan to discuss with the neighboring indigenous communities the scope and impact of the Santa Ana Project.³⁹ Article 4 of Supreme Decree 028 incorporated international law obligations under ILO Convention No. 169,⁴⁰ and thus compliance with the requirements of Supreme Decree 028, by definition, entails compliance with ILO Convention No. 169.

20. MINEM’s General Directorate for Environmental Mining Affairs (“DGAAM”) approved the Executive Summary of Bear Creek’s Environmental and Social Impact Assessment (“ESIA”),⁴¹ which provided an exhaustive description of the entire contents of the ESIA (the latter which totaled nearly 3,000 pages), as well as Bear Creek’s Citizen Participation Plan (“PPC”),⁴² by which Bear Creek proposed community participation mechanisms for continued interaction with the local communities.⁴³ Both were prepared in accordance with Peruvian mining regulations by Ausenco Vector, a world-class mining consultant. Again, any

³⁷ *Amicus* Submission, pp. 12-15.

³⁸ Claimant’s Reply Memorial, ¶¶ 66-105.

³⁹ Expert Report of Hans A. Flury, Jan. 5, 2016, ¶ 70 (“Flury Expert Report”); Claimant’s Reply Memorial, ¶ 72.

⁴⁰ Flury Expert Report, ¶¶ 71-72.

⁴¹ **Exhibit C-0071**, Ausenco Vector, Environmental Impact Assessment Report for the Santa Ana Project, Dec. 2010, p. 3.

⁴² **Exhibit C-0155**, Ausenco Vector, *Plan de Participación Minera* (“PPC”) de Bear Creek.

⁴³ **Exhibit C-0073**, MINEM Resolution No. 021-2011/MEM-AAM, Jan. 7, 2011.

dissatisfaction with these processes is properly raised with the Government of Peru, not Bear Creek.

21. Bear Creek far exceeded the requirements of domestic and international law, which the *Amici* fail to address. The *Amici* ignore that Bear Creek organized five workshops with the communities to introduce the indigenous peoples to the Santa Ana Project, even though Resolution No. 304 requires only one such workshop.⁴⁴ The *Amici* ignore that between 2008 and 2011, Bear Creek held over 120 additional workshops in 18 communities to engage the communities with the Santa Ana Project.⁴⁵ The *Amici* also ignore that Bear Creek conducted numerous guided visits and participatory monitoring events,⁴⁶ and that, with the communities' approval, Bear Creek implemented a large-scale rotational work program to allow Bear Creek to employ, at times, over 100 community members to assist with exploration activities, providing much needed employment opportunities to the impoverished local communities.⁴⁷

22. Bear Creek regularly informed the relevant Peruvian authorities of its activities, and DGAAM staff even visited the project area several times for the purpose of monitoring Bear Creek's relationship with the communities.⁴⁸ Representatives of the Peruvian State participated in the workshops that Bear Creek organized for the communities and never raised any concerns that Bear Creek's community relations programs were insufficient or otherwise unsatisfactory.⁴⁹ The Peruvian Ministry of Environmental Assessment and Monitoring Agency ("OEFA") also visited the project site and reported that the relationship between Bear Creek and the local

⁴⁴ **Exhibit R-153**, MINEM Resolution No. 304-2008-MEM/DM, Jun. 24, 2008, Art. 13; **Exhibit C-0161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011; Claimant's Reply Memorial, ¶ 73.

⁴⁵ **Exhibit C-0155**, Ausenco Vector, *Plan de Participación Ciudadana* ("PPC") de Bear Creek, Annex 2.

⁴⁶ Antunez de Mayolo Rebuttal Witness Statement, ¶ 82.

⁴⁷ Claimant's Reply Memorial, ¶ 73; Witness Statement of Andrew T. Swarouth, May 28, 2015, ¶ 40; Antunez de Mayolo Witness Statement, ¶ 7.

⁴⁸ **Exhibit C-0155**, Ausenco Vector, *Plan de Participación Ciudadana* ("PPC") de Bear Creek, Annexes 3 and 4; **Exhibit C-0157**, Letter from C. Rios Vargas, Bear Creek, to F. Ramírez, MINEM, July 6, 2009; **Exhibit C-0158**, Letter from E. Antunez de Mayolo, Bear Creek, to F. Ramírez, MINEM, Oct. 19, 2010; **Exhibit C-0159**, Letter from F. Ramírez, MINEM, to V. Paredes Argandoña, Regional Directorate of Energy and Mines (*Dirección Regional de Energía y Minas* or "DREM"), Oct. 28, 2010; **Exhibit C-0160**, Letter from E. Antunez de Mayolo, Bear Creek, to F. Ramírez, MINEM, Nov. 18, 2010.

⁴⁹ Claimant's Reply Memorial, ¶ 77.

communities was “harmonious.”⁵⁰ The OEFA returned to the project site in November 2011 and found, again, that the communities close to Santa Ana continued to support both Bear Creek and the Project.⁵¹ Bear Creek thus complied with Peruvian law and standards on establishing community relations for the Santa Ana Project, which, as noted above, also incorporate certain international standards such as obligations under ILO Convention 169, and Peru itself confirmed Bear Creek’s compliance when it approved the executive summary of the company’s ESIA and the PPC.

23. The *Amici* have not identified with specificity any additional international obligations and standards with which Bear Creek allegedly failed to comply. Consequently, Bear Creek cannot respond to these hollow assertions. Bear Creek can only re-emphasize that it is and always has been committed to developing peaceful and respectful relationships with local communities and has been recognized in the industry for this commitment: Bear Creek was ranked fourth in MacCormick’s 2013 Social Responsibility Index, which reviewed the top 100 junior mining companies by market capitalization listed on the TSXV.⁵² Bear Creek’s corporate social responsibility and sustainable development strategy is to build strong, harmonious relations with communities impacted by its projects in order to gain a social license to operate⁵³ and, in support of this aim, invests in community programs that directly involve citizens in the conception, delivery and management of such projects.⁵⁴ As discussed in the following section, contrary to the *Amici*’s claim, Bear Creek obtained the communities’ support in the case of the Santa Ana Project.

IV. THE LOCAL COMMUNITIES SUPPORTED THE SANTA ANA PROJECT

24. Contrary to the unsubstantiated allegations of the *Amici*, the communities surrounding the Santa Ana Project repeatedly expressed their support for Bear Creek and the

⁵⁰ **Exhibit C-0143**, OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, Jan. 2011, pp. 4, 31. The OEFA Report describes Bear Creek’s community relations as “good.” The other categories are “bad” and “regular.”

⁵¹ **Exhibit C-0179**, *Acta de Supervisión Ambiental*, Nov. 25, 2011; **Exhibit C-0180**, OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, Dec. 31, 2011, p. 15.

⁵² **Exhibit C-0230**, 2013 MacCormick Social Responsibility Index, at 13.

⁵³ **Exhibit C-0067**, Bear Creek Mining Corporation, *Community Engagement*.

⁵⁴ **Exhibit C-0068**, Bear Creek Mining Corporation, *Community Initiatives*.

Project. As previously briefed, Bear Creek signed agreements with the communities, formalizing the communities' support and the company's commitment to provide jobs, assist them in the development of sustainable projects, and respect the indigenous peoples' way of life.⁵⁵ The Peruvian Government recognized the harmonious and cooperative relationship between Bear Creek and the indigenous communities in a report OEFA issued following its December 2010 site visits, stating that “[r]elations with the communities located around the Santa Ana Exploration Project have not caused any kind of social conflict, in what can be construed as a very friendly relationship[,]”⁵⁶ and community members independently expressed their support for Bear Creek and the Santa Ana Project on many occasions and in many ways.

25. For example, in March 2011, representatives of the Huacullani District denounced the protests led by Walter Aduviri and the *Frente de Defensa de Recursos Naturales de la Región de Puno* (“FDRN”) related to natural resource projects, and the March 20, 2011 ordinance of the Puno Regional Council purporting to prohibit all mining activities in the Department of Puno.⁵⁷ Members of the communities continued to negotiate harmoniously with Bear Creek and even organized a general assembly in April 2011 to discuss the transfer of land to Bear Creek for the Santa Ana Project.⁵⁸ Even after Peru issued Supreme Decree 032, members of the communities “asked [OEFA] about the date of return of the Santa Ana Mining Project, and others expressed their hope for a prompt return.”⁵⁹

26. Local authorities wrote letters to the Peruvian Government, requesting the return of the Project, explaining that the Santa Ana Project was the driving force behind the communities' economic development plans that were frustrated by the suspension of the

⁵⁵ See, e.g., **Exhibit C-0177**, Agreement between Condor Ancocahua and Bear Creek, May 23, 2009; **Exhibit C-0178**, Agreement between Ancomarca and Bear Creek, July 2, 2009.

⁵⁶ **Exhibit C-0179**, *Acta de Supervisión Ambiental*, Nov. 25, 2011, p. 4.

⁵⁷ **Exhibit C-0184**, *Comunidades de Huacullani Apoyan a Minera Santa Ana*, CORREO PUNO PRENSA PERU, Mar. 23, 2011; **Exhibit C-0083**, *Rechazan intervención de dirigentes de zonas aledañas en tema de minera Santa Ana*, LOS ANDES, Mar. 29, 2011; and **Exhibit C-0185**, *Huacullani en contra de marcha antiminera*, LA REPÚBLICA, Mar. 29, 2011.

⁵⁸ **Exhibit C-0186**, *Acta de Asamblea General Extraordinaria de la Comunidad Campesina de Concepción de Ingenio*, Apr. 2, 2011; Antunez de Mayolo Rebuttal Witness Statement, ¶ 75.

⁵⁹ **Exhibit C-0180**, OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, Dec. 31, 2011, p. 2.

Project.⁶⁰ The community members explained that they did not comprehend the Government's decision to suspend the Project, noting that the Company had provided the community with social programs, activities, and workshops, and had conducted a public hearing with a majority of the community expressing its support for the Santa Ana Project.⁶¹ Community members reiterated these sentiments again in subsequent letters to the Government,⁶² and to this day, maintain that Bear Creek's community relations programs were successful:

The communities from Huacullani wanted the Santa Ana project to be developed. If we hadn't had [sic] wanted this, we wouldn't have allowed [the company] to conduct all that exploration work for several years. It was people outside of the communities that did not want the project to move forward, and they did not comprise the majority... **What the population wanted was to continue learning more about the project and continue with the programs that were being developed with Bear Creek's Santa Ana mine.** We fail to understand why **the people from the Association** speak of discontent; they **do not know what the communities were thinking or wanted.**⁶³

⁶⁰ **Exhibit C-0118**, Memorandum from Members of the Huacullani District to the Prime Minister of Perú, MINEM and Bear Creek Mining, *Memorial Por El Desarrollo y La Inclusión*, May 15, 2013 ("Our plans and desires were directed to develop the livestock, agriculture, craftwork and commercial potential for which we counted with the engine that meant the Santa Ana mining project which deposit is located in Huacullani and that would also help for the development of our neighboring brothers, such as the province of Chucuito and the region of Puno, both for the sharing of the mining tax and the royalties and for the developments plans that would for now be already under development with the Santa Ana mine.").

⁶¹ *Id.*

⁶² **Exhibit C-0119**, Memorandum from Members of the Huacuallni District to MINEM, *Reactivación del Proyecto Santa Ana*, Oct. 27, 2013; **Exhibit C-0120**, Memorandum from Members of the Huacuallni District to Prime Minister of Perú, MINEM and Bear Creek Mining, *Reiterativo Por El Desarrollo y La Inclusión*, Jan. 24, 2014.

⁶³ **Exhibit C-0331**, Letter from Sixto Vilcanqui Mamani, Aug. 8, 2016, p. 2 (emphasis added).

27. In summary, and contrary to the *Amici*'s assertions, DHUMA's account of the events that took place surrounding the development of the Santa Ana Project does not represent the views and opinions of the Aymara people and does not reflect the truth of what actually took place, as proven by contemporaneous documentation and evidence. Bear Creek engaged in meaningful and extensive community relations programs and complied with its obligations under international and Peruvian law, as the Government of Peru itself confirmed at the time.

August 18, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'H. Burnett', with a long horizontal flourish extending to the right.

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