

**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.**

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**REBUTTAL WITNESS STATEMENT OF ANDREW T. SWARTHOUT**

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1. My name is Andrew T. Swarthout. I submit this rebuttal witness statement in response to portions of the Republic of Peru’s (“Peru”) Counter-Memorial on the Merits and Memorial on Jurisdiction dated October 6, 2015 (the “Counter-Memorial”), including the Witness Statements of Luis Fernando Gala Soldevilla and César Zegarra, and the Expert Reports of Antonio Alfonso Peña Jumpa, Luis Rodríguez-Mariátegui Canny, Professor Graham Davis and the Brattle Group, and SRK Consulting.

2. As I explained in my first witness statement of May 28, 2015 (the “First Witness Statement”), I currently serve as President, CEO, and Director of the Claimant in this arbitration, Bear Creek Mining Corporation (“Bear Creek” or the “Company”). As such, I am familiar with the facts and circumstances that concern the dispute referenced above.

**I. BEAR CREEK IS AN EXPERIENCED MINING COMPANY, INCLUDING IN THE CONSTRUCTION AND OPERATION OF MINES**

3. Peru attacks Bear Creek by suggesting that it lacks mining experience.<sup>1</sup> This is untrue. The individuals who formed the Company, and the people whom we then hired to run it, have a wealth of mining experience, including in the construction and operation of mines in Peru. To portray Bear Creek as an inexperienced mining novice, as Peru attempts, is like suggesting that a law firm that was formed recently by experienced and seasoned trial attorneys has no experience conducting trials. It simply does not make sense.

4. I have over 40 years of mining experience, and spent many years of my career in Peru. I also have specific experience constructing and operating mines. For example, in 1979, while at Kennecott Minerals (later a division of British Petroleum), I oversaw the successful development of the US\$ 30 million expansion of the Bolaños silver mine in Jalisco, Mexico, as well as the initiation of production at the Rawhide silver and gold heap leach project in Nevada, a project that was similar in design to the Santa Ana mining project (the “Santa Ana Project” or “Santa Ana”). As I previously testified, I left Kennecott to found Socorro Mining Company in 1985 and successfully oversaw the design, construction, and operation of three silver and gold

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<sup>1</sup> Respondent’s Counter-Memorial on the Merits and Memorial on Jurisdiction, October 6, 2015 (“Respondent’s Counter-Memorial”), ¶¶ 22 *et seq.*

heap leach mines in Mexico and the U.S.<sup>2</sup> These three mines were all similar in design to the Santa Ana Project and produced significant amounts of silver and gold over the following years. Moreover, as I also previously testified, I was the Qualified Person at Southern Peru Copper Corporation (“SPCC”),<sup>3</sup> one of the largest and most respected copper mining companies in Peru, in connection with the raising of US\$ 700 million for the expansion of the Cuajone Project, one of the largest copper mines in Peru, located in Moquegua, which is still in production to this day.<sup>4</sup>

5. The other 13 partners who founded Bear Creek with me also had substantial mining experience, including in the construction and operation of mines.<sup>5</sup> For example, Kevin Morano (who sits on Bear Creek’s Board of Directors) was the General Manager of the ASARCO Ray Complex in Arizona. ASARCO is one of the largest mining companies in North America and the Ray Complex is one of the largest copper mines in the Southwestern United States, *i.e.*, a 250,000 ton/day open pit mine with a 30,000 ton/day concentrator, a 103 million pound/year solvent extraction-electrowinning operation, and associated maintenance, warehouse and administrative facilities. Mr. Morano was also the longstanding Chief Financial Officer for ASARCO and was later promoted to President and Chief Operating Officer. Moreover, he was a director of Apex Silver during the construction and start-up of San Cristobal, located in Bolivia, the largest silver producing mine in Bolivia, and one of the largest in the world. In that connection, he was intimately involved in the financing and the engineering, procurement and construction management (“EPCM”) phases of San Cristobal.

6. Another founding partner, Charles Smith, had served previously as CEO of SPCC. Prior to that, he served as General Manager of the Cuajone and Toquepala copper mines

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<sup>2</sup> Witness Statement of Andrew T. Swarthout, May 28, 2015, ¶¶ 5-6 (“First Swarthout Witness Statement”).

<sup>3</sup> A “Qualified Person” is defined by National Instrument 43-101, Canada’s national instrument for Standards of Disclosure for Mineral Products and means an individual who, among other things: (a) is an engineer or geoscientist with a university degree, or equivalent accreditation, in an area of geoscience, or engineering, relating to mineral exploring or mining, (b) has at least five years of experience in mineral exploration, mine development or operation, or mineral project assessment, or any combination of these, that is relevant to his or her professional degree or area of practice, (c) has experience relevant to the subject matter of the mineral project and the technical report, and (d) is in good standing with a professional association. **Exhibit C-0138**, National Instrument 43-101, *Standards of Disclosure for Mineral Projects, Form 43-101F1* Technical Report and Related Consequential Amendments, Jun. 24, 2011.

<sup>4</sup> First Swarthout Witness Statement, ¶ 8.

<sup>5</sup> *Id.*, ¶ 10.

(some of the largest mines in Peru) for about 10 years. In that capacity, he was responsible for all aspects of the mines' production, concentration, and product sales. Previously, he was General Manager of Inspiration Copper's Pinto Valley Mining Operation, an open pit copper mine located in Pinal County, Arizona. As for Richard deJ. Osborne (also a founding partner of Bear Creek), he served as CEO of ASARCO for about 15 years. Grupo Mexico acquired ASARCO (including SPCC) in November 1999. ASARCO controlled Northern Peru Mining Corporation, which operated the Quirivilca silver lead zinc copper mining complex until its sale to Pan American Silver in 1996.

7. When Bear Creek became a public company and listed on Canada's TSX Venture Exchange, it raised US\$ 6 million in its Initial Public Offering (and not US\$ 7 million as I stated in my First Witness Statement).<sup>6</sup> This was twice as much as compared to what most other mining companies raised at the time (the average figure was approximately US\$ 3 million). We also attracted first-tier institutional investors, such as Canaccord Genuity, Haywood Securities, and Paradigm Capital. Canaccord Genuity, for example, is the largest non-bank-owned independent investment bank in Canada, and one of the most respected names in mining finance worldwide.

8. It goes without saying that Bear Creek raised US\$ 6 million on the strength of the collective mining experience of its founders. If the market, including the very sophisticated institutional investors referenced above, had believed that the Company had no mining experience, I can assure the Tribunal that Bear Creek would never have raised that kind of money. The same logic applies to our twice over-subscribed November 5, 2010 equity financing, which ultimately raised US\$ 130 million, principally for the construction of the Santa Ana mine. Once again, Bear Creek would not have obtained that amount if the Company had been viewed as lacking experience in the construction and operation of mines.

9. In 2006, Bear Creek hired Marc Leduc as Vice-President of Technical Services, responsible for the engineering development of the Santa Ana and Corani Projects. We hired him because the Company wanted to develop those projects and we needed a production-oriented engineer to guide our test-work. Mr. Leduc had held several operational and

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<sup>6</sup> First Swarthout Witness Statement, ¶ 11.

engineering positions at Barrick Gold Corporation's Goldstrike mine in Nevada between 1992 and 1996. He was also head of the technical group for the design construction and commissioning of the Pierina gold mine in Peru. The Pierina mine had been discovered by Arequipa Resources, a junior company founded by prominent explorationist J. David Lowell (who later served as Chairman of Bear Creek) and Catherine McLeod-Seltzer (the current Chairman of Bear Creek's Board of Directors), which was later acquired by Barrick for over C\$ 1.1 billion. Pierina was built, on time and on budget, in 1998 and started production later that year. It was one of Barrick's most profitable mines.

10. I also would highlight that in April 2010, we hired Elsiario Antunez de Mayolo as General Manager of Bear Creek Mining Company Sucursal del Peru ("Bear Creek Peru") and Vice-President of Operations. As I explain in my First Witness Statement, Mr. Antunez de Mayolo had over 30 years of experience in the Peruvian mining industry, and had just spent ten years as Director of Operations at Cuajone, one of the largest copper mines in Peru, owned by SPCC.<sup>7</sup> He also had worked as a Mine Manager and as a Technical Services Manager. Mr. Antunez de Mayolo thus had direct and extensive experience operating a Peruvian mine, including mine planning, management and development, community relations, and regulatory and permitting issues. I had worked with him at SPCC in the late 1990s and had been very impressed with him.

11. I was confident, on the basis of the individual mining track records of the members of the Company, that Bear Creek would successfully develop the Santa Ana Project, and I am certain that it would have, but for Peru's interference with the Project. In sum, I believe that Peru's allegation that Bear Creek lacks mining experience should be disregarded, as it is wrong and reflects a poor understanding of the mining industry.

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<sup>7</sup> First Swarthout Witness Statement, ¶ 41.

## II. BEAR CREEK DID NOT ENGAGE IN AN UNLAWFUL SCHEME TO ACQUIRE THE SANTA ANA MINING CONCESSIONS

12. In its Counter-Memorial, Peru describes the following, alternatively as an unlawful scheme,<sup>8</sup> a ruse,<sup>9</sup> and a sham transaction:<sup>10</sup> Karina Villavicencio's acquisition of the Santa Ana mining concessions; the option agreements that she executed with Bear Creek; and the transfer of the concessions to Bear Creek after it exercised its option thereunder, which took place only after Peru issued Supreme Decree 083 following a careful analysis of Bear Creek's extensive and detailed application for a declaration of public necessity. I vehemently disagree with Peru's mischaracterization. Throughout the entire process, I was always firmly convinced, and was advised by, Estudio Grau, experienced and highly-respected Peruvian mining counsel, that we were acting properly and in accordance with Peruvian law, a position that Peru at the time appeared to implicitly and explicitly endorse.

13. As I noted in my First Witness Statement, we discovered that no one held mineral rights over the Santa Ana area.<sup>11</sup> Given that the prospective mineralization was located within 50 km of the border with Bolivia, we knew that, as a foreign company, we would need a supreme decree from the Peruvian government confirming that our proposed mining project was in the public interest and that it did not pose a threat to Peru's national security. As I mentioned previously, we were assisted during this application process by Estudio Grau, one of the most prominent mining law firms in Peru, with whom I had worked with since 1991 on numerous mining projects in Peru.

14. I note that Mr. Zegarra says in his Witness Statement that the Ministry of Energy and Mines ("MINEM") could reserve the mining concessions for Bear Creek until the Peruvian government issued its decision on Bear Creek's application for a declaration of public necessity.<sup>12</sup> However, we believed that, without an option agreement in place, there was a potential risk that others interested in acquiring the concessions would interfere with our

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<sup>8</sup> Respondent's Counter-Memorial, ¶¶ 4, 5, 10, 25, 198.

<sup>9</sup> *Id.*, ¶ 4.

<sup>10</sup> *Id.*, ¶¶ 35, 37, 46, 50, 145.

<sup>11</sup> First Swarthout Witness Statement, ¶ 15.

<sup>12</sup> **RWS-003**, Witness Statement of César Zegarra, ¶¶ 9-10.

application process. We also understood and were advised by counsel that proceeding in the way we did complied with Peruvian law in all respects.

15. Peru claims that, from the outset, Bear Creek was the *de facto* owner of the Santa Ana mining concessions,<sup>13</sup> and that the option agreements that the Company executed with Ms. Villavicencio represented “an indirect acquisition and possession of border zone mining rights.”<sup>14</sup> This is not true. There is simply no such thing as *de facto* ownership of mining concessions on the basis of option agreements. No one in the mining industry would ever consider option agreements as even remotely indicative of any ownership—even indirect. Option agreements are widely-used by natural resources companies and will never be confused with ownership. For example, having been in the mining business for over 40 years, I can assure the Tribunal that during the time when Bear Creek merely held the discretionary option to acquire the concessions at a later point in time, no bank would have accepted these as collateral pledged by Bear Creek to secure repayment of a loan.

16. Moreover, the option agreements clearly indicated that Ms. Villavicencio held the mining concessions.<sup>15</sup> They provided that Bear Creek had 60 months from the date of signature to exercise its option (the “Option Period”), *i.e.*, to request that Ms. Villavicencio transfer the mining concessions to the Company.<sup>16</sup> They also provided that Bear Creek could do so only if it obtained the declaration of public necessity from the Peruvian government.<sup>17</sup> I understand that this 60-month period is the maximum time period for an option agreement under Peruvian law. In other words, if Peru refused to issue the declaration of public necessity in favor of Bear Creek, or if Bear Creek failed to obtain it within the Option Period, Ms. Villavicencio would continue to own the mining concessions.<sup>18</sup> Bear Creek would have absolutely no claim over the Santa Ana mining concessions. Peru’s allegation that somehow this would not have been the case because

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<sup>13</sup> Respondent’s Counter-Memorial, ¶ 47.

<sup>14</sup> *Id.*, ¶ 45.

<sup>15</sup> **Exhibit C-0016**, Contracts for the Option to Transfer Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Nov. 17, 2004, and Dec. 5, 2004, Art. 1.1.

<sup>16</sup> *Id.* at Arts. 2.1, 2.3.1.

<sup>17</sup> *Id.* at Art. 2.4.1.

<sup>18</sup> *Id.* at Art. 2.5.

Ms. Villavicencio was one of Bear Creek Peru's corporate representatives for certain banking matters and a company employee is, to the best of my knowledge, completely unfounded.

17. The SUNARP Registry Tribunal reviewed the option agreements and confirmed that the execution of these agreements did not transfer the ownership of the mining concessions from Ms. Villavicencio to Bear Creek.<sup>19</sup> The transfer of ownership would occur later in time and only if – and when – Bear Creek decided to exercise its option under the terms of the option agreements, provided that it met the conditions to be able to do so.<sup>20</sup> I would emphasize that those conditions were completely outside of Bear Creek's control and in the Peruvian government's hands. Peru was the sole decision-maker responsible for determining whether to issue a declaration of public necessity in favor of Bear Creek.

18. Peru suggests that, in 2006, the Company described itself as the owner of these concessions to the Fundo Ancocahua community, with whom it was in discussions to obtain permission to conduct exploration activities.<sup>21</sup> To support its allegation, Peru relies on land use agreements that it describes as being between Bear Creek and the community.<sup>22</sup> I was present at the discussions with the Fundo Ancocahua representatives, and can confirm that neither I, nor anyone else from Bear Creek, ever said that the Company owned the concessions. We told the community leaders that Ms. Villavicencio owned the mining concessions, that Bear Creek held an option and that it hoped to acquire the concessions in the future in order to build a producing mine. I also confirm that on any other occasions that I met with different community leaders, I made very clear that Bear Creek simply held an option to acquire the mining concessions that Ms. Villavicencio owned. In fact, it was common knowledge in the area that Ms. Villavicencio owned the concessions, that Bear Creek had signed an option agreement with her, and that Bear Creek was actively interested in the development of the Santa Ana Project.

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<sup>19</sup> **Exhibit C-0038**, Resolution No. 193-2005-SUNARP-TR-A issued by the SUNARP Registry Tribunal, Nov. 7, 2005.

<sup>20</sup> *Id.*

<sup>21</sup> Respondent's Counter-Memorial, ¶¶ 51-52.

<sup>22</sup> **Exhibit R-043**, Agreements between Bear Creek and Local Communities, May 2006.

19. As for the agreements that Peru cites,<sup>23</sup> these were filed with and reviewed by MINEM's General Directorate for Environmental Mining Affairs (*Dirección General de Asuntos Ambientales Mineros* or "DGAAM") as part of Ms. Villavicencio's *Declaración Jurada del Proyecto de Exploración Minera "Santa Ana."*<sup>24</sup> After reviewing her submission, the DGAAM simply instructed Ms. Villavicencio to resubmit the agreements making clear that they were between the community and her, as the owner of the mining concessions, and not Bear Creek, which was a third party that did not own the concessions (since it was merely the holder of an option).<sup>25</sup> This issue was obviously not of great import to the government since neither MINEM nor any other governmental agency contacted Bear Creek in relation to this matter.

20. Peru speculates that Bear Creek entered into the option agreements with Ms. Villavicencio to further its economic interests and to proceed immediately with exploration activities, which it could not have otherwise done, all "in order to get it closer to the point where the Santa Ana Project could be attractively marketed to 'senior' mining companies with actual experience in the operation of such mines."<sup>26</sup> That is false on all counts. Bear Creek did not enter into the option agreements with Ms. Villavicencio because it was economically attractive to do so or to proceed with exploration activities in order to sell the Santa Ana Project to a senior mining company. Moreover, Bear Creek would not have raised US\$ 130 million in November 2010 to build Santa Ana if all it wanted to do was to sell Santa Ana. Such decision would have made no economic sense since it would have reduced the value of Santa Ana for Bear Creek's existing shareholders.

21. Bear Creek chose to proceed in the way that it did to avoid the risk that a Peruvian citizen or company could interfere with or acquire the potential mineral deposits that we had identified. In any event, when we signed the option agreements with Ms. Villavicencio, we had no idea about the existence of, or potential size or economic viability of, any ore deposit on the Santa Ana Project. We had virtually no information on the property, it did not fit our standard exploration models, and there was no demonstrated value. This, like many early-stage

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<sup>23</sup> **Exhibit R-043**, Agreements between Bear Creek and Local Communities, May 2006.

<sup>24</sup> **Exhibit C-0139**, Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006.

<sup>25</sup> *Id.* at 5.

<sup>26</sup> Respondent's Counter-Memorial, ¶ 55.

exploration ventures, was a high-risk venture that, for all we knew, could end up costing the Company a significant amount of time, effort, and money because, for example, we could realize that the property was not commercially viable.

22. Moreover, the specific exploration activities that we ultimately undertook in the Santa Ana Project area in late 2006, *i.e.*, more than a year and a half after entering into the option agreements, were done on behalf and for the benefit of – and in coordination with – Ms. Villavicencio, who owned the mining concessions. MINEM was also aware that Bear Creek was involved in exploration activities in the area.<sup>27</sup> The information that our exploration activities generated belonged to Ms. Villavicencio and would have remained her property if Peru had not issued the declaration of public necessity in our favor and the option agreements were terminated.

23. Finally, it was always our intention to build the Santa Ana Project ourselves, as we frequently reported in our public disclosure statements, which would, in turn, help finance the development of the Corani Project and increase our profile in the debt and equity markets. This is further evidenced by our November 2010 US\$ 130 million equity financing that was undertaken precisely for the construction of Santa Ana.

24. Bear Creek applied to MINEM for a declaration of public necessity on December 5, 2006.<sup>28</sup> Peru assumes, without any evidence whatsoever, that it took so long for us to apply, after Ms. Villavicencio applied for the Santa Ana mining concessions, because we allegedly *de facto* owned and controlled the concessions and thus were satisfied with the situation as it was and did not need Peru to issue a supreme decree in our favor.<sup>29</sup> According to Peru, however, the company ultimately decided to “formalize the situation and become the direct, rather than indirect, title-holder of the concessions,” “perhaps in the hopes of selling the project to a qualified senior mining company.”<sup>30</sup> Again, this is entirely speculative and untrue. As I explain

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<sup>27</sup> **Exhibit R-043**, Agreements between Bear Creek and Local Communities, May 2006; **Exhibit C-0139**, Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006; and **Exhibit C-0140**, Informe No. 170-2006/MEM-AAM/EA, Jul. 10, 2006.

<sup>28</sup> **Exhibit C-0017**, Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006.

<sup>29</sup> Respondent’s Counter-Memorial, ¶ 56.

<sup>30</sup> Respondent’s Counter-Memorial, ¶ 56.

above, it was not our intention to sell the Santa Ana Project, as evidenced by all the steps that we took to develop and operate it ourselves.

25. Bear Creek applied to MINEM for a declaration of public necessity in December 2006 because that is how long it took the Company to validly register the option agreements with SUNARP, to conduct specific exploration activities – on behalf of and in coordination with Ms. Villavicencio pursuant to the option agreements and with MINEM’s knowledge and approval,<sup>31</sup> in order to ensure that it was actually worth applying to the Peruvian government for a supreme decree – and to prepare the application. In fact, we received the first draft of the application from Estudio Grau in July 2006. We continued working on the application with our lawyers over the following months. We finalized the application in November 2006 and filed it in December 2006, which was also a busy year for Bear Creek because we were intensively drilling at Corani, performing metallurgical testing, and completing our first mineral resource estimate and engineering studies for the Corani project.

26. Bear Creek’s application to MINEM for a declaration of public necessity included, among other things, a complete set of corporate documentation for Bear Creek Peru and its corporate representatives, evidence that Ms. Villavicencio was the owner of the mining concessions, copies of the option agreements themselves, and a description of Bear Creek’s plans with respect to the Santa Ana Project.<sup>32</sup> Specifically, Annex VI of our application provided that, as from May 19, 2003, Ms. Villavicencio had been a representative of the Company (*apoderada*), empowered to deal with limited banking issues on behalf of Bear Creek Peru.<sup>33</sup> Accordingly, upon reviewing our application, MINEM would have, or clearly should have, known that Ms. Villavicencio had had a relationship with the Company since 2003 and that Bear Creek had entered into option agreements with her. I will state again for the Tribunal that Bear Creek was not hiding any aspect of this relationship. Therefore, when Peru issued Supreme Decree 083 declaring that Bear Creek’s ownership of the Santa Ana mining concessions was of

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<sup>31</sup> **Exhibit C-0139**, Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006; **Exhibit C-0140**, Informe No. 170-2006/MEM-AAM/EA, Jul. 10, 2006; and **Exhibit C-0141**, Informe No. 265-2006/MEM-AAM/EA/RC, Oct. 12, 2006.

<sup>32</sup> **Exhibit C-0017**, Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006.

<sup>33</sup> *Id.* at Annex VI at 80.

public necessity, after, as Peru describes it, “careful consideration by the government authorities involved in the oversight of the economic activity that the foreigner intends to develop in the border area,”<sup>34</sup> I reasonably concluded that MINEM would have examined and agreed with the entire contents of our application and the propriety of our option agreements with Ms. Villavicencio.

27. I note that Mr. Zegarra says in his Witness Statement that, at the time, he was not made aware of the option agreements or the document listing Ms. Villavicencio as one of Bear Creek Peru’s corporate representatives,<sup>35</sup> all of which however were included in our application to MINEM for a declaration of public necessity. I was surprised to see that Mr. Zegarra would volunteer that he was not aware of these documents when the seal of the office that he heads, along with what seem to be his own initials, appears on each page of the document describing the reasons for the enactment of Supreme Decree 083.<sup>36</sup> Moreover, since the decree was signed by the President, the Prime Minister, MINEM, and the Ministry of Defense, I certainly expected that their legal departments would have carefully vetted – and obviously approved – our application.

28. It is for this reason, as I noted in my First Witness Statement, that I was astonished when Peru issued Supreme Decree 032 three and a half years later. I was even more surprised and disappointed to hear that the justification for Peru’s measure could possibly have something to do with the option agreements between Bear Creek and Ms. Villavicencio.<sup>37</sup> Apart from the fact that these were matters of public record, well known to Peru throughout this time, this information had also been specifically disclosed to Peru in our application for a declaration of public necessity, as I explain in this statement.

### **III. PERU IMPROPERLY ENACTED SUPREME DECREE 032**

29. On June 22, 2011, Elsiario Antunez de Mayolo and I met with Mr. Gala at his request. This was just before Peru enacted Supreme Decree 032 on June 25, 2011. During that meeting, Mr. Gala asked us to voluntarily suspend the Santa Ana Project for one year. We

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<sup>34</sup> Respondent’s Counter-Memorial, ¶ 29.

<sup>35</sup> **RWS-003**, Witness Statement of César Zegarra, ¶ 27.

<sup>36</sup> **Exhibit R-032**, Statement of Reasons for Supreme Decree No. 083, 2007.

<sup>37</sup> First Swarthout Witness Statement, ¶ 51.

explained to him that, in respect of the Santa Ana Project, Bear Creek had done everything by the book and had complied with – even gone beyond – every applicable legal requirement. Accordingly, suspending the project for an entire year was not something we could do. Mr. Gala accepted our explanation and told us that Peru nevertheless would protect Bear Creek’s legally acquired rights over Santa Ana. I remember coming out of the meeting with Mr. Gala feeling relieved. I distinctly recall saying to Mr. Antunez de Mayolo on the way back to our office that, at the very least, Peru would respect the rule of law.

30. Mr. Gala confirms what he told us at the June 22, 2011 meeting: namely, that Peru would protect Bear Creek’s legally acquired rights over Santa Ana.<sup>38</sup> I am surprised, however, by the “clarifications” that he provides in his Witness Statement. Mr. Gala states that he does not consider that Supreme Decree 032 violated Bear Creek’s *legally* acquired rights in light of the information that he had received indicating that Bear Creek had allegedly acquired the mining concessions in breach of Article 71 of the Peruvian Constitution.<sup>39</sup> He summarizes that information as follows:

Bear Creek, a foreign company, obtained a mining concession in the border area through a Peruvian citizen (Jenny Karina Villavicencio) before having obtained the declaration of public necessity. In other words, Bear Creek had acquired the mining concessions in violation of Article 71 of the Constitution and had used a Peruvian citizen to obtain a mining concession where the Santa Ana Project would be developed before the company obtained the required declaration of public necessity. That was the first time I learned of these facts and of the relationship that existed between Ms. Villavicencio and Bear Creek.<sup>40</sup>

This supposedly incriminating information, which Mr. Gala refers to as “new facts,”<sup>41</sup> is allegedly contained in documents that Aymaran leaders provided to him at meetings that occurred between June 17 and 23, 2011.<sup>42</sup> Yet, Mr. Gala provides no real detail regarding this alleged discovery, likely because the existence and nature of the option agreements and Bear

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<sup>38</sup> **RWS-001**, Witness Statement of Luis Fernando Gala Soldevilla, ¶¶ 44-45.

<sup>39</sup> *Id.*, ¶ 45.

<sup>40</sup> *Id.*, ¶ 35.

<sup>41</sup> **RWS-001**, Witness Statement of Luis Fernando Gala Soldevilla, ¶ 36.

<sup>42</sup> *Id.*, ¶ 35.

Creek's relationship with Ms. Villavicencio were already a matter of public record and would have been readily apparent to any of the Peruvian government officials who reviewed and approved our application for a supreme decree.

31. But in light of our meeting on June 22, 2011 and his testimony, it appears Mr. Gala likely knew about the alleged "new facts" when we met him. However, if he did, he did not refer to them during the meeting, meaning he either considered them to be irrelevant or was not truthful when he assured me and Mr. Antunez de Mayolo that he would protect Bear Creek's legally-acquired rights over Santa Ana when, in fact, he had no intention of doing so. At no point did he ask us about Bear Creek's acquisition of its mining concessions nor did he inform us that he had received "new" information suggesting that Bear Creek allegedly had violated Article 71 of the Peruvian Constitution. If Mr. Gala was informed of these "new facts" after our meeting, which seems unlikely, then I fail to understand why he did not immediately reach out to us to ask for an explanation or to hear our side of the story and give the Company an opportunity to be heard.

32. Mr. Zegarra, General Director of the Office of the Legal Advisor at MINEM, says in his Witness Statement that "[a]t that time we had no reason to doubt the veracity of the documents [allegedly provided by the Aymaran leaders], and we had to withdraw the public necessity declaration until the issue was clarified."<sup>43</sup> It appears then that Peru hurriedly enacted Supreme Decree 032 on the basis of supposedly "new" but unverified information received from unidentified Aymaran leaders. My understanding is that, even if there were such "new" facts, the government should have investigated and commenced a legal process during which Bear Creek would have an opportunity to be heard. Instead, Peru issued Supreme Decree 032, which took away all of Bear Creek's rights to the Santa Ana project with no legal process at all.

33. Therefore, from my perspective, it appears that Peru used the option agreements and Bear Creek's relationship with Ms. Villavicencio as an after-the-fact justification to issue Supreme Decree 032 where no real justification for revoking Bear Creek's rights to the Santa Ana project existed. In my opinion, it was issued clearly because of political pressure from Mr. Aduviri and his misinformed supporters. The issuance of Supreme Decree 032 (and the earlier

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<sup>43</sup> **RWS-003**, Witness Statement of César Zegarra, ¶ 26.

suspension of the evaluation process of Bear Creek’s Environmental and Social Impact Assessment (“ESIA”)) was extremely disturbing and upsetting to everyone at the Company, especially since we had completed a bankable feasibility study, had financing in place, our PPC had been approved, the public hearing had been held with participation of governmental officials who were all pleased with the outcome of the hearing, and our ESIA had been submitted and was pending.

34. In addition to having been advised throughout by prominent mining counsel in Peru, Estudio Grau, Bear Creek sought additional legal advice shortly after Peru issued Supreme Decree 032 from another prominent mining law firm in Peru, Rodrigo, Elias & Medrano Abogados (“Estudio Rodrigo”), regarding the manner in which we had acquired the Santa Ana mining concessions. Estudio Rodrigo provided us with a legal memorandum confirming that the manner in which we had acquired the concessions did not violate the Peruvian Constitution or Peruvian law.<sup>44</sup>

#### **IV. THE ISOLATED INCIDENT AT BEAR CREEK’S CAMP SITE IN LATE 2008 DOES NOT MEAN THAT THE COMMUNITIES SURROUNDING SANTA ANA WERE NOT SUPPORTIVE OF THE PROJECT**

35. Peru and its expert Professor Peña seek to undermine the support of the communities surrounding Santa Ana for Bear Creek and for the Project by singling out an isolated incident that occurred at Bear Creek’s camp site on October 14, 2008.<sup>45</sup> On that day, which coincided with the monthly Huacullani fair, which was attended by people from many different communities, including the Kelluyo communities, I understand that members of the Kelluyo community became upset regarding the fact that the majority of the limited jobs at Santa Ana that could be provided to local community members at the time were filled by Huacullani residents. I was also informed that a fair amount of drinking was involved and that the argument degenerated into the subsequent invasion of our campsite. The protesters caused minimal damage and left our US\$ 5 million worth of drill core untouched. However, some of the

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<sup>44</sup> **Exhibit C-0142**, Memorandum from Rodrigo, Elias & Medrano Abogados to Mr. Alvaro Diaz Castro, Bear Creek Peru, Sept. 26, 2011 at 3, ¶ 2.

<sup>45</sup> Respondent’s Counter-Memorial, ¶ 88; **REX-002**, Expert Report of Antonio Alfonso Peña Jumpa, ¶¶ 64-71.

protesters stole a pickup truck and several laptops, and one of our supervisors was hurt during the disturbance. This is why we filed a criminal complaint.

36. This sort of thing happens with some frequency and many miners will share similar stories. Within a few days, the Company was back at the camp site and back to work. There was certainly no lingering animosity between Bear Creek and the communities whose members had participated in the incident. In fact, over the next several days after the incident, a number of those who had participated in the protest returned to the camp to repair it and to repaint the buildings. We even hired one of the leaders, Mr. Luna, who was a mining engineer, to assist with our exploration activities.

37. I can attest that, after October 14, 2008, not a single disturbance occurred on the Santa Ana Project site. In fact, the Ministry of Environment's *Organismo de Evaluación y Fiscalización Ambiental* ("OEFA") visited the Project site in December 2010, and produced a report summarizing its findings in January 2011.<sup>46</sup> OEFA reported that there was no social conflict between the communities and Bear Creek; to the contrary, it described their relationship as "harmonious."<sup>47</sup>

38. Also I note that at our Corani Project, the surrounding communities were very supportive of the company's work, so much so that during the unrest that took place in 2011 targeting the nearby Macusani Yellowcake project, the communities spontaneously created a barrier to protect Corani from any possible damage.

## **V. IF MINEM HAD APPROVED BEAR CREEK'S ESIA, WE WOULD HAVE PROCEEDED TO BUILD AND OPERATE THE SANTA ANA PROJECT**

39. I have reviewed the Expert Report of Mr. Luis Rodríguez-Mariátegui Canny in which he states that "given the numerous pending steps to be able to begin construction of the Santa Ana project, together with the fact that, in many cases, they are drawn out processes, it would have been very difficult, if not impossible, for Bear Creek to have been able to begin construction of the Santa Ana project facilities during the second semester of 2011 ... or to have

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<sup>46</sup> **Exhibit C-0143**, OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, Jan. 2011.

<sup>47</sup> *Id.* at 4, 31. The OEFA Report also describes Bear Creek's community relations as "good." The other categories are "bad" and "regular."

been able to begin production in the fourth quarter of 2012...”<sup>48</sup> I strongly disagree and believe that Mr. Rodríguez-Mariátegui Canny’s comments illustrate his lack of on-the-ground mining experience.

40. SRK Consulting includes in their Report an accurate description of various technical studies that are generally produced throughout the development of a mining project, including the Feasibility Study, which we had completed for the Santa Ana Project.<sup>49</sup> In my experience working on mining projects in Peru and in other countries, once a company has completed the Feasibility Study and obtained the ESIA, it has a bankable mining project. The remaining milestones consist of going through a routine permitting process, which in most countries, including Peru, is rigid and bureaucratic. As long as one meets the requirements for a particular permit, that permit will be granted. In other words, there is no discretion in the process, contrary to what Mr. Rodríguez-Mariátegui Canny alleges.<sup>50</sup> The general assumption among bankers, lenders, and risk evaluators is that the company has passed the tipping point and they can commit funds for the construction and operation of the mine, given that permitting risk has been greatly diminished. Offtakers and smelters share this assumption since it is common for offtake agreements to be signed at this stage as well.

41. Bear Creek had already raised US\$ 130 million in equity financing from the market even though MINEM had not yet approved its ESIA. To me, that is evidence not just of Bear Creek’s credibility on the market as a company capable of building and operating a producing mine, but also of the fact that once the ESIA was approved, permitting risk was greatly reduced and the remaining permits would be easily obtained within a reasonable

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<sup>48</sup> **REX-003**, Expert Report of Luis Rodríguez-Mariátegui Canny, ¶ 108.

<sup>49</sup> **REX-005**, Expert Technical Report of SRK Consulting, ¶ 58, Table 4-2 at 12. SRK defines a feasibility study as follows: “A comprehensive study of a mineral deposit in which all geological, engineering, legal, operating, economic, social, environmental and other relevant factors are considered in sufficient detail so that it could reasonably serve as the basis for a final decision by a financial institution to finance the development of the deposit for mineral production. For the avoidance of doubt, this would commonly ensure that the technical feasibility and economic viability of the mineral deposit has been demonstrated on a multi-disciplinary basis to what it commonly known as ‘bankable standards.’ In a Feasibility Study the declaration of Reserves would be expected and the economic viability of the mineral deposit could be demonstrated with sole reliance on the depletion of the Ore Reserves without inclusion of Mineral Resources. In parallel to the development of the Feasibility Study it is normally expected that an Environmental and Social Impact Study would have been completed. Typical contingencies within the capital expenditure estimate range between 10% and 15% and accuracy ranges are typically  $\pm 15\%$ .”

<sup>50</sup> Respondent’s Counter-Memorial, ¶ 168.

timeframe. Moreover, it is worth highlighting that the Santa Ana Project had gone beyond the Feasibility Study stage and was at the EPCM phase, which SRK Consulting describes as involving extensive design, planning and procurement activities.<sup>51</sup>

42. Bear Creek had an EPCM agreement with a top-tier Peruvian engineering firm, Graña y Montero,<sup>52</sup> which had already completed approximately 26% of the detailed engineering work by the time our ESIA was suspended.<sup>53</sup> Not only did we have the capacity to build the Santa Ana Project, we were on our way to building it. We were following the same timeline that Rio Alto Mining had followed for the La Arena project, which is very similar to Santa Ana in terms of capacity and process, and had enabled Rio Alto to move from the submission of its ESIA to entry into production in 20 months. I am convinced that Bear Creek would have initiated the construction of the Santa Ana Project in the second semester of 2011 and production would have begun in the fourth quarter of 2012, had Peru not put an end to the Project.

## **VI. DAMAGE TO THE CORANI PROJECT RESULTING FROM PERU'S TAKING OF BEAR CREEK'S RIGHTS TO SANTA ANA**

43. Contrary to what Peru and its experts assert,<sup>54</sup> Bear Creek's financing efforts for Corani have, in fact, been delayed and continue to be delayed as a result of Peru's taking of Santa Ana. This is because Bear Creek's strategic plan was to bring the Santa Ana Project into production first, in order to help finance the development of Corani.

44. Bear Creek did stay on track with respect to completing Corani's 2011 Feasibility Study,<sup>55</sup> submitting the ESIA in December 2012, and obtaining governmental approval of the

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<sup>51</sup> **REX-005**, Expert Technical Report of SRK Consulting, ¶ 58, Table 4-2, p. 121. (“This [EPCM] stage includes completion of detailed designs based on the project scope and concept designs approved in the Feasibility Study, and the issuing of ‘for construction’ designs, provision of construction and equipment specifications, scope of work packages for contract documents, definition of and procedures for construction quality control, etc. The purchase of key plant equipment often occurs prior to or in parallel with this stage of design, as vendor drawings for equipment are required in order to complete the detailed engineering designs.”).

<sup>52</sup> **Exhibit C-0144**, Letter of Intent between Bear Creek and Graña y Montero, Mar. 3, 2011.

<sup>53</sup> **Exhibit C-0145**, Bear Creek Mining Company, EPCM-Proyecto Santa Ana, May 30, 2011 through June 17, 2011 (reflecting payment of US\$ 533,691.33 on engineering out of contracted amount of US\$ 2,064,642.62)

<sup>54</sup> Respondent's Counter-Memorial, ¶¶ 368, 371-375; **REX-004**, Expert Valuation Report of Prof. Graham Davis and The Brattle Group, ¶¶ 137 *et seq.*

<sup>55</sup> **C-0066**, M3 Engineering, Corani Project Form NI 43-101F1 Technical Report Feasibility Study, Dec. 2011.

ESIA in September 2013.<sup>56</sup> However, it was impossible to raise financing for a project of Corani's magnitude until the ESIA was finally approved – especially in light of how Peru acted at Santa Ana. While the Santa Ana capital requirements were fully financed at the time Peru took away Santa Ana on June 25, 2011, this was not possible for Corani, which involved substantially higher upfront capital investments. Despite Peru's actions against Santa Ana, we decided to keep moving forward with the Corani Feasibility Study and ESIA process, because we believed that the Peruvian government would be dealing with us in good faith and that, as Government officials had repeatedly told us, it would return Santa Ana to Bear Creek.

45. At this point, there is little doubt in my mind that Bear Creek's financing of Corani cannot move forward unless Bear Creek receives compensation in this arbitration for Peru's taking of Santa Ana. It is absurd to argue that there is no causal link between Peru's actions against Santa Ana and damage to Corani. One would not exist but for the other.

46. Peru's damages experts claim that the 2011 Feasibility Study for Corani did not envision undertaking an updated feasibility study and that Bear Creek decided to do so in September 2014.<sup>57</sup> This is untrue. As explained in detail in the 2011 Feasibility Study, various recommendations were made for Bear Creek's future consideration and execution.<sup>58</sup> In other words, additional technical studies, which is what optimization strategies are, were clearly contemplated in the 2011 Feasibility Study and are customary steps in the development of mining projects. In addition, these recommendations were completely independent of market conditions.

47. Peru also claims (in part on the basis of a statement that I made in connection with the completion of the updated feasibility study), that there is no indication that the delay at Corani has harmed Bear Creek.<sup>59</sup> It is correct that, as a result of the 2015 updated feasibility study, Corani's value has increased, which was precisely the purpose of that study. However,

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<sup>56</sup> **Exhibit C-0146**, Ministerio de Energia y Minas, Resolución Directorial, No. 355-2013-MEM/AAM, Sept. 20, 2013.

<sup>57</sup> **REX-004**, Expert Valuation Report of Prof. Graham Davis and The Brattle Group, ¶¶ 138-139.

<sup>58</sup> **Exhibit C-0066**, M3 Engineering, Corani Project Form NI 43-101F1 Technical Report Feasibility Study, Dec. 2011, ¶¶ 1.15.1-1.15.7.

<sup>59</sup> Respondent's Counter-Memorial, ¶¶ 379-380; **REX-004**, Expert Valuation Report of Prof. Graham Davis and The Brattle Group, ¶ 146.

our ability to finance Corani remains substantially impaired, which severely impacts Bear Creek's ability to monetize Corani's value. Given that Santa Ana will not be put into production, there is no reason to expect in the future that this loss in value will diminish in any way.

48. Peru also alleges that we did not inform investors that the Corani project would face financing challenges as a result of Peru's enactment of Supreme Decree 032.<sup>60</sup> It relies on an information call that I held with market analysts shortly after the issuance of the decree.<sup>61</sup> Peru even goes so far as to suggest that Bear Creek and I could be in violation of Canadian securities regulations.<sup>62</sup> These accusations are preposterous. Canadian securities regulations provide that a company must disclose a change in the business operations or capital of the company that would reasonably be expected to have a significant effect in the market price or value of its shares. That is precisely what I did. On June 25, 2011, Bear Creek issued a news release (followed by a material change report filed on 27, 2011) indicating that Peru had enacted Supreme Decree 032 on June 25.<sup>63</sup> I consulted with Canadian securities counsel at the time and was advised that our disclosure satisfied our obligations under Canadian law. Also, when I told market analysts on June 27, 2011 that "Corani is unaffected by the actions taken by the government or the protests and is on track for completion of the Feasibility Study,"<sup>64</sup> I was clearly referring to the lack of protests near Corani, and to the fact that Supreme Decree 032 was applicable only to Santa Ana and had not affected our ownership of Corani or the 2011 Feasibility Study, which I noted on the call was 70% complete.<sup>65</sup> We did, in fact, complete that study as scheduled, but nevertheless, as described above, our financing plan for Corani, which the market understood was contingent on putting Santa Ana into production,<sup>66</sup> was destroyed. Based on the drop in stock price, it was apparent that the market understood this.

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<sup>60</sup> Respondent's Counter-Memorial, ¶ 379.

<sup>61</sup> *Id.*

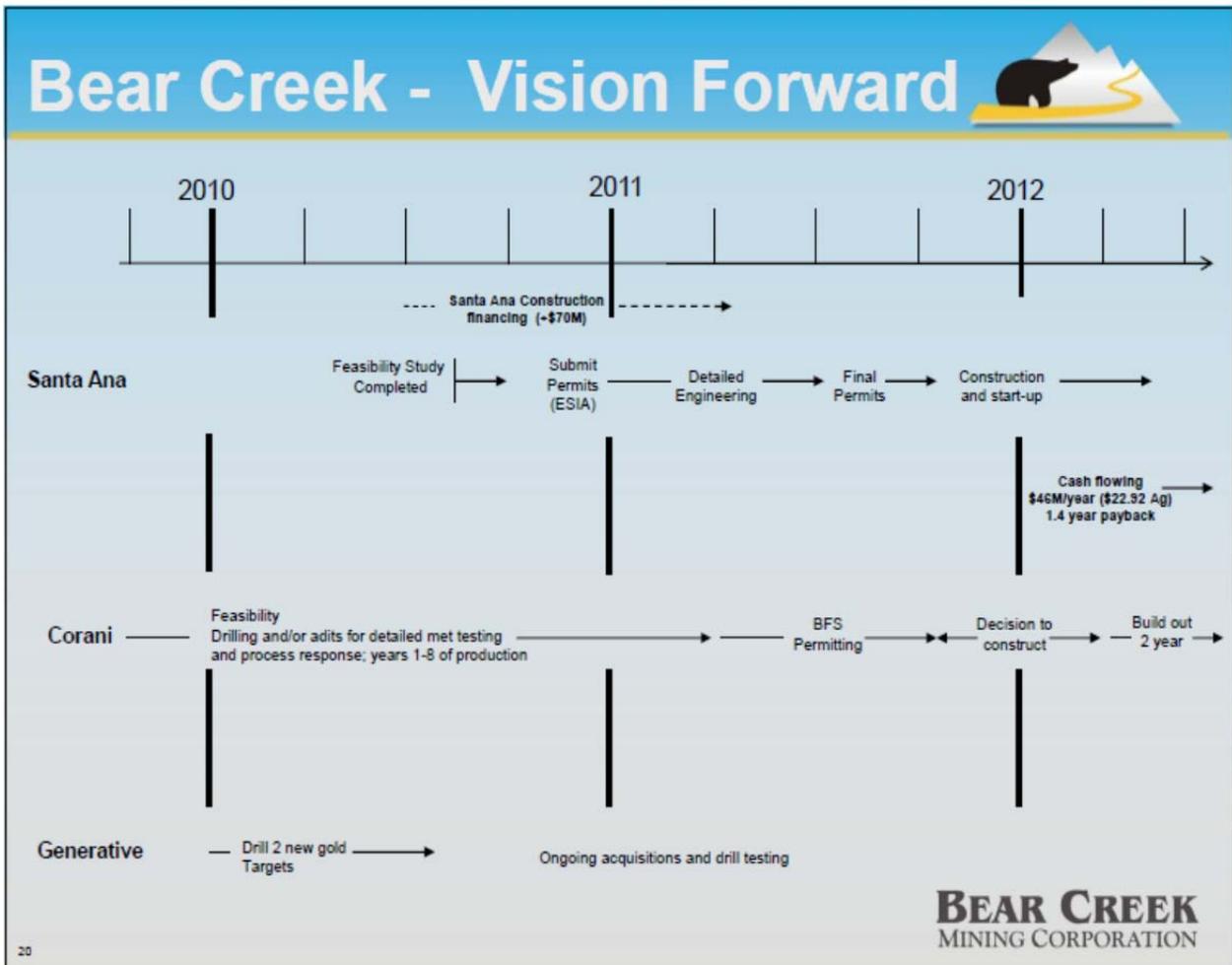
<sup>62</sup> Respondent's Counter-Memorial, ¶¶ 380-381; **REX-004**, Expert Valuation Report of Prof. Graham Davis and The Brattle Group, ¶¶ 157-158, 163.

<sup>63</sup> See <http://www.bearcreekmining.com/s/news.asp?ReportID=605738>; and **Exhibit C-0147**, Bear Creek Material Change Report, Jun. 27, 2011.

<sup>64</sup> **Exhibit R-186**, Transcript of Bear Creek Mining Corporation Special Call, Jun. 27, 2011 at 3.

<sup>65</sup> *Id.* at 7.

<sup>66</sup> **Exhibit C-0148**, Corporate Presentation, October 21, 2010 at 2, 13 (making clear Santa Ana would go into production prior to Corani), at 3 (making clear that Santa Ana was advancing to development and was fully financed to production), at 13 (setting forth a construction timeline of ten months and first production in mid-



(Bear Creek Corporate Road Show Presentation of October 21, 2010, used during fundraising efforts for the construction of Santa Ana and showing that the cash flows generated by the operation of the Santa Ana Project would assist with the construction of the Corani Project)<sup>67</sup>

2012), at 20 (showing Santa Ana going into production and generating significant revenue from the end of 2012 onward, well before build-out of Corani); *see also* **Exhibit C-0149**, Paradigm Capital Research Report, October 14, 2010 at 3 (“Santa Ana is a nice “bite-sized” project to transition Bear Creek from an explorer to a silver producer. The capex (~\$70M) is manageable relative to the basic market cap of the Company ~4Moz of annual silver production (a bit more in the earlier years, a bit less in the latter years) produces a “healthy” ~\$49M of annual pre-tax operating cash flow”). **Exhibit C-0150**, Canaccord Genuity Research Report, April 27, 2011 at 25 (“The company’s other asset, Santa Ana, is being developed as an open pit, heap leach pure silver mine, and will be the company’s first project into production. Santa Ana is fully financed to production which is to begin in mid to late-2012”).

<sup>67</sup> **Exhibit C-0151**, Corporate Presentation, October 10, 2010 at 20; *see also* **Exhibit C-0152**, Corporate Presentation, February 28, 2011 at 20 (showing increase in cash flow from Santa Ana to \$79 million per year based upon \$28.75 Ag silver prices).

49. I agree with Peru that Corani has not experienced governmental interference since the issuance of Supreme Decree No. 032. I also agree that Corani's social license has remained solid, which largely results from the same strategies and corporate policies and actions being employed at Santa Ana before the expropriation. Peru asserts that no social conditions have emerged at Corani which would cause the government to take similar actions than at Santa Ana.<sup>68</sup> That is true. However, it is also important to note that Bear Creek was not responsible for the alleged opposition to Santa Ana, but that the project was sacrificed to appease political pressure. Moreover, Peru's actions were taken without granting Bear Creek its right to be heard. Thus, as the Government candidly admitted during many of the meetings we had after the issuance of Supreme Decree No. 032, the social conditions in Puno did not justify the Government's taking of Bear Creek's rights to Santa Ana. It is irrelevant that social opposition has not existed with respect to Corani or that the Peruvian government has not taken action against Corani. The fact remains that the taking of Santa Ana caused substantial financing delays and impacted the perception of the market that the government could take action against Corani. Bear Creek's depressed share price has reflected this concern.

50. Peru and its experts also assert that the value of Corani to a buyer capable of raising financing would not be affected by the expropriation of the Santa Ana project.<sup>69</sup> To my astonishment, Peru also argues that the value of Corani in a sale will differ from the value to Bear Creek should the project be built and operated through its mine life.<sup>70</sup> However, it has always been clear that Bear Creek never intended to sell either project and instead clearly and consistently articulated to the market since the inception of these two projects that our strategy was to create the maximum value for its shareholders by first building Santa Ana, followed by Corani using the financial strength of our successful execution of the Santa Ana project start-up and subsequent cash flow. Also, the value in the two long-lived mines is greatest by building and operating these assets through what will likely be several higher-price commodity cycles, which aggregately generate significant cash flows. The mining business history repeatedly shows this to be true, and the aspiration of every mining company is to have the good fortune to

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<sup>68</sup> **REX-004**, Expert Valuation Report of Prof. Graham Davis and The Brattle Group, ¶ 149.

<sup>69</sup> *Id.*, ¶¶ 152-155.

<sup>70</sup> *Id.*, ¶ 152.

discover and develop long-lived mineral deposits. This was the message consistently sent to our shareholders and this was their expectation. Our strategy never envisioned “mitigating our losses by selling Corani,” thus sacrificing the long-term cash flows, all because Peru had spoiled our chances of financing Corani by stripping our rights to operate Santa Ana.

51. While I hesitate to even respond, Peru goes as far as to use a tomato project in Manhattan as an analogy to illustrate its assertion.<sup>71</sup> This is both ludicrous and insulting to suggest that Bear Creek and its investors have the mind-set of tomato farmers and real estate speculators. As they repeatedly stated to Catherine McLeod Seltzer and me, some of the most sophisticated mining investors in the world invested substantial amounts in Bear Creek with the view of participating in an emerging mining company capable of being one of the top 10 silver producers in the world. This was not only possible for Bear Creek, but probable given our team and access to capital; that is until the actions taken by Peru in June 2011 and their continuing effect on Bear Creek for the foreseeable future. Accordingly, it does not make any sense to suggest that Bear Creek should sell Corani in distressed conditions and miss on the opportunity to turn it into a producing mine. Peru basically suggests that Bear Creek should “cut its losses” and be content to go back to square one. This is not how one runs a mining company.

52. Peru asserts that external financing and using internal funds are equally costly.<sup>72</sup> Again, Peru misses the point as Bear Creek has always acknowledged that it will need traditional project debt (bank lending), equity, equipment financing, and other forms of external financing besides the Santa Ana cash flow in order to finance Corani. There is no doubt that the cost of this external financing has substantially increased (assuming it remains available at all) after the taking of Santa Ana. Peru further asserts that the annual cash flow (US\$ 68 million/year) from Santa Ana would be inadequate to cover the Corani construction costs.<sup>73</sup> The important fact is, however, that 11 years’ of projected cash flows at Santa Ana totaling US\$ 715 million would

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<sup>71</sup> Respondent’s Counter-Memorial, ¶¶ 376-377; **REX-004**, Expert Valuation Report of Prof. Graham Davis and The Brattle Group, ¶ 155.

<sup>72</sup> **REX-004**, Expert Valuation Report of Prof. Graham Davis and The Brattle Group, ¶ 156 (“But since Corani’s cost of capital is driven by Corani’s risk, and since in general equal risk implies equal expected returns, it is not clear that Bear Creek would have suffered loss from having to raise more external funds [for?] Corani compared to using retained earnings instead”).

<sup>73</sup> *Id.*, ¶ 159.

have enormously reduced Bear Creek's risk profile in the eyes of its lenders and, hence, substantially reduced its cost of capital.

53. Peru suggests that lenders and the markets view the financing of the Corani Project solely on the basis of the risks related to the Corani Project itself.<sup>74</sup> To decouple Corani from Santa Ana when discussing cost of capital is naïve and unrealistic. Perhaps the best illustration is the answer I frequently gave to President Humala and other government officials when they repeatedly asked me “why doesn't Bear Creek just build Corani and worry about Santa Ana later?” I invariably responded that “I have just raised US\$ 130 million in 2010 specifically to build Santa Ana which has now been taken away. You are suggesting that I go back to the very same markets and ask for perhaps US\$ 250 million (the equity portion) in order to build Corani, also located in Peru AND in Puno – the same region as Santa Ana?” President Humala and others told me that they understood what I was saying, as well as the gravity of the relationship between Santa Ana and Corani.

54. Peru also asserts that by losing Santa Ana we have saved US\$ 71 million in construction costs, apparently thereafter available for the construction of Corani,<sup>75</sup> seemingly painting the picture that we have somehow been given an opportunity. However, those funds were raised in 2010 in a Canadian Securities regulated, public equity offering for which the “Use of Proceeds” in the Offering Prospectus directed the vast majority of funds specifically to building the Santa Ana Project. Therefore, I do not view the unexpected availability of this US\$ 71 million as a windfall for Corani.

55. Peru uses a few general market and peer group comparisons, including stock indices, to argue that the overall effect of the breach at Santa Ana and the general political turbulence in 2011 did not significantly impact stock prices.<sup>76</sup> What Peru fails to recognize or acknowledge is the unique circumstance wherein Bear Creek was sequentially developing two major mining projects. I am not aware of any other case in Peru in which a mining company was developing two major mining projects, much less two that were so intertwined and

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<sup>74</sup> **REX-004**, Expert Valuation Report of Prof. Graham Davis and The Brattle Group, ¶¶ 160-161.

<sup>75</sup> *Id.*, ¶ 159.

<sup>76</sup> *Id.*, ¶ 166.

interdependent with respect to acquiring financing. Peru spends a lot of time describing how Corani was otherwise unaffected, but it repeatedly misses the main point, namely the clear existence of the financial dependence of Corani on Santa Ana. Investors understandably conclude that Peru can act as capriciously at Corani than it did at Santa Ana under any political pressure, especially since both projects are located in the same region.

56. Peru discusses the general impact on the market due to general perceptions of the outgoing Garcia administration, which issued Supreme Decree 032, and incoming Humala administration, and market reactions to those events.<sup>77</sup> This is speculative and irrelevant and certainly bears no rational relation to whether a potential investor, when considering investing in Corani, would be impacted by the fact that its sister project had been expropriated by the Peruvian government.

57. Peru also states that much of the Bear Creek stock value had recovered within one month of the taking of Santa Ana.<sup>78</sup> This phenomena is relatively common when a company's shares decline rapidly in a short period and certain investors feel that the stock was over-sold. However, here, the stock dropped precipitously from May 27, 2011 (C\$ 6.98), just prior to the suspension of the ESIA, to June 27, 2011 (C\$ 3.75), just after the issuance of Supreme Decree 032.<sup>79</sup> Peru claims that Bear Creek's share price recovered much of the drop recorded immediately after the expropriation. That is not accurate. As evidenced by the short recovery period and the low trading volumes in August 2011, this can hardly be considered resounding evidence for the lack of damage. While the share price did go up to C\$ 5.64 as of July 22, 2011, by early August the share price had dropped back to the low levels immediately following the expropriation. By August 9, 2011, it was down to C\$ 3.85 and by August 25, 2011, to C\$ 3.76. In fact, Bear Creek's share price has never recovered and, as I mention above, is currently trading substantially below its offering price in 2003, despite possessing potentially one of the top 10 silver producers in the world, Corani.

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<sup>77</sup> **REX-004**, Expert Valuation Report of Prof. Graham Davis and The Brattle Group, ¶ 168-170.

<sup>78</sup> *Id.*, ¶ 171.

<sup>79</sup> **Exhibit C-0153**, Yahoo Finance Print-Out of BCM share prices from May 2, 2011 through December 30, 2011. Dates referenced in paragraph 56 are designated for ease of reference.

58. Thus, for Peru to argue that there has been no direct negative impact on Corani's value as a result of Peru's expropriation of Bear Creek's rights to Santa Ana, when the two projects are both in the Department of Puno, and the development of Santa Ana was going to assist in financing the larger Corani project, defies logic. The damage to Corani, due to Peru's unlawful taking of the Santa Ana Project, has been and remains significant.

\* \* \*

I have prepared this witness statement in English with the assistance of counsel, but the facts and circumstances recounted in it reflect the best of my knowledge and recollection of the relevant events. Should my presence be required at the evidentiary hearing, I anticipate that I will give my testimony in English.

Tucson, Arizona  
January 6, 2016



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Andrew T. Swarthout