

## **Expert Report**

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## **I. ABOUT THE AUTHOR OF THE REPORT**

1. My name is Hans Albert Flury Royle. I have almost forty years of professional experience as an attorney in Peru. From the start of my professional career, I have been involved with the mining industry in Peru. In 1972, I began working for the Peruvian branch of Southern Peru Copper Corporation, a corporation organized in 1952 pursuant to the Corporation Law of the State of Delaware, United States. The branch is known as "SPCC". I have held several legal positions at the organization, and since 1989, I have held the highest corporate position in the company's legal area: Legal Vice President, as executive officer of the corporation. I am currently still fulfilling these functions, now under the title of Legal Director. Currently, I also hold the position of Secretary of the Board of the same mining company, today called Southern Copper Corporation ("SCC" or the "Corporation"), and I am a member of the Board for other mining companies. I have held all these positions from the city of Lima (Peru), the administrative main branch of SCC and the Corporation.

2. SCC is one of the largest integrated copper producers in the world and it has one of the largest copper reserves of any company that is publicly traded on the stock market. The Corporation is listed on the New York Stock Exchange and the *Bolsa de Valores de Lima* [Lima Stock Exchange]. SCC operates mining and metallurgical units in Peru and Mexico, in addition to exploration activities in Argentina, Chile and Ecuador. SCC's branch in Peru carries out extraction activity in the Toquepala and Cuajone mines, and smelting and refining in Ilo, located at the southern territory of the Republic of Peru.

3. In my current position, and for over 20 years, I have managed several departments of the Peru branch of SCC, such as the Legal Department (in charge of all legal matters), Technical Services Management (in charge of environmental matters regarding the National and Regional Government, in its different governmental entities, with business associations and other institutions), and the Superintendence of Coordination and Licenses (in charge of management and maintenance of permits, authorizations and licenses required to legally carry out mining activity and operate in the country). I was also in charge of the Department of Environmental Services (in charge of environmental matters relating to SCC's mining activities).

4. Additionally, I held the position of Minister of Energy and Mines between July 2003 and February 2004.

5. Finally, for years I have been actively participating in the Peruvian mining guild, promoting and supporting the development of national mining activity, participating in various business institutions related to the mining sector. For example, since 1987 I am a member of the Board of Directors of the *Sociedad Nacional de Minería, Petróleo y Energía* [National Mining, Oil and Energy Association] ("SNMPE"), and I was the President of the SNMPE during two different periods, from 1997-1998 and 2009-2011. In my role as former President of the institution, I am also on its Consulting Committee.

6. Due to my professional experience, I have first-hand knowledge not only of mining legislation in Peru but also its specific application and common practices in the Peruvian mining industry.

7. And, as former responsible for the national policy in the Energy and Mining sector, I also directly understand the perspective of the State in the application of Peruvian mining legislation.

8. For more detail, I am attaching my *curriculum vitae* as an Annex.<sup>1</sup>

## **II. INTRODUCTION**

9. I have prepared this Expert Report at the request of the attorneys at King & Spalding and Miranda & Amado, who represent Bear Creek Mining Corporation in an arbitration proceeding against the Republic of Peru before ICSID.

10. My opinion has been requested, as an expert in the sector and in Peruvian mining legislation with respect to:

- (i) The acquisition of mining concessions by Bear Creek, Peruvian branch (“Bear Creek”), under the authorization granted by Supreme Decree No. 083-2007-EM dated November 28, 2007 (“Supreme Decree No. 083-2007-EM”)<sup>2</sup>;
- (ii) The legality of Supreme Decree No. 032-2011-EM dated June 24, 2011 through which the previous Supreme Decree was derogated (“Supreme Decree No. 032-2011-EM”)<sup>3</sup>.
- (iii) The Environmental Impact Study (EIS) for the Santa Ana Project<sup>4</sup>; and,
- (iv) The permits and licenses applicable to the Santa Ana Project under Peruvian legislation.

11. In Section III below, I will describe the main characteristics of the mining legal framework in Peru, and I will specifically address the acquisition of mining concessions by foreigners in border areas. Below in Section IV, I will analyze the specific case of Bear Creek and Supreme Decrees No. 083-2007-EM and No. 032-2011-EM. In that context, I will refer specifically to the legal framework applicable to relations between local residents and mining investors, to the Santa Ana Project EIS and the applicable permits and authorizations. Finally,

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<sup>1</sup> (FLURY 001).

<sup>2</sup> Supreme Decree No 083-2007-EM (C-0004).

<sup>3</sup> Supreme Decree No. 032-2011-EM (C-0005).

<sup>4</sup> Ausenco Vector, Santa Ana Project EIS dated December 2010 (C-0071).

in Section V, I will summarize the main conclusions from this Expert Report.

### III. GENERAL CHARACTERISTICS OF MINING IN PERU

#### 3.1. General Characteristics

12. In Peru, mining is a regulated activity, with controls from the beginning, for exploration, exploitation and operation of the mine and until its closure. As established in the Consolidated General Mining Act, approved by Supreme Decree No. 014-1992-EM, dated June 2, 1992 and its amendments (“General Mining Act”)<sup>5</sup>, main mining activities may only be carried out under the concessions system.

13. Article 9 of the General Mining Act, when referring to and defining the mining concession indicates that it grants exploration and exploitation rights:

*“The concession grants its holder the right to explore and exploit the mineral resources granted, which are within a solid area of indefinite depth, bounded by vertical planes corresponding to the closed sides of a square, rectangle or polygon which vertices refer to Universal Transversal Mercator (UTM) coordinates....”*<sup>6</sup>

14. These concessions granted by the State give, among others, the following rights to their holders:

- *“The concession grants its holder the right to use and enjoyment of the natural resource granted and, consequently, the property of the fruits and products to be extracted.”*<sup>7</sup>
- They are irrevocable provided the holder meets the obligations that this law or special legislation requires to maintain its validity.<sup>8</sup>
- Granting a right in rem to the holder consisting of the sum of the attributes that this law recognizes in favor of the concessionaire.<sup>9</sup>

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<sup>5</sup> General Mining Act (**BULLARD 031**).

<sup>6</sup> Article 9 of the General Mining Act (**BULLARD 031**).

<sup>7</sup> Article 23 of the Organic Law for sustainable development of Natural Resources, Law No. 26821 dated June 25, 1997 (“Law Bi, 26821”) (**R-142**).

<sup>8</sup> Ibid.

<sup>9</sup> Article 10 of the General Mining Act (**BULLARD 031**).

- Granting the holder the right to the exploration and exploitation of the mineral resources granted.<sup>10</sup>

15. For its part, the Political Constitution of Peru of 1993 (the “Constitution”) establishes that an organic law must set the conditions to grant individuals the right to use the natural resources and that “*The concession grants its holder a right in rem (...)*”<sup>11</sup> As explained in the doctrine, this in rem right consists of “a right to the use granted, which allows for carrying out the mining activity granted, and in the case of deposits, lawfully obtaining ownership of the mineral extracted.”<sup>12</sup> According to this constitutional provision, the General Mining Act establishes that the mining concession grants its holder a right in rem consisting of the sum of the attributes that the mining law establishes.<sup>13</sup> As stated by Article 885, section 3 of the Civil Code, “mines” are real properties.<sup>14</sup> Being real property, the general real rules applicable to a property owner are applicable to the concession holder.

16. This “right in rem” quality that the regulation grants to mining concessions, under the holding of the appropriate title, can be used by the holder for profiting from the income produced and the benefits created, for its encumbrance in operations required for its enjoyment, or to enjoy the additional benefits, or to dispose of it in favor of third parties, subject to the limitations or conditions set forth by the regulation.

### 3.2. Obtaining a Mining Concession

17. There are two institutions that manage the information regarding mining concessions so that the system can offer security to the holders of duly registered mining rights. These are the *Catastro Minero* [Mining Registry] and the *Registro de Derechos Mineros* [Registry of Mining Rights].

18. The *Catastro Minero* is now under the *Instituto Geológico Minero y Metalúrgico* [Mining and Metallurgical Geological Institution] (the “INGEMMET”), which maintains the document archive for all the mining concessions and rights granted and those being processed (known as *petitorios* [petitions]). This registry holds the record for the area, location, extension defined by UTM coordinates and the identification of the holders of the mining rights that have been granted or whose procedure has been admitted.

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<sup>10</sup> Article 20 of the Investment Promotion Law for the Mining Sector, Legislative Decree No. 708, dated November 13, 1991 (**FLURY 002**).

<sup>11</sup> Article 66 of the Constitution (**C-0024**).

<sup>12</sup> MARTINEZ APONTE, Humberto. *La Concesión Minera, Derecho a la Explotación de los Recursos de la Nación* [The Mining Concession, Right of Exploitation of the Nation’s Resources], *Revista Advocatus* No 21, 2009, p. 218 (**FLURY 003**).

<sup>13</sup> Article 10 of the General Mining Act (**BULLARD 031**).

<sup>14</sup> Article 885, section 3, Civil Code (**FLURY 003**).

19. Additionally, the Registry of Mining Rights, which is part of the Real Estate Registry of the *Superintendencia Nacional de los Registros Públicos* [National Superintendence of Public Registries] (the “SUNARP”) has a registry of mining rights. The Regulation for Entries in the Registry of Mining Rights<sup>15</sup> establishes that the Registry of Mining Rights contains: the concessions to which the General Mining Act refers; the contracts that are entered into regarding mining concessions, the acts that declare, transfer, modify, limit or extinguish obligations, rights and attributes established in the General Mining Act, Environmental Code and additional provisions that correspond to the mining concessions and the administrative and legal resolutions, at the request of the party or by order of the authority, that fall under the concession, the obligations, the rights and the attributes that correspond to those mining concessions<sup>16</sup>.

20. To obtain a mining concession, the interested party must fill out a “petitorio,” this is a petition to the competent authority, INGEMMET. The petitorio should refer to a specific area; and, in the corresponding form, the requesting party (called petitioner) indicates, among other things, the coordinates and other location information for the requested area<sup>17</sup>.

21. The title of the mining concession is issued by the Director of INGEMMET and it must be entered in both INGEMMET’s Catastro Minero and also in SUNARP’s Registry of Mining Rights,<sup>18</sup> for being effective against third parties, since the General Mining Act establishes that acts, contracts and resolutions that are not recorded are not effective against the State or third parties.<sup>19</sup>

22. The Mining Procedure Regulations<sup>20</sup> were approved to grant the mining concessions regulated by the General Mining Act, the Mining Procedure Regulations were approved. These regulations complement Title XII of the said Act which establishes the “ordinary procedure” that interested parties must follow with the administrative mining entities to obtain the enabling title to be able to carry out mining activity. It is a special mining regulation that shall be applied in addition to the

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<sup>15</sup> Resolution of the National Superintendency of Public Registries No. 052-200-SUNARP-SN from February 9, 2004 (“Regulation of Entries in Registry of Mining Rights”)(**FLURY 004**).

<sup>16</sup> Ibid. Article 6.

<sup>17</sup> General Mining Act (**BULLARD 031**).

<sup>18</sup> Law by which the National System of Public Registries and of the Superintendence of Public Registries was created, Law No. 26366 dated October 26, 1994 (**FLURY 005**).

<sup>19</sup> Article 106 of the General Mining Act (**BULLARD 031**).

<sup>20</sup> Mining Procedures Regulations, Supreme Decree No. 018-92-EM dated September 8, 1992 (“Mining Procedures Regulations”) (**FLURY 006**).

regulations of the general administrative procedure.<sup>21</sup> The *petitorios* for mining concessions are filed by the interested party at any INGEMMET office, where they will be recorded<sup>22</sup> to determine the priority of their presentation. Each *petitorio* must meet the requirements established in the regulation, and in the event of any omission, they must be corrected within ten business days following the date of notification of the omission.

23. The analysis of the filed *petitorio* requires, on the part of the authority, a study of the filed *petitorio* to be carried out on various levels. With regard to the request itself, the file is reviewed to determine whether it meets all the requirements established in the General Mining Act and the Mining Procedure Regulations to determine that it has not failed to present any of them.<sup>23</sup>

24. If the *petitorio* meets the requirements demanded by the Mining Procedures Regulations, within seven (7) business days of its submission, the Head of the Mining Concessions Office will notify the interested party, attaching the notices for their publication. The publication<sup>24</sup> must be made within thirty (30) business days of the date of service of the corresponding notice.<sup>25</sup> Simultaneous to the notification to the petitioner, the Head of the Mining Concessions Office must notify any previous holders of *petitorios* or mining concessions about the new *petitorio*, if their areas are located on part of the same grid or set of grids requested.

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<sup>21</sup> General Administrative Procedure Law, Law No. 27444 dated April 11, 2001 (“LPAG”) (**BULLARD 005**).

<sup>22</sup> Previously, entries were registered in a book, and currently registration is electronic.

<sup>23</sup> These requirements include: the receipts from the payment of the validity fee, the processing fee, with the grid or set of grids identified correctly as well as the information regarding the U.T.M. coordinates of the area requested by the interested investor, they must be adjacent at least on one side within the set of grids requested, the area requested must not exceed the maximum area established by the General Mining Act; the area requested must not correspond to concessions or *petitorios* that are abandoned, nulled, waived, or those that were rejected in the act of submission, that have not been published as claimable, or if the same areas had previously been requested by the same person, or their relatives up to second degree of consanguinity or affinity up to two years after they were published as claimable, or if the area corresponds to an area of Non-Acceptance of Claims. See Article 14, 14(A) and 14(B) of the Mining Procedures Regulation (**FLURY 006**).

<sup>24</sup> *Petitorios* for mining concessions located in the province of Lima are published only in the official newspaper “El Peruano”; those for other districts are published a single time in the official newspaper “El Peruano” and also in the newspaper responsible for the publication of court notices in the capital of the province where the area requested is located. See Article 19 of the Mining Procedures Regulation (**FLURY 006**).

<sup>25</sup> Article 20 of the Mining Procedures Regulation (**FLURY 006**).



25. Within sixty (60) calendar days from the date of publication, the interested party must deliver the entire pages on which the publication of the notices appear to the corresponding office.<sup>26</sup> Within thirty (30) business days of receipt of the publication of the notice, if there is no objection, the INGEMMET Mining Concessions Office must issue the corresponding technical and legal opinions. Within five (5) business days of the issuance of the opinions and at least thirty (30) calendar days after the last publication was made, the file must be referred for the issuance of the corresponding resolution, granting the mining concession title.<sup>27</sup> A request for review may be filed before the Mining Council against the resolution by the Presidency granting the mining concession title.<sup>28</sup> The mining concession title shall be sent to the SUNARP Mining Rights Registry for registration of the mining right granted.

26. As part of the procedure, the authority must check the history of the area requested, on different databases, to identify archaeological or historical monuments, National Road Network, pipelines, barracks, ports or national defense or Institutional works with scientific or technological research purposes located in the requested area, therefore these areas must be expressly excluded from the corresponding mining concession title.

### **3.3. Irrevocability of mining concessions and other rights related to natural resources**

27. The legal framework established for the granting of mining concessions aims to guarantee legal security to mining concessionaires. It is essential that the mechanisms to grant these rights clearly establish the attributes of the mining rights and their ownership. This is the only way that private investors may be guaranteed sufficient security to invest resources into developing the potential of the deposits located inside the mining concession area.

28. Legal protection is so important for the mining industry, and for industries that use natural resources in general, that Peruvian law establishes the irrevocability of mining concessions, by a unilateral act of the State<sup>29</sup>. The law expressly establishes that the mining concessions “Are irrevocable provided the holder meets the obligations set forth by this Law or special legislation to maintain their validity.”<sup>30</sup> This is a special regulation, but one which is consistent with the general scheme of the LPAG which establishes, as a general rule, the prohibition of the revocation of

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid. Article 21.

<sup>28</sup> Ibid. Article 25.

<sup>29</sup> Article 10 of the General Mining Act (**BULLARD 031**).

<sup>30</sup> Ibid. and Article 23 of Law No. 26821 (**R-142**).

administrative acts for reasons of opportunity, merit or convenience<sup>31</sup>, allowing revocation, exceptionally, when an express rule so allows or due to the disappearance of conditions legally required for the issuance of the administrative act.<sup>32</sup>

29. This does not mean that concessions may never be terminated or “extinguished”. As the regulation itself states, the validity of the mining concession is subject to the holder’s compliance with various obligations. These are: (i) to make investments to achieve “annual minimum production of minerals”,<sup>33</sup> and, (ii) to comply with the annual payment of “Validity Fee” and “Penalty”.<sup>34</sup> The General Mining Act as special regulation acknowledges that for certain industries the protection of titles granted by the State is especially important and therefore, they are protected in a special manner.

30. The General Mining Act specifically establishes the causes to terminate the mining concessions, specifying the expiration, abandonment, nullity, waiver and cancellation.<sup>35</sup> Expiration shall occur when the holder fails to make the timely payment of the validity fee for two consecutive years or due to lack of investment or also due to failure to pay penalties. According to the Organic Law for Sustainable Development of Natural Resources,<sup>36</sup> “The application of reasons for expiration shall be subject to the procedures set forth by special laws, regardless of the corresponding administrative, civil or criminal liability. Expiration establishes the reversal of the concession to the State from the moment in which the cancellation of the related title is entered.” Renouncing occurs by an act carried out by the holder of the mining right before or after such right has been granted. I understand that in this case it has not been alleged that Bear Creek has incurred any of these causes.

#### **3.4. The specific case of border areas: Authoritative Supreme Decrees**

31. The Constitution establishes as a special condition that foreigners, to have property on border areas, must have an express authorization granted by a supreme decree approved by the Cabinet of Ministers to “acquire or possess, through any title, mines, land, forests, waters, fuel or sources of energy, directly or indirectly.”<sup>37</sup> The abovementioned Supreme Decree must be signed by the President of the Republic

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<sup>31</sup> Article 203.1 of the LPAG (**BULLARD 005**).

<sup>32</sup> Article 203.2 of the LPAG (**BULLARD 005**).

<sup>33</sup> Articles 38 and 40 of the General Mining Act (**BULLARD 031**).

<sup>34</sup> Ibid. Articles 39 and 59.

<sup>35</sup> Article 58 of the General Mining Act (**BULLARD 031**).

<sup>36</sup> Article 30 of Law No. 26821 (R-142).

<sup>37</sup> Article 71 of the Constitution (**C-0024**).

according to Organic Law of the Executive Branch (the “LOPE”)<sup>38</sup> and Article 118 of the Constitution.<sup>39</sup>

32. To hold mining concessions within 50 kilometers of any Peruvian border, Article 71 of the Constitution, Legislative Decree No. 757<sup>40</sup> and its regulations<sup>41</sup> must be complied with, following Procedure No. 53 of the Consolidated Text of Administrative Procedures of the Ministry of Energy and Mines<sup>42</sup> that regulate the conditions and the procedure that must be met to obtain the authorization which is granted by supreme decree, which must be signed by the President of the Republic, the President of the Cabinet of Ministers and the minister of the corresponding sector, i.e., Energy and Mines. To issue this authorization, the Joint Command of the Armed Forces must issue a favorable opinion regarding the presence of foreign investors.

33. According to the Constitution, it is the President of the Republic’s duty to “Exercise the authority of regulating laws without violating or distorting them; and, within these limits, issue decrees and resolutions.”<sup>43</sup> In other words, the President has the authority to issue decrees within the legally established limits. The LOPE develops these powers and defines the supreme decrees as follows:

*“They are general rules that regulate provisions of legal ranking or regulate functional sectorial or multi-sectorial activity on a national level. They may or may not require approval vote from the Cabinet, as provided by law. They are signed by the President of the Republic and endorsed by one or more Ministers of the corresponding sector. Supreme Decrees become effective on the day following their publication in the Official Newspaper, except when otherwise provided, in which case they can be postponed in full or in part.”<sup>44</sup>*

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<sup>38</sup> Organic Law of the Executive Branch, Law No. 29158 dated December 20, 2007 (**R-103**).

<sup>39</sup> Article 118 of the Constitution (**C-0024**).

<sup>40</sup> Framework Law for the growth of private investment, Legislative Decree No. 757 of November 13, 1991 (“Legislative Decree No. 757”) (**BULLARD 004**).

<sup>41</sup> Regulations for private investment guarantee regimes, Supreme Decree No. 162-92-EF dated October 12, 1992 (Supreme Decree No. 162-92-EF”) (**BULLARD 023**).

<sup>42</sup> Consolidated Text of Administrative Procedures of the Ministry of Energy and Mines, passed by Supreme Decree No. 038-2014 (the TUPA of the Ministry of Energy and Mines”) (FLURY 040).

<sup>43</sup> Article 118.8 of the Constitution (C-0024).

<sup>44</sup> Article 11.3 of the LOPE (**R-103**).

34. Most supreme decrees are issued to establish the rules to implement and comply with the laws issued by the Congress of the Republic. These decrees are legal rules with general and continued application during the effective period of the law which they regulate. They may be extended, modified, specified, substituted, derogated, etc. by the Executive Branch, according to their regulatory authority.

35. For its part, authoritative supreme decrees respond to a request of an individual or corporation, granting or denying a right to a specific matter. To this extent, this type of decrees does not correspond to the exercise of the abovementioned regulatory power, but rather it involves the issuance of an administrative act<sup>45</sup> in response to a request by the administration's subject in accordance with a procedure provided for in the applicable rules. The rank or type of instrument used to grant the authorization requested by the administration's subject does not alter the nature of the act. Accordingly, the Executive Branch does not have the general authority to modify or derogate it as it could do with a regulatory provision.

36. In general, as I explained in Section 3.1, a mining concession grants its holder the right to explore and exploit<sup>46</sup> mineral resources located within the granted area. However, in the case of foreigners, in order for them to acquire title and carry out activities in a border area, they will not only need the corresponding concession, but also the authoritative supreme decree. Thus, the authoritative supreme decree, together with the concession title, grants the foreigner access to the mining concession and to the exercise of its attributes, complying with obtaining the permits required by the regulations..

### **3.5. Mechanisms used by foreign investors to access mining concessions in border areas**

37. Any foreign natural or legal person has the right to acquire one or more mining concessions in Peruvian territory, but in order to be able to do so in border areas, as was explained in Section 3.4 above, an authorization must be obtained via a supreme decree.

38. In practice, to access mining concessions in border areas, foreigners usually opt for one of the following alternatives: (i) the mining *petitorio* is filed directly by a foreigner by following the corresponding

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<sup>45</sup> Article 1.1 of the LPAG. "Administrative acts are declarations by entities which, within the framework of provisions under public law, are intended to produce legal effects on the interests, obligations or rights of administration's subjects ' within a specific situation ."

**(BULLARD 005).**

<sup>46</sup> Subject to the obtainment of the corresponding permits, according to the activity to be developed in each case.

procedure of INGEMMET, or (ii) the foreigner is ensured that it can acquire the mining concession in the future through some contractual arrangement while the required authorization is being processed before the MINEM.

39. However, Peru seems to indicate that a foreign investor could only obtain an authorization through a supreme decree to acquire mining rights in border areas with respect to areas that do not have a concession already granted (or a pending *petitorio*) if the foreigner himself files the *petitorio* directly.<sup>47</sup> It also maintains that entering into an option contract with a Peruvian citizen with whom the foreigner has a relationship of trust for it to acquire the concession and maintaining it while the foreigner processes the corresponding authorization would be contrary to Article 71 of the Constitution.<sup>48</sup> In my opinion, as I will explain below, this is incorrect. These situations are common in Peruvian mining practice and the Ministry of Energy and Mines issues authoritative decrees under these circumstances regularly.

### 3.5.1. *Petitorio* filed by a foreigner

40. A foreigner may file a *petitorio* with the competent authority in accordance with the procedure provided for in the regulations listed above. In these cases, I understand that, in practice, INGEMMET suspends the corresponding procedure until the moment the foreign investor proves that it has the supreme decree that authorizes it to be the holder of the mining right requested. In other words, the concession will not be granted until the authoritative supreme decree has been issued.

41. This practice would be based on the Mining Procedure Regulations<sup>49</sup> which establish that mining *petitorios* shall be declared inadmissible if "... they are requested by foreigners in border areas when the application is expressly rejected, or when, once six (6) months have passed from said application, constructive rejection is admitted and the petition is considered denied." Thus, while the procedure to obtain the authoritative supreme decree is pending, the INGEMMET would not, in principle, declare the *petitorio* inadmissible.

42. However, this suspension situation generates uncertainty for the foreign investor, insofar as the possibility is always latent for INGEMMET to change its practice of suspending the procedure until the time when the foreign investor demonstrates having the supreme decree authorizing him to be the holder of the mining right requested or, at the end of the time period indicated beforehand, there is the possibility that an interested third party could request INGEMMET to declare the proceeding concluded pursuant to the general rules applicable to administrative proceedings. This is insofar as the LPAG provides that when an administration's subject does not comply with any proceeding which causes the paralyzation of the

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<sup>47</sup> Counter-memorial, paragraphs 25-57.

<sup>48</sup> Counter-memorial, paragraphs 38-39.

<sup>49</sup> Article 14B.g of the Mining Procedures Regulations (**FLURY 006**).

procedure for thirty days, in this case obtaining the authoritative supreme decree, the procedure shall be declared abandoned at the administration's initiative.<sup>50</sup>

43. As can be observed, in the event that the foreign investor is able to file the mining *petitorio* and submits it for an ordinary proceeding before the INGEMMET; it will be unavoidably subject to pressure and will need to complete the process of obtaining the authoritative supreme decree within 7 months. In my opinion, this is not a reasonable period to obtain the authoritative supreme decree referred to in article 71 of the Constitution, for the various bodies of the Executive Branch to coordinate this process among each other.

44. It is not possible to establish precisely how long the public administration takes to respond to an authorization request of a foreign investor to acquire a mining right in a border area. However, from the following information about the authoritative decrees issued by the Ministry of Energy and Mines starting from the year 2006 which appear on that ministry's website<sup>51</sup>, it is possible to determine the time elapsed between the date of the letter with the favorable opinion from the Joint Command of the Armed Forces of Peru (which is issued when the proceeding is substantially advanced – for example, the Joint Command issued its approval over seven months after Bear Creek submitted its request before the Ministry of Energy and Mines) and the date of publication of the respective Supreme Decree, as follows:

HOLDER	APPROVAL	AUTHORITATIVE DECREE	PUBLISHED IN EL PERUANO	TIME (MONTHS)
1. ENERGY RESOURCES & ELECTRICAL POWER S.A.C.	09/16/2009	SD 085-2009-EM <sup>52</sup>	12/04/2009	2.63
2. SUMITOMO METAL MINING PERU SA	07/03/2009	SD 080-2009-EM <sup>53</sup>	11/20/2009	4.67
3. NEWMONT PERU SRL	05/14/2009	SD 072-2009-EM <sup>54</sup>	10/22/2009	5.37
4. MINERA GOLD FIELDS SA	09/12/2008	SD 012-2009-EM <sup>55</sup>	02/13/2009	5.13

<sup>50</sup> Article 191 of the LPAG: "In proceedings begun at a party's initiative, when the administration's subject does not complete any procedure requested of it which produces the paralyzation thereof for thirty days, the authority may declare the abandonment of the proceeding at its own initiative or at the administration's subject's request. Said resolution must be notified, and it shall be open to the pertinent administrative remedies." (**BULLARD 005**).

<sup>51</sup> [www.minem.gob.pe/\\_detalle.php?idSector=1&idTitular=190&idMenu=sub154&idCateg=190](http://www.minem.gob.pe/_detalle.php?idSector=1&idTitular=190&idMenu=sub154&idCateg=190)

<sup>52</sup> Supreme Decree No. 085-2009-EM (**FLURY 007**).

<sup>53</sup> Supreme Decree No. 080-2009-EM (**FLURY 008**).

<sup>54</sup> Supreme Decree No. 072-2009-EM (**FLURY 009**).

<sup>55</sup> Supreme Decree No. 012-2009-EM (**FLURY 010**).

5.	EMP MIN LOS QUENUALES	05/21/2008	SD 013-2009-EM <sup>56</sup>	02/13/2009	8.93
6.	XIAMEN ZIJIN TONGGUAN	12/19/2007	SD 024-2008-DE <sup>57</sup>	12/27/2008	12.47
7.	SOLEX DEL PERU	09/27/2007	SD 063-2008-EM <sup>58</sup>	12/25/2008	15.17
8.	NEWCREST RESOURCES INC	05/07/2007	SD 032-2008-EM <sup>59</sup>	06/14/2008	13.47
9.	SHERIDAN PLATINUM GROUP	01/17/2008	SD 033-2007-EM <sup>60</sup>	06/14/2008	4.97
10.	RIO TINTO MINING AND EXPLORATION LIMITED PERU	07/26/2007	SD 017-2007-EM <sup>61</sup>	03/26/2008	8.13
11.	MINERA PEÑALES DEL PERU	01/10/2007	SD 042-2007-EM <sup>62</sup>	08/07/2007	6.97
12.	NEWMONT PERU SRL	01/10/2007	SD 040-2007-EM <sup>63</sup>	07/19/2007	6.33
13.	MOLINETES BVI LTD	08/11/2006	SD 010-2007-EM <sup>64</sup>	03/01/2007	6.73
14.	ANGLO AMERICAN EXPLORATION PERU SA	03/07/2006	SD 062-2006-EM <sup>65</sup>	10/29/2006	7.87
15.	MINERA PEÑALES DEL PERU SAC	04/27/2006	SD 060-2006-EM <sup>66</sup>	10/27/2006	6.13
16.	MINERA CHAN SAC	--	SD 030-2006-EM <sup>67</sup>	05/30/2006	n/a

45. The average time needed by the Ministry of Energy and Mines, main interested party in promoting the mining investment, to issue these Supreme Decrees was 7.18 months, once it had the favorable opinion from the Joint Command of the Armed Forces. This period of time does not include the entire period from the time the foreigner requests the authorization until it is granted, which means such procedure

<sup>56</sup> Supreme Decree No. 013-2009-EM (**FLURY 011**).

<sup>57</sup> Supreme Decree No. 024-2008-DE (**FLURY 012**).

<sup>58</sup> Supreme Decree No. 063-2008-EM (**FLURY 013**).

<sup>59</sup> Supreme Decree No. 032-2008-EM (**FLURY 014**).

<sup>60</sup> Supreme Decree No. 033-2009-EM (**FLURY 015**).

<sup>61</sup> Supreme Decree No. 017-2007-EM (**FLURY 016**).

<sup>62</sup> Supreme Decree No. 042-2007-EM (**FLURY 017**).

<sup>63</sup> Supreme Decree No. 040-2007-EM (**FLURY 018**).

<sup>64</sup> Supreme Decree No. 010-2007-EM (**FLURY 019**).

<sup>65</sup> Supreme Decree No. 062-2006-EM (**FLURY 020**).

<sup>66</sup> Supreme Decree No. 060-2006-EM (**FLURY 021**).

<sup>67</sup> Supreme Decree No. 030-2006-EM (**FLURY 022**).

takes a longer time. In other words, in only the time used to fulfill this last and final part of the process under its charge, the *petitorio* presented to INGEMMET would have largely exceeded the term indicated in the Mining Procedure Regulations. Therefore, the total term of the procedure for obtaining a supreme decree amply exceeds this term.

46. In this sense, one of the risks is that third parties that are aware of the foreign investor's intention to take a certain area (something that they will learn from the foreign investor's own *petitorio*), shall themselves be attempting to be the beneficiaries of the mining concession title and could take advantage of the delays in the processing of the authoritative supreme decree. This creates a situation of uncertainty and eventual conflict of interest (between local investors and foreign investors) that may risk the foreign investor's ability to obtain the mining right title. It is important to understand that the information – and the confidential handling thereof when so appropriate – is very valuable in the mining industry. Thus, disclosing an interest in a certain area to third parties could harm an investor in many ways, if said investor is at the same time subject to a condition to actively materialize such interest.

47. During the period in which the *petitorio* is suspended due to the lack of an authoritative decree, for more than 7 months, and given a third-party request, the risk is that INGEMMET shall be obligated to fulfill the principles imposed by the LPAG, which aim for proceedings to be completed in a diligent and timely manner. Especially pursuant to the "Sua Sponte Principle" and the obligation of "Expediting Procedures," according to which "The competent authority, even without a request from a party, must further any action that is necessary for its processing; determining the rule applicable to the case even when it has not been invoked or the citation is erroneous; as well as preventing slowness or delay due to procedures that are unnecessary or merely formal, adopting the appropriate measures to eliminate any irregularity produced." In keeping with the foregoing, the "Informality Principle" notes that "procedural rules must be interpreted favorably towards the admission and final decision of the administration's subject's requests, so that their rights and interests are not affected by the requirement of formal aspects that may be corrected within the procedure, provided that said excuse does not affect the rights of third parties or public interest."<sup>68</sup> On the basis of the abovementioned principles, third parties could demand that a *petitorio* that is pending for a period beyond what is provided for by law be declared inadmissible or abandoned, arguing that "third party rights or the public interest" are being affected by the postponement of mining activity in a given area.

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<sup>68</sup> Items 1.3 and 1.6 of Article IV of the Preliminary Title and Article 145 of the LPAG (**BULLARD 005**).



### **3.5.2. The foreigner ensures its chance of acquiring the mining concessions in the future with contractual arrangements**

48. Another common practice is when the foreigner interested in the concession signs a contract with the holder that allows it to acquire all or a part of the mining concession in the future. This occurs both in the case of already existing concessions and with new concessions. With new concessions, this practice is used to eliminate the risks described in Section 3.5.1 above.

49. In my experience, when a foreigner is interested in an existing concession, he will negotiate with the concession holder and will agree to a contractual arrangement to ensure that he can acquire it in the future, at a value that the foreign investor believes to be reasonable, once he obtains the authorization from the State. Otherwise, it makes no sense to begin the process with the Ministry of Energy and Mines to obtain the supreme decree.

50. Something similar occurs when a *petitorio* will be filed for an area that appears to be interesting from a geological standpoint. In these cases, the *petitorio* form is usually filed under the name of a Peruvian company or a Peruvian individual to avoid the risks described in Section 3.5.1 above. Thus, you can also avoid revealing the interest in a certain area to the market, while the supreme decree authorization is pending. This is a common practice in the Peruvian mining industry, even in areas that are not on the border since mining companies usually do not want to reveal their interest in a given area (as mentioned, information is perhaps what is most valuable in mining). This happens frequently due to the fact that the mining concession management system described above in Section 3.2 is a public procedure, and is not at any time confidential. To the contrary, the aim of the regulation is that during the processing of the *petitorio*, the public be aware of its filing. In addition, when a mining concession title is entered in the SUNARP Registry of Mining Concessions, this situation is public knowledge.

51. The Peruvian framework establishes various contractual arrangements to ensure the concession is transferred to the foreign investor in time once he is granted authorization. For example investors can use option contracts to transfer mining rights or to transfer the shares of the company holding the mining rights, or transfer contracts subject to a suspensive condition. Under these structures, the foreign investor will have the opportunity to process the authorization so that title to the mining right be legitimately transferred.

52. Of these possibilities, I believe that signing an option contract to transfer mining rights in the future is a way that grants adequate legal security to the foreign investor to have the possibility to subsequently, and definitively, accessing the mining concession of interest in the border area, avoiding any attempt of third parties seeking to take advantage of the delay. This is because it will have the certainty that the mining right for the area of interest will be granted by INGEMMET, entered in the Registry of Mining Rights of SUNARP, is effective against third parties and that provided the obligations of the General Mining Act are met, it shall keep its validity and

may be, in the future, subject to a definitive contract and, at that time, acquire ownership over it.

#### **IV. THE CASE OF BEAR CREEK**

##### **4.1 Bear Creek was authorized to acquire mining concessions in border areas.**

53. Bear Creek is a Canadian company, therefore, as a foreigner; it had to obtain authorization from the Peruvian government, issued by the President of the Republic through a Supreme Decree, to be able to acquire properties within 50 kilometers of the border area. This authorization was legally granted for concessions associated with the Santa Ana Project, located in Puno, through Supreme Decree No. 083-2007-EM.

54. I understand that precisely because of the need for this authorization, Bear Creek secured its future access to the corresponding mining concessions by signing Mining Option Contracts with Ms. Jenny Karina Villavicencio Gardini (“Ms. Villavicencio”), but not contracts for the final transfer of ownership of said mining rights. After receiving authorization,<sup>69</sup> Bear Creek exercised the option to acquire the mining concessions and acquired them complying with the formalities required and by registering its right.

55. As noted in the whereas section of the authoritative Supreme Decree cited, the procedure required was followed. As required, a favorable opinion was obtained from the Joint Command of the Armed Forces. On July 26, 2007 an official letter was sent from the Head of the State Joint Command of the Armed of the Republic of Peru, addressed to the Secretary General of the Ministry of Defense, which stated “(...) after having visited the concession area to carry out the respective evaluation by the officials of the corresponding military organizations; this Joint Command from a national security standpoint, issues a FAVORABLE OPINION to the request presented by the Mining Company Bear Creek MINING COMPANY, PERU BRANCH, for the acquisition of seven (07) mining rights called (...)”<sup>70</sup>

56. On November 29, 2007, Supreme Decree No. 083-2007-EM<sup>71</sup> was published in the Official Newspaper El Peruano; which authorized Bear Creek to acquire the mining concessions in the border area. This provision was based on the declaration of public necessity according to article 71 of the Constitution<sup>72</sup>, Legislative Decree No.

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<sup>69</sup> The day after the obtainment of Supreme Decree No. 083-2007-EM, on November 30, 2007, Bear Creek exercised the option with its contractual counterparty, Ms. Villavicencio (**C-0018**).

<sup>70</sup> Letter from the Chairman of the Joint Chiefs of Staff of the Peruvian Armed Forces to the Secretary General of the Ministry of Defense, July 26, 2007 (**C-0045**).

<sup>71</sup> Supreme Decree No. 083-2007-EM (**C-004**).

<sup>72</sup> Constitution (**C-0024**)

757<sup>73</sup> and Supreme Decree No. 162-92-EF<sup>74</sup>, obtaining the declaration of public necessity required regarding the contribution to the development of the border area in the Puno Region that this important investment would represent.

57. In conclusion, Bear Creek fulfilled Article 71 of the Constitution for the legitimate acquisition of the mining concessions associated with the Santa Ana Project.

#### **4.2 Bear Creek was transparent in its proceedings before the mining authority**

58. In the proceeding before the Ministry of Energy and Mines, starting with the initial request and up to the obtainment of the authoritative supreme decree, Bear Creek disclosed the existence of the option contracts with Ms. Villavicencio, without concealing or disguising the relationship between the parties. Among the documents provided to the ministry, it even included a copy of the bank powers of attorney granted by Bear Creek in favor of Ms. Villavicencio, an indication of the existence of a relationship of trust between the parties.<sup>75</sup>

59. In line with the abovementioned, the mining option agreement is a legal, valid and common way to begin the process of acquiring mining rights in Peru, and it is used frequently with respect to mining rights located in border areas. This considering the risk that I have described in paragraphs 45, 46 and 49, among others, of this report. In my opinion, the way in which Bear Creek proceeded in the acquisition of the concessions was legal and consistent with usual practices in the mining industry in Peru to eliminate such risk.

60. It can be clearly concluded that the Ministry of Energy and Mines fully understood the structure through which Bear Creek was acquiring the mining rights. In my opinion, with such a structure being completely compatible with the legal framework, it drew no attention or concerns from the mining authority, nor was reason for questioning. In fact, nobody questioned the relationship between the parties or the contractual structure employed, and the corresponding authorization was legitimately issued.

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<sup>73</sup> Legislative Decree No. 757 (**BULLARD 004**).

<sup>74</sup> Supreme Decree No, 162-92-EF (**BULLARD 023**).

<sup>75</sup> See request to acquire mining rights located in a border area submitted by Bear Creek to the Ministry of Energy and Mines on December 4, 2006 (**C-0017**).

### 4.3 Supreme Decree No. 032-2011-EM

61. Supreme Decree No. 032-2011-EM, which derogates the authoritative supreme decree issued in 2007, does not ascribe any breach to Bear Creek, but rather refers to “circumstances that would imply the disappearance of the conditions required legally for the issuance of the said act [Supreme Decree 083-2007-EM].”<sup>76</sup> It is evident that if there had been any violation of the law by Bear Creek prompting this decree, the Peruvian Government would have cited it therein. Such omission directly infringes the principle to provide reasons that governs all administrative acts.<sup>77</sup>

62. This decree does not explain or support what these new “circumstances” prompting its issuance were. Given this lack of explanation, Bear Creek was forced to request that the Ministry of Energy and Mines provide it with all the supporting documentation for this supreme decree.<sup>78</sup> The only document that it obtained in response was the *exposición de motivos* [statement of grounds], which, without greater support from technical or legal reports as is usual in these cases, which also fails to provide sufficient explanation, simply stating:

*“(…) under the framework of the dialogue process carried out with the representatives of the Aymara people from the Puno department; circumstances were discovered that would imply the disappearance of the conditions legally required for issuing the mentioned act.”<sup>79</sup>*

63. In other words, even the *exposición de motivos* [statement of grounds] lacks clarity and contains generic formulas without real content or legal reasoning supporting it, thus it gives no legal basis for the action of the Executive to derogate Supreme Decree No. 083-2007-EM as the corresponding regulations require. It is proper to cite here the Ministry of Justice and Human Rights of Peru<sup>80</sup>, which on this matter states that:

*“According to Article 5 of the LPAG, the purpose or content is anything that the administrative authority decides, declares or certifies, which must be expressed in a clear and precise manner so the*

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<sup>76</sup> Supreme Decree No. 032-2011-EM (**C-0005**).

<sup>77</sup> Article 3.4 of the LPAG (**BULLARD 005**).

<sup>78</sup> Request for access to information dated August 10, 2011 (**C-0110**).

<sup>79</sup> Official Letter No. 1433-2011-MEM/SEG dated August 19, 2011 responding to the request for access to information and sending the *exposición de motivos* [statement of grounds] for Supreme Decree 083-2011-EM (**C-0111**).

<sup>80</sup> Practical guide on the validity and efficiency of administrative acts in the Peruvian legal system. May 2014, page 17 (**FLURY 023**).

administration's subject *and the institution itself unequivocally learn and establish its legal effect.*

*Another element imposed by this validity requirement includes the necessary compatibility between its content and the legal system provisions; provided, at the same time, agreement with the factual situation set forth in the rules, which implies the need to comply with the following features:*

...

*d) It must include the matters that arise from the reasoning: The content shall include all matters of fact and of law posed by those administered, and can include others that were not proposed by them or that have been assessed sua sponte, provided the Public Administration grants the administration's subjects the opportunity to present its case and, where appropriate, provide evidence to support it."*

64. I have not found any precedent in which the Ministry of Energy and Mines has repealed the authoritative supreme decree of a foreign investor using the argument of a change in circumstances or the "disappearance of the legally required conditions to issue said act."

65. It can be seen that the language used in the preamble of the referenced Supreme Decree No. 032-2011-EM<sup>81</sup> is similar to the cause for revocation established in article 203.2.2 of the LPAG.<sup>82</sup> The LPAG requires the effective "*disappearance of circumstances*" that existed at the moment of issuing the administrative act; however, Supreme Decree No. 032-2011-EM<sup>83</sup> does not prove this situation to ground the repeal.

66. In practice, this decision by the State is aimed at revoking the rights granted to Bear Creek, contradicting not only the principle of legal security that the Constitution and the mining laws guarantee, but also the provisions of Article 203 of the LPAG<sup>84</sup> itself, since the State has not met any of the requirements to proceed with the revocation provided for in that rule. In fact, the consequence of this decree has been that mining concessions currently cannot be subject to utilization as promoted by

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<sup>81</sup> "Circumstances have been found out that would imply the **disappearance of the conditions legally required for the issuance of the mentioned act; (...)**" (C-0005)

<sup>82</sup> Article 203.2.2 of the LPAG: When **the legally required conditions to issue the administrative act disappear**, the permanence of which being indispensable for the existence of the legal relationship created. It is worth noting that in accordance with Article 2015.1 of the LPAG, in the event of revocation of administrative acts, the payment of compensation to the administration's subject is appropriate when harm has been caused to it. (BULLARD 005).

<sup>83</sup> Supreme Decree No. 032-2011-EM (C-0005).

<sup>84</sup> Article 203 of the LPAG (BULLARD 005).

Peruvian law for the sustainable use of natural resources. Under the Peruvian legal framework, in order to revoke a right previously granted by means of an administrative act, it is necessary to pursue a proceeding, which must be supported by facts and law that recognizes and grants the administration's subject's right of defense and compensates the damages caused with the revocation by means of compensation.<sup>85</sup>

67. Regarding the consequences of the annulment of administrative acts, it is appropriate to cite once again the Ministry of Justice and Human Rights of Peru, which, on this matter, indicates:<sup>86</sup>

*“A problem that is regulated by Article 12.3 of the LPAG is when the defective act has been already consummated or when it is impossible to take their effects back. In such situation, the rules provide for two effects: on the one hand, the possible compensation to the affected party, and, on the other, the irremediable administrative liability of the one issuing the administrative act.”*

68. I understand that in the framework of this arbitration, the Peruvian Government has noted that the purpose of this revocatory decree was two-fold: on the one hand, to address the issue of an alleged (“circumstances that would imply”)<sup>87</sup> unlawful acquisition of concessions and, on the other, to respond to a situation of social crisis.<sup>88</sup> Neither of these two grounds is clearly explained in the said decree<sup>89</sup>, nor in its *exposición de motivos* [statement of grounds].<sup>90</sup> Furthermore, as I indicated in Section 4.1 above, in my opinion, the acquisition of the concessions was not unlawful. With respect to the second point, referring to the situation of social crisis, in my opinion a situation of social crisis is not justification under the Peruvian legal framework to revoke rights previously granted to a private party.

#### **4.4 Mining investments and community relations**

69. Peruvian law requires that the holder of a mining activity who intends to carry out exploration or exploitation inform neighboring residents of the scope and impacts of the project. However, Peruvian law does not in any way grant these residents the right to veto or prevent the development of a mining project.

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<sup>85</sup> See Article 203 and 205 of the LPAG (**BULLARD 005**).

<sup>86</sup> Practical guide on the validity and efficiency of administrative acts in the Peruvian legal system. May 2014, page 22 (**FLURY 023**).

<sup>87</sup> *Exposición de motivos* [statement of grounds] of Supreme Decree 032-2011-EM (**C-0111**).

<sup>88</sup> Counter-memorial, paragraph 8.

<sup>89</sup> Supreme Decree 032-2011-EM (**C-0005**).

<sup>90</sup> *Exposición de motivos* [statement of grounds] of Supreme Decree 032-2011-EM (**C-0111**).

70. The first formal approach by the holder of the mining activity toward neighboring residents takes place when it intends to carry out mining exploration.<sup>91</sup> This communication activity continues during the evaluation of the EIS for the future mining exploitation. The process whereby dialogue is held with residents with respect to the scope, benefits and impact of mining projects that has been referred to as “consultation” or “citizen participation” is the investor’s responsibility. This process was initially governed by Ministerial Resolution No. 596-2002-EM-DM<sup>92</sup> and currently by Supreme Decree No. 028-2008-EM<sup>93</sup> and Ministerial Resolution No. 304-2008-EM-DM<sup>94</sup>. As explained in these provisions, the purpose of this process is to inform residents about the projects and also to allow them to manifest their concerns, contributions, comments, etc. in this regard.<sup>95</sup>

71. In turn, Convention No. 169 of the International Labor Organization (“Convention 169”)<sup>96</sup> establishes the right of indigenous and original peoples to be consulted by the State with respect to legislative or administrative measures affecting their collective rights. In the counter-memorial submitted by the State, it is stated that the consultation of indigenous communities referred to in Convention 169 “is understood, in practical terms, as an obligation to obtain prior consent.”<sup>97</sup> This is incorrect.

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<sup>91</sup> Article 8 of the Environmental Regulations for Mining Exploration Activities, Supreme Decree No. 020-2008-EM dated April 2, 2008 (**FLURY 024**).

<sup>92</sup> Regulations on Consultation and Citizen Participation in the Process for Approval of Environmental Impact Studies in the Energy and Mines Sector, Ministerial Resolution No. 596-2002-EM-DM dated December 21, 2002 (“Ministerial Resolution No. 596-2002-EM-DM”) (**FLURY 025**).

<sup>93</sup> Regulations on Citizen Participation in the Mining Sector, Supreme Decree No. 028-2008-EM dated May 27, 2008 (“Supreme Decree No. 028-2008-EM”) (**FLURY 026**).

<sup>94</sup> Ministerial Resolution No. 304-2008-EM-DM (**FLURY 027**).

<sup>95</sup> The first provision defines a consultation as “a process of information and dialogue between the Holder of the project, the citizens and the State regarding mining or energy activities in the location, about the regulatory framework governing them and the measures for prevention and management of possible social and environmental impacts of the project; furthermore, it allows to learn about the citizens’ perceptions and concerns. A consultation is held through meetings aimed at persons and social organizations; it does not imply a right of veto by citizens over the project.” (Article 2 of Ministerial Resolution No 596-2002-EM-DM. The new regulations explain that citizen participation is “a dynamic and flexible public process which, through the application of various mechanisms, is aimed at making appropriate and adequate information available to the participating residents regarding mining projects planned or in execution; promote dialogue and consensus building; and learn and channel opinions, positions, points of view, observations or contributions with respect to mining activities for decision making by the competent authority on the administrative proceedings under its charge.” (Article 3 of Supreme Decree No. 028-2008-EM).

<sup>96</sup> Convention 169 (**R-029**).

<sup>97</sup> Counter-memorial, paragraph 62.

72. It is worth noting that in 2011 Article 4 of Supreme Decree No. 028-2008-EM was in force, which stipulated that: “The right to consultation to which reference is made in Convention 169 of the International Labor Organization on Indigenous and Tribal Peoples in Independent Countries, is exercised and implemented in the mining subsector, through the citizen participation process that is governed by these Regulations.”<sup>98</sup> Under this legal framework, by ordering and monitoring the application of the citizen participation mechanisms provided in the abovementioned regulations, the State was also fulfilling its obligations under Convention 169. This article also expressly established that “A consultation does not grant the participating residents a right of veto of mining activities or of decisions by the authority.”<sup>99</sup>

73. As of Law No. 29785<sup>100</sup>, the provisions in effect since September 2011 govern the right of consultation of indigenous peoples independently from the general right of participation of the populations. Even under this new legal framework, it is repeated and ratified that the right of consultation does not imply a right of veto. Although the purpose sought by a consultation is to reach an agreement or consensus with indigenous peoples,<sup>101</sup> the final decision about the administrative or legislative measure is solely up to the State.<sup>102</sup>

74. It is worth noting that Dr. Peña, expert for the Peruvian State, wrongly identifies farmer communities and [native] communities as indigenous or original peoples.<sup>103</sup> This is incorrect. The requirements to be considered as a farmer or native community are not the same than those that characterize original or indigenous peoples. The applicable provision itself states that native or farmer communities will only be recognized as descendants of indigenous or original peoples when they meet the objective and subjective criteria set forth by the provision (which match with the provisions of Convention 169).<sup>104</sup>

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<sup>98</sup> Article 4 of Supreme Decree No. 028-2008-EM (**FLURY 026**).

<sup>99</sup> Ibid.

<sup>100</sup> Law on the right to prior consultation of indigenous or original peoples, recognized in Convention 169, Law No. 29785 dated September 7, 2011 (“Law No. 29785”) (**FLURY 028**).

<sup>101</sup> Ibid. Article 3.

<sup>102</sup> Ibid. Article 15. See also Articles 5.d and 23.3 of the Regulations to Law No. 29785, Supreme Decree No. 001-2012-MC dated April 3, 2012 (**FLURY 029**): “... not achieving said purpose [the purpose of reaching an agreement or consent] does not imply that the right of consultation is affected” and “If no agreement is reached and the sponsoring entity issues the measure that is the subject of the consultation, it is up to said entity to adopt all the measures that are necessary to guarantee the collective rights of the indigenous people or peoples ....”

<sup>103</sup> Expert Report of Antonio Alfonso Peña Jumpa (“Peña Report”), par. 28 (**REX-002**).

<sup>104</sup> Article 7 of Law No. 29785 (**FLURY 028**).



75. Additionally, Dr. Peña misinterprets article 89 of the Constitution when suggesting that a veto right in favor of such communities over projects conducted in the areas in which they inhabit arises from such provision.<sup>105</sup> The autonomy this article grants to native and farmer communities relates to “their organization, in the communal work and the use and free disposal of their lands, as well as in economic and administrative matters, within the framework established by the law.”<sup>106</sup> This provision must be read in harmony with all other Constitutional provisions, which clearly establish that the Peruvian State is a unitary State, and that the use of natural resources shall be governed by the State.<sup>107</sup>

76. In this sense, the obligations of mining companies in this context refer to informing the population in general about the activity that they are going to carry out and the impacts and benefits that this activity creates. The companies do not replace the State in any of its obligations vis-à-vis these residents. It is the State exclusively that must fulfill its constitutional obligation to grant residents health, education and safety, among others.<sup>108</sup> And it is up to the State, not the mining investor, to carry out the process of consultation with indigenous peoples under Convention 169.

77. Furthermore, it is the State that must preserve social peace, which implies solving social conflicts, monitoring and sanctioning activities that entail violation of the Rule of Law. A company is not responsible for the occurrence of protests, nor is it obligated to paralyze its operations given the opposition of local residents.

78. On the date of issuance of Supreme Decree No. 032-2011-EM<sup>109</sup>, Bear Creek was meeting all its legal obligations provided for in the regulations for the “Citizen Participation” required for the approval of the Environmental Impact Study (EIS) for the Santa Ana project. During this process, Bear Creek was able to hold the mandatory Public Hearing, a public act open to any interested parties, where in the presence of the mining and other authorities, it reports on the characteristics of the mining project being studied, the possible impacts that it could entail, as well as the benefits hoped to be achieved from the mining activity proposed for the population of the area adjacent to the area of resource exploitation and the country. This hearing represents a very significant milestone because it entails the culmination of the citizen participation process, in which the EIS is publicly disclosed, enabling the Ministry of Energy and

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<sup>105</sup> Peña Report, pars. 37-38 (**REX.002**).

<sup>106</sup> Article 89 of the Constitution (**C-0024**).

<sup>107</sup> Articles 43 and 66 of the Constitution (**C-0024**).

<sup>108</sup> Constitution (**C-0024**).

<sup>109</sup> Supreme Decree No. 032-2011-EM (**C-0005**).

Mines to commence the evaluation process and subsequent approval of the EIS.

#### 4.5 The Santa Ana Project Environmental Impact Study

79. In the context of the procedure for approval of the EIS, the regulations encourage and ensure the intervention of third parties, the public and State institutions for the purpose of enriching the content of this environmental instrument. For this, any interested party may submit contributions, suggestions, comments or criticism to the EIS, which together are known in general as “observations.” All these comments must be addressed by the company by providing additional or clarificatory information allowing the authority to evaluate the EIS, enriched now with this additional or clarificatory information.

80. Throughout my career, I have reviewed many environmental management instruments associated with different mining projects. In order to prepare this report, I have had the opportunity to review the EIS for the Santa Ana Project,<sup>110</sup> the observations made to it,<sup>111</sup> and the response to the “observations” by Bear Creek.<sup>112</sup> In my opinion, the Santa Ana Project EIS, which includes the additional and clarifying information contained in the response to the observations, meets the requirements of form and content required by the applicable legal provisions and it was reasonable to expect it to be approved by the Ministry of Energy and Mines within the legally established time period with some reasonable delay (a few months), which unfortunately is not uncommon.

81. However, I must note that the suspension of the proceeding for evaluating the Santa Ana EIS imposed by the Administration itself by means of a precautionary measure is illegal under the applicable Peruvian legal framework<sup>113</sup>. Precautionary measures must seek exclusively to guarantee the effectiveness of the final decisions by the Administration, in this they are similar to those precautionary measures that may be ordered by the judicial authorities. In this particular case, the decision to suspend the proceeding was justified on the movement of people or protests in the area, but did not relate the occurrence of such facts to the company’s conduct. Thus, in practice the Administration would be demanding conditions that are not in the applicable regulations in order to continue with the proceeding under its charge.

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<sup>110</sup> Ausenco Vector, Santa Ana Project EIS dated December 2010 (**C-0071**).

<sup>111</sup> Report No. 399-2011-MEM-AAM/WAL/jCV/CMC/JST/KVS/AD of the Ministry of Energy and Mines dated April 19, 2011 (**R-040**) and Technical Opinion No. 016-11-AG-DVM-DGAA-DGA of January 2011 (**R-041**).

<sup>112</sup> Ausenco Vector, Bear Creek Mining Company Santa Ana Project Response to Observations by the MINAG to the EIS, July 2011 (**FLURY 031**), and Ausenco Vector, Bear Creek Mining Company Santa Ana Project Response to Observations to the Environmental and Social Impact Study of MINEM, July, 2011 (**FLURY 032**).

<sup>113</sup> Directorial Resolution No. 162-2011-MEM-AAM (**C-0098**).

82. I understand that on January 7, 2011, the General Environmental Affairs Administration of the Ministry of Energy and Mines approved the Executive Summary of the Santa Ana Project EIS and its Citizenship Participation Plan.<sup>114</sup> In this respect, Dr. Rodríguez-Mariátegui notes that “this approval served as an authorization to allow community participation mechanisms proposed by Bear Creek and did not constitute a ruling by the authority on the merits of the EIS.”<sup>115</sup> I agree that by approving the citizen participation plan, the authority recognizes that the mechanisms proposed by Bear Creek are adequate, and accordingly with this decision, it is authorized<sup>116</sup> to go on to implement this plan, carrying out the public hearing, for example. However, I disagree with the final comment. In my opinion, although this decision is not the final approval of the EIS, it represents an initial green light from the authority and is a very important milestone in the process of approval of the EIS, which indicates that Bear Creek was conducting itself in an appropriate manner and consistently with mining practice. For this, the authority granted its approval to the EIS Executive Summary and the Citizen Participation Plan, authorizing the continuation of the procedure.

83. As was explained, as part of the EIS evaluation process, all the observations made and submitted by interested parties and by the competent authorities are provided to the investors. The experience of recent years shows that it is common for those leading or participating in the anti-mining movement in Peru to promote and disseminate multiple “observations,” and its “great” number is advertised to argue before third parties the “validity” of their opposition to investment, especially mining, projects.

84. However, the quantity of “observations” does not constitute a challenge or put into question the quality of the EIS. For example, one same group can put forth one or more “observations,” and the “observations” may be repeated – with nuances – by different persons or groups. A high number of observations is part of the process of generating a document that resolves all the concerns of residents and authorities. In other words, there is no relationship between the number of observations and the socio-environmental sensitivity of a mining project; nor with the likelihood that the project will become a mine.

85. In this case, the Santa Ana Project EIS received 196 “observations.” At first glance, this number may appear high, but in my opinion it is what is normal and to be expected. From the table that I am including below, we can see that receiving numerous “observations” with respect to an EIS is a normal and even welcomed part of the approval process of the EIS, where the main mining projects received multiple requirements for information or clarification. This list includes a series of projects that received a similar number of observations, or even a much higher number, and these

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<sup>114</sup> Official Letter No. 021-2011/MEM-AAM dated January 7, 2011 (**C-0073**).

<sup>115</sup> Expert’s Report by Luis Rodríguez-Mariátegui Canny (“Rodríguez-Mariátegui Report”), paragraph 43 (**REX-003**).

<sup>116</sup> Articles 18 and 19, Ministerial Resolution No. 304-2008-MEM-DM (**FLURY 027**).

EIS were approved, with the construction and operation of the respective mines being authorized, as follows:

<b>Project</b>	<b>Number of “observations”</b>	<b>EIS Approval</b>
<b>La Zanja</b> (Minera LA ZANJA S.R.L.)	<b>162</b>	Directorial Resolution No. 090-2009-MEM/AAM dated April 24, 2009 <sup>117</sup>
<b>Antapaccay</b> (Minera XSTRATA TINTAYA S.A.)	<b>151</b>	Directorial Resolution No. 225-2010-MEM/AAM dated July 6, 2010 <sup>118</sup>
<b>Toromocho</b> (Minera Chinalco Peru S.A.)	<b>252</b>	Directorial Resolution No. 411-2010-MEM/AAM dated December 14, 2010 <sup>119</sup>
<b>Antamina</b> (Cía. Minera Antamina)	<b>139</b>	Directorial Resolution No. 054-2011-MEM/AAM dated February 18, 2011 <sup>120</sup>
<b>Las Bambas</b> (Minera XSTRATA Tintaya S. A.)	<b>179</b>	Directorial Resolution No. 073-2011-MEM/AAM dated March 7, 2011 <sup>121</sup>
<b>Expansión de la Unidad de Producción Cerro Verde</b> (Sociedad Minera Cerro Verde S.A.A.)	<b>171</b>	Directorial Resolution No. 403-2012-MEM/AAM dated December 3, 2012 <sup>122</sup>
<b>Shahuindo</b> (Minera Sulliden Shahuindo S.A.C.)	<b>170</b>	Directorial Resolution No. 339-2013-MEM/AAM dated September 10, 2013 <sup>123</sup>
<b>Santa Ana</b> (Bear Creek Mining Company, Peru Branch)	<b>196</b>	

86. As can be observed from this table, receiving a large number of “observations” does not entail a poor quality EIS and much less that it will not be approved. It also does not entail a social environment necessarily hostile to the project.

87. I have reviewed the observations made on the EIS of the Santa Ana Project<sup>124</sup> and Bear Creek’s response to those observations<sup>125</sup>. In my opinion, all of

<sup>117</sup> Directorial Resolution No. 090-2009-MEM/AAM dated April 24, 2009 (**FLURY 032**).

<sup>118</sup> Directorial Resolution No. 225-2010-MEM/AAM dated July 6, 2010 (**FLURY 033**).

<sup>119</sup> Directorial Resolution No. 411-2010-MEM/AAM dated December 14, 2010 (**FLURY 034**).

<sup>120</sup> Directorial Resolution No. 054-2011-MEM/AAM dated February 18, 2011 (**FLURY 035**).

<sup>121</sup> Directorial Resolution No. 073-2011-MEM/AAM dated March 7, 2011 (**FLURY 036**).

<sup>122</sup> Directorial Resolution No. 403-2012-MEM/AAM dated December 3, 2012 (**FLURY 037**).

<sup>123</sup> Directorial Resolution No. 339-2013-MEM/AAM dated September 10, 2013 (**FLURY 038**).

the observations could be remedied through the usual procedure, there was no observation on the merits that could entail a significant obstacle for the development of the project. In addition, in my opinion, Bear Creek's responses to the observations are appropriate, and, due to this, it was reasonable to expect that the Ministry of Energy and Mines would accept them, declaring the observations remedied, and that it would have approved the ESI.

88. Finally, in relation to the public hearing held on February 23, 2011, Dr. Rodríguez-Mariátegui limits himself to emphasizing some formal defects of the minutes, stating, for example, that the minutes do not reflect that informational material was distributed among the attendees, that the proper functioning of the audiovisual equipment was checked, nor does it leave a record of the participation of an Aymara translator.<sup>126</sup> First, it is important to note the difference between a defect in the minutes and the lack of compliance with a legal requirement when holding of the public hearing. For example, in relation to the presence of the translator, the relevant issue is that a translator has actually participated while the hearing was being held, although it may not appear in the minutes. Secondly, it is worth noting that formal defects are not uncommon in this type of minutes (which tend to be drafted at the time that the hearing is held) and normally can be remedied without greater consequence. Pursuant to the citizen participation rules, the development of the hearing is recorded in a minute and by audio equipment, and, if possible, in a visual recording. The minutes, which is a form approved by the MINEM, provides in detail the information required by the rule<sup>127</sup> to corroborate the conduction of this important activity, and there is no specific rule supporting the fact that a flaw may constitute a legal argument to annul the procedure, since there is a double record of this activity.

#### **4.6 Permits and Authorizations Applicable to the Santa Ana Project**

89. As I explained at the beginning of this opinion, in Peru mining activity is a regulated activity and accordingly, carrying out mining activity requires many permits or licenses. These are granted at different levels, according to the stage of development of the activity. In other words, the existence of all permits or licenses simultaneously is not required.

90. After obtaining the mining concession, the first permits to be requested and obtained are those related to the environmental impact studies, first for the exploration

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<sup>124</sup> Report No. 399-2011-MEM-AAM/WAL/JCV/CMC/JST/KVS/AD of MEM of April 19, 2011 (**R-040**) and Technical Opinion No. 016-11-AG-DVM-DGAA-DGA of January, 2011 (**R-041**).

<sup>125</sup> Ausenco Vector, Bear Creek Mining Company Santa Ana Project Response to Observations by the MINAG to the EIS, July 2011 (**FLURY 030**) and Ausenco Vector, Bear Creek Mining Company Santa Ana Project Response to Observations to the Environmental and Social Impact Study of MINEM, July, 2011 (**FLURY 031**).

<sup>126</sup> Rodríguez-Mariátegui Report, paragraph 59 (**REX-003**).

<sup>127</sup> Article 25.2 of Ministerial Resolution No. 304-2008-MEM-DM (**FLURY 027**)

stage, by means of the EISDIA and/or EISd, depending on the size of the intended operation and the area that will be disturbed by this process. Once this first stage is completed, an EIS will be required to report on the impacts and benefits that will be created by the possible future exploitation of the deposit located in the sub-soil of the area of which the mining concession is granted. In the next stage, the investor will require several additional permits and will go on acquiring access to the surface land where the mining concession is located (which might be in addition to those obtained for exploring).

91. In relation to this process of obtaining permits, on June 25, 2011, the date of issuance of Supreme Decree No. 032-2011<sup>128</sup>, Bear Creek had submitted the EIS to the General Administration of Mining Environmental Affairs Office of the Ministry of Energy and Mines and had held a public hearing, as was explained, at which the EIS was disclosed to interested neighboring residents. In addition, Bear Creek had received the “observations” on the EIS. At that time, what was pending was Bear Creek’s response to the observations made and subsequently the completion of the evaluation and issuance of a final decision on the EIS by the Ministry of Energy and Mines. Considering the documentation reviewed, I understand that Bear Creek was able directly and with the advice of environmental consultants to give an adequate response to all the observations made within the time periods legally provided for this.<sup>129</sup> Therefore, a favorable decision was to be expected from the Ministry of Energy and Mines with respect to the Santa Ana Project EIS.

92. It is correct to say that in order to continue with the Santa Ana Project Bear Creek would have to obtain several additional permits. However, Dr. Rodríguez-Mariátegui suggests in his report that a wide margin of discretion exists for the competent authorities to grant these permits and licenses.<sup>130</sup> This is not correct. All of the permits to which Dr. Rodríguez-Mariátegui refers are granted following formal procedures that have detailed specific requirements. If the holder of the mining concession meets all the requirements, the administration must necessarily issue the corresponding permit. These permits do not depend on the administration’s discretion, as I will explain with some examples below.

93. Insofar as the mining plan, for example, Dr. Rodríguez-Mariátegui notes that “approval or rejection of this Mining Plan is within the scope of discretion of the Ministry of Energy and Mines (...).”<sup>131</sup> However, the applicable provisions establish a series of

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<sup>128</sup> Supreme Decree No. 032-2011 (**C-0005**).

<sup>129</sup> In fact, on July 22, 2011, Bear Creek drew up a notarized instrument responding to the observations made. In my opinion, this response adequately answered all the observations made. (**FLURY 039**).

<sup>130</sup> Rodríguez-Mariátegui Report, paragraph 40 (**REX-003**).

<sup>131</sup> Ibid, paragraph 75.

technical criteria that determine the approval of a mining plan by the authority.<sup>132</sup> The approval of the mining plan is not a discretionary decision, but rather a regulated decision because limitations for decision-making are imposed on the officer. Every mining plan is different, and it answers to different factors, such as the nature of the mining operation, the ore, the size of the field, the geography of the area, the financial capacity of the [concession] holder, the exploitation pace intended for the mine, etc. Therefore, the only one having “discretion” on this matter is the holder of the concession himself. A company such as Bear Creek, which has staff experienced with mining projects and first-rate consultants, would have no difficulty in satisfying these technical requirements and obtaining the approval. In vein with the foregoing, it is worth recalling that, whether discretionary decisions or not, item 3 of Article 3 of the LPAG states that all administrative acts must fulfill a public purpose. In this regard, the provision cited literally states the following:

**“Article 3 – Requirements for validity of administrative acts**

*The following are requirements for the validity of administrative acts:*

(...)

*3. Public Purpose –Be in keeping with the purposes of public interest assumed by the provisions that grant authorities to the issuing body, without it being authorized to pursue through the act, even in concealed fashion, any purpose that may be personal of the authority itself, in favor of a third party, or another public purpose other than that provided for by law. The lack of provisions indicating the purposes of a power does not generate discretion.”<sup>133</sup>*

94. The provision cited is quite clear, whether a discretionary decision is involved or not, administrative acts must be issued with the purpose of safeguarding the fulfillment solely of the public interest, clarifying moreover that “the lack of provisions indicating the purposes of a power does not generate discretion.” Consequently, even if the possibility of rejecting the mining plan were a discretionary decision, the issuance of the administrative act rejecting the mining plan entails the obligation of justifying the reasons why said decision suits the public interest of the State and not just with the interest of the persons filing objections to the project, and being subject to due process, which allows the exercise of the right to defense of the investor at original and appellate levels.

95. In relation to the obtainment of the Certificate of Non-Existence of Archaeological Remains (CIRA), Dr. Rodríguez-Mariátegui seems to suggest that this proceeding could obstruct the project.<sup>134</sup> The obtainment of the CIRA is essential for

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<sup>132</sup> See Consolidated Text of Administrative Procedures of the Ministry of Energy and Mines approved by Supreme Decree No. 038-2014-EM (**FLURY 040**), procedure No. 43 and Annex I to Supreme Decree No. 018-92-EM (**FLURY 041**).

<sup>133</sup> Article 3 of the LPAG (**BULLARD 005**).

<sup>134</sup> Rodríguez-Mariátegui Report, paragraphs 70-73 (**REX-003**).

the investment projects to be conducted in new areas; therefore, to facilitate it, special provisions<sup>135</sup> were enacted for issuing such documents, specifying that the CIRA must be issued by a competent authority within a term no greater than twenty (20) working days following the submission of the request, subject to positive administrative silence, provided all requirements are met.<sup>136</sup> It should be noted that even if there are archeological remains, the rules allow their preservation and care, so their presence—unless it is a major installation—generally does not prevent the carrying out of projects.

96. However, in the case of the Santa Ana Project, I have not found any indication that would make me think that relevant or significant archaeological remains exist in the areas critical for construction of the facilities. It is worth noting that even in the event that archaeological remains were to exist, the provisions allow for continuing with the project with their preservation and care. In relation to the procedure to obtain this certificate, it is worth noting that in accordance with the applicable provisions, this certificate must be issued within a time period of twenty (20) business days and if the administration fails to issue it within that time period, the petitioner's request will be deemed approved.<sup>137</sup>

97. In section 9 of his opinion, titled "Water Supply", Dr. Rodríguez-Mariátegui also refers to the licenses for use of water as a serious problem for Bear Creek.<sup>138</sup> I disagree with this opinion. First, the obtainment of those types of licenses is not necessarily problematic. Second, I understand that the National Water Authority did not submit observations to the EIS of the Santa Ana Project, which, in my opinion, would be expected if the authority had detected problems in relation to the use of water resources by the Project.

98. In addition, it should be stated that the observations of Dr. Rodríguez-Mariátegui regarding the water for the project are mainly based on Supreme Decree No. 014-2011-EM<sup>139</sup>, which regulated the requirement of authorization for use of water in the procedure of benefit concession. According to such rule, each one of the subsequent stages of the benefit concession required a document regarding water. Currently, new legal provisions have been rendered on the matter, showing a trend of the Administration to improve the procedures applicable to these types of permits. These rules amend the Regulation of the Water Resources Act (Supreme Decree No. 001-2010-AG<sup>140</sup>). The new rules relate to administrative procedures aimed at

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<sup>135</sup> Supreme Decree No. 054-2013-PCM (**FLURY 043**).

<sup>136</sup> Ibid. Article 2.d

<sup>137</sup> Ibid.

<sup>138</sup> Rodríguez-Mariátegui Report, paragraph 91-95 (**REX-003**).

<sup>139</sup> Supreme Decree No. 014-2011-EM (**FLURY 044**).

<sup>140</sup> Supreme Decree No. No. 001-2010-AG (**FLURY 045**).



obtaining a license for use of ground or underground water. Rules have been approved that encourage investment projects by simplifying the beneficiation concession procedure regulated by the Mining Procedures Regulation. The Procedures Regulation was amended to grant rights of use of water and authorization to perform works in water natural resources.<sup>141</sup> The TUPA of the Department of General Mining is simplified and updated regarding procedure 41: Granting, Amendment and Opposition of Benefit Concession. Finally, there is a regulation of the requirement to request the Authorization to build the benefit plant.<sup>142</sup>

99. The procedure called “Approval of the Use of Water Study” referred to in paragraph 92<sup>143</sup> is now called “Water Availability Approval” and is solely focused in showing water availability, the existence of water resources in quantity, opportunity and quality appropriate for a certain project. Regarding the comment of Dr. Rodríguez-Mariátegui that if no water availability is shown, a hydrological or hydrogeological study should be submitted,<sup>144</sup> we should bear in mind the provisions of Supreme Decree No. 028-2015-EM<sup>145</sup>. For the authorization to build the benefit plant, the National Water Authority should render a favorable technical opinion on water availability, granted under the approval of the environmental management instrument (that is, the EIS). In accordance to the updated TUPA of the Ministry of Energy and Mines<sup>146</sup> and Supreme Decree No. 028-2015-EM<sup>147</sup>, there is no longer need to obtain an authorization to perform works of use of water for the authorization stage to build a benefit plant.

100. Regarding paragraph 93<sup>148</sup> on the license for use of water, we should indicate that the favorable technical report in mining is now the inspection certificate of the

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<sup>141</sup> Chief Resolution No 007-2015-ANA repealing Chief Resolution No. 579-2010-ANA (**FLURY 045**),

<sup>142</sup> Supreme Decree No. 014-2011-EM (**FLURY 043**).

<sup>143</sup> Rodríguez-Mariátegui Report, paragraph 91(**REX-003**).

<sup>144</sup> Rodríguez-Mariátegui Report, paragraph 92(**REX-003**).

<sup>145</sup> Supreme Decree No. 028-2015-EM (**FLURY 046**).

<sup>146</sup> TUPA of the Ministry of Energy and Mines (**FLURY 040**).

<sup>147</sup> *Ibid.*

<sup>148</sup> Rodríguez-Mariátegui Report, paragraph 93(**REX-003**).

building of works and facilities of the approved project, under Supreme Decree No. 001-2015-EM<sup>149</sup>, which states:

*“3.7 Inspectors of the Department of General Mining and the holder of the mining activity shall enter into an inspection certificate of the building of works and facilities of the approved project, stating whether it is suitable or not. The conformity certificate is the favorable report with which the person administered requests, before the competent authority, the license for use of water, authorization to discharge the water used, or certificate of zero discharge, in accordance with Supreme Decree No. 014-2011-EM.”*

101. Regarding paragraph 94<sup>150</sup>, it should be stated that is not realistic to request a license exclusively for the benefit plant, since the appropriate way would be to include all water needs in the Hydrology Study, including water supply to the equipment and facilities of extractive operations, such as drills, in order not to request another license. Additionally, regarding the water use with domestic purposes, it would be included within the license for use of water for mining purposes, considering the following Resolution No. 007-2015-ANA<sup>151</sup>:

***“Article 22 Characteristics of the license for use of water.***

*22.1 The class or type of water use appointed in the license allows its holder to use a volume of water to develop the main activity and other supplementary works for achieving the purpose for which the water is used.[“]*

102. As indicated with respect to the mining plan, for the obtainment of this type of licenses it is necessary to fulfill several requirements, but if these requirements are met, the administration does not have discretion to deny the permits. In addition, Dr. Rodríguez-Mariátegui does not take into account provisions issued recently and specifically intended for the promotion of investments that allow for carrying out processing in a more streamlined manner, such as, for example, Supreme Decrees No. 001-2015-EM<sup>152</sup> and 028-2015-EM.<sup>153</sup>

103. The administration can not deny these permits in a discretionary manner; neither can it delay their granting. Different provisions in the Peruvian legal framework obligate officials to rule within the time periods established.

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<sup>149</sup> Supreme Decree No. 001-2015-EM (**FLURY 047**).

<sup>150</sup> Rodríguez-Mariátegui Report, paragraph 94(**REX-003**)

<sup>151</sup> Chief Resolution No. 007-2015-ANA (**FLURY 045**).

<sup>152</sup> Supreme Decree No. 001-2015-EM (**FLURY 047**)

<sup>153</sup> Supreme Decree No. 001-2015-EM (**FLURY 047**) and Supreme Decree No. 028-2015-EM (**FLURY 046**).

104. Thus, the LPAG<sup>154</sup> stipulates the following:

***“Article 131. Mandatory Nature of Time Periods and Terms***

*131.1 Time periods and terms are understood as maximums, they are computed independently of any formality, and are equally binding on the administration and on administration’s subjects, without need for compulsion, in what concerns them respectively.*

*131.2 Any authority must meet the terms and time periods under its charge, as well as ensure that subordinates meet those specific to their level.*

*131.3 It is the right of administration’s subjects to demand compliance with of the time periods and terms established for each proceeding or service.”*

***“Article 136. – Undeferable time periods***

*136.1 Time periods set by an express provision are undeferrable, save for a provision authorizing the contrary.*

*136.2 The competent authority may grant a postponement of the time periods established for the processing of evidence or for the issuance of reports or opinions, when so requested prior to their expiration by administration’s subjects or officials, respectively.*

*136.3 A postponement shall be granted one single time by express decision, provided that the time period has not been impaired by the party requesting it and provided that it does not affect third-party rights.”*

105. As can be observed, the general principle is that the time periods that the provisions establish shall be final and can only be extended by means of a specific provision so providing, such [extension] will be granted one single time, ensuring that it does not affect the rights of other persons with a common interest in the matter.

106. In relation to the procedures to be followed for obtaining permits, one should not [sic] be careful when asserting they will be of long or unpredictable duration. Although there are some occasions in which these procedures extend beyond the time stated by the governing rules, the State cannot rely on its lack of diligence in the approval of projects in the time it has imposed itself when exercising the corresponding constitutional right to regulate laws; therefore, none of these must be used as an excuse for the government to prevent, limit or divert the nation regarding due process or the protection and maintenance of the Rule of Law.

107. The mining industry has publicly and repeatedly declared its concern for the duration of some of these procedures. The MINEM and other authorities, admitting this situation, conduct efforts to reduce these barriers, coordinating the issuance of special rules to support investments and reduce terms, reducing the administrative burden and/or procuring to solve the obstacles in a technical and coordinate manner, in defense of the institutions, for the welfare of the population and the country.

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<sup>154</sup> LPAG (BULLARD 005).

108. The policy of the Peruvian State is for the procedures and processes for these permits and licenses to be efficient and timely, in order to achieve the goals that the regulations indicate, and the country's objective of developing its natural resources, effectively and timely fulfilling the regulations and guidelines of the LPAG and the General Mining Act<sup>155</sup>, as the sectorial regulation.

109. The Peruvian State's commitment to meeting the deadlines established by the law to promote, optimize and strengthen investments for economic growth and sustainable development of the Nation has been strengthened with the enactment of a specific law to promote investments in Peru<sup>156</sup> which drastically penalizes delay, creation of processes and requirements not foreseen in the regulations, when establishing the following:

*"Article 1. Purpose of the Law*

*The purpose of this law is to promote investment for economic growth and sustainable development, simplifying and integrating the permits and procedures, as well as ways to promote investment."*

*"Article 38. Actions to Optimize Administrative Processes and Procedures Connected With Private Investment*

*Organization of the administrative processes and procedures connected with private investment is declared of national interest and public necessity, as is the active and effective participation in monitoring large-scale investments. ..."*

*"Article 39. Responsibility of the Official*

*A responsible official's failure to comply with the obligations imposed by this Law or Law 30230, which establishes tax measures, simplifying and integrating the permits and procedures for the promotion and fostering of investment in Peru, within the established term, causes a breach of his/her obligations, incurring in a serious offense applicable to the labor system to which it belongs. In this case, the corresponding sanction proceeding shall be commenced against the responsible official, under the responsibility of the head of the entity."*

110. Additionally, the Government has shown its will to expedite and simplify the coordination among its different administrative stages to reduce processing, through the enactment of different rules specifically aimed at promoting investments, some of them are the following:

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<sup>155</sup> The General Mining Act (**BULLARD 031**).

<sup>156</sup> Law for the Promotion of Investments for Economic Growth and Sustainable Development, Law No. 30327 dated May 20, 2015 (**FLURY 048**).

- a) The rule to “**Approve special provisions to execute administrative proceedings**” approved by Supreme Decree No. 054-2013-PCM<sup>157</sup>), which is aimed at approving special provisions for administrative proceedings of authorizations and/or certifications for investment projects within the national territory.
- b) The rule to “**Approve special provisions to execute administrative procedures and other measures to boost public and private investments**” approved by Supreme Decree No. 060-2013-PCM<sup>158</sup>), which is aimed at approving special provisions to expedite the execution of private and public investment projects.
- c) The rule to “**Approve Provisions for Mining Procedures boosting Investment Projects**” approved by Supreme Decree No. 001-2015-EM<sup>159</sup>); and  
 The rule to “**State specifications to the procedure of the beneficiation concession governed by the Mining Procedures Regulations, amended by Supreme Decree No. 001-2015-EM**”, approved by Supreme Decree No. No. 028-2015-EM.

111. The State and its officials are obligated to comply with due process, execute their obligations in the time provided for that effect by each regulation, especially for the rules imposed by means of the regulations that the Ministry of Energy and Mines and the Executive Branch , and the State can not allege third party responsibility upon its own breach. In my experience, the Ministry of Energy and Mines acts in good faith and with the purpose of complying with the time periods provided for the processing of this type of permits. In general, officials tend to have a sense of duty, an open attitude to the concern of [concession] holders to comply with processing in a timely manner with the objective of promoting mining investment. Thus, given doubts or missing information, additional documentation or working sessions tend to be requested to explain details when necessary. If the mining company responds to questioning in a diligent manner, which I understand that Bear Creek would have no difficulty in doing, the process can be streamlined.

112. In this arbitration, the State has mentioned that Supreme Decrees Nos. 033 and 034-2011-EM impose additional requirements on the Santa Ana Project that are difficult to meet ex post. In particular, it notes that they impose a requirement of prior consent by the indigenous communities.<sup>160</sup> This is incorrect. These decrees refer to the State’s obligation to hold a prior consultation with indigenous communities in accordance with Convention 169, but they do not refer to a right of veto. In addition, as

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<sup>157</sup> Supreme Decree No. 054-2013-PCM (**FLURY 042**).

<sup>158</sup> Supreme Decree No. 060-2013-PCM (**FLURY 049**).

<sup>159</sup> Supreme Decree No. 001-2015-EM (**FLURY 047**).

<sup>160</sup> Counter-memorial, paragraphs 137 and 183. See also Testimonial Declaration of Luis Fernando Gala Soldevilla, paragraph 36 (**RWS-001**).

I explained, the provisions that have developed this obligation legislatively do not establish a right of veto,<sup>161</sup> and, on the contrary, the rule states that “the final decision on the approval of the legislative or administrative measure relates to the promoting (State) entity” of the previous consultation.<sup>162</sup> Naturally, a supreme decree, with an infralegal rank, cannot be interpreted in a manner contrary to the specific law on the subject.

113. In conclusion, if the State acted in good faith in the processing of permits, as was its obligation and its practice, it was reasonable to expect that Bear Creek would have had the necessary permits to commence the construction of the Santa Ana Project in the second half of 2011 and production in the last quarter of 2012 as scheduled. In addition, in my opinion these decrees are contrary to the Constitution and therefore should not be applied.

## V. CONCLUSIONS

114. The main conclusions of this Expert’s Report are the following:

- (i) Legal security, a constitutionally protected principle, is particularly important in the mining sector. Thus, the relevant provisions establish that concessions “are irrevocable to the extent that the holder fulfills the obligations that this Law or special laws require to maintain their validity”<sup>163</sup> and that they may be extinguished only for causes provided for specifically.”<sup>164</sup>
- (ii) The Constitution requires an authorization by a supreme decree approved by the Council of Ministers in order for foreigners to be able to “acquire or possess, under any title, directly or indirectly, mines, lands, woods, water, fuel or energy sources” within 50 kilometers of the borders.<sup>165</sup> This authoritative supreme decree constitutes an administrative act, which is issued at the request of the interested foreigner after an administrative proceeding.

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<sup>161</sup> Law No. 29785 (**FLURY 028**).

<sup>162</sup> Article 23.1 of Supreme Decree No. 001-2012 of April 2, 2012

<sup>163</sup> Ibid. and Article 23 of Law No. 26821 (**R-142**).

<sup>164</sup> Article 58 of the General Mining Act (**BULLARD 031**).

<sup>165</sup> Article 71 of the Constitution (**C-0024**).

- (iii) In practice, to obtain mining concessions in border areas foreigners tend to choose one of the following alternatives: (i) the mining *petitorio* is filed directly by a foreigner following the corresponding procedure before the INGEMMET; or (ii) the foreigner ensures that he will be able to acquire the mining concession in the future by means of some contractual mechanism, while he processes the required authorization before the MINEM. In my opinion, both alternatives are equally valid and legal.
- (iv) Bear Creek complied with Article 71 of the Constitution for the acquisition of the concessions associated with the Santa Ana Project, obtaining the authoritative supreme decree.
- (v) When a foreigner is interested in an existing concession, he will negotiate with the concession holder and will find a contractual mechanism ensuring he may acquire it in the future at a value the foreign investor deems reasonable, after receiving State authorization. Otherwise, there is no sense in starting the processing before the Ministry of Energy and Mines to obtain the supreme decree.
- (vi) In requesting the authoritative supreme decree, Bear Creek was transparent with respect to the structure to be used for said acquisition. From the file, it can clearly be inferred that the Ministry of Energy and Mines fully understood the structure by which Bear Creek would acquire the mining rights, which structure, moreover, was commonly used in the sector for this type of acquisition.
- (vii) Supreme Decree No. 032-2011-EM, which derogates the authoritative supreme decree issued to Bear Creek for the acquisition of the Santa Ana Project, would have the purpose of revoking the rights granted to Bear Creek, contradicting the principle of legal security that the Constitution and the mining laws guarantee and the provisions of the LPAG.
- (viii) The obligations of mining companies in relation to residents neighboring their mining concessions refer to informing residents in general about the activity that they are going to carry out and the impacts and benefits that this activity creates through citizen participation. It is up to the State to carry out the process of consultation with indigenous peoples under Convention 169, not the mining investors. Furthermore, it is the State that must preserve the social peace, which implies resolving social conflicts, overseeing and sanctioning activities that entail violation of the Rule of Law pursuant to the Constitution and the laws.

- (ix) On the date of issuance of Supreme Decree No. 032-2011-EM<sup>166</sup>, Bear Creek was meeting all the legal obligations provided for in the provisions on “Citizen Participation” as required for approval of the EIS for the Santa Ana project, according to Supreme Decree No. 032-2011-EM,<sup>167</sup> which additionally established that this procedure complied with the previous consultation of OIT 169 Convention.
- (x) In my opinion, all the observations on the Santa Ana Project EIS could be remedied within the usual process, none represented an observation on the merits that could entail a significant obstacle to carrying out the project. In addition, in my opinion, Bear Creek gave them an adequate response with the information acquired regarding the physical, geological and social reality of the area, and the professionalism of its personnel and advisors, and, given these responses, it was reasonable to expect that the Ministry of Energy and Mines would approve the EIS.
- (xi) The amount of “observations” made to the EIS is not a challenge or questioning to its EIS capacity, since there is no relation between the amount of observations and the socio- environmental sensitivity of a mining project; or the probabilities that such environmental instrument be not approved.
- (xii) If the State acted in good faith in the processing of permits, as was its obligation and its practice, it was reasonable to expect that Bear Creek would have had the environmental certificate of the Santa Ana Mining Project (that is, the approval of its EIS), and then the necessary permits to commence the construction of the Santa Ana Project in the second half of 2011 and production in the last quarter of 2012 as scheduled.
- (xiii) The action of the State, by issuing Supreme Decree No. 032-2011-EM has a harmful effect for the Nation: It is not the legal means required by the Constitution to withdraw a right granted; it has confiscated Bear Creek right since the latter cannot exercise any act related to its mining right (permits, exploitation or trade of ore), distorting through an unsupported unilateral act its own declaration of public interest of the investment in a border area that it has been admitted as economically depressed that needs investment.

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<sup>166</sup> Supreme Decree No. 032-2011-EMC (C-0005).

<sup>167</sup> Supreme Decree No. 032-2011-EM (C-0005).



## VI. STATEMENTS

115. I hereby declare that I am independent of the Parties that are involved in this arbitration process, as well as their legal advisors and the Arbitral Tribunal.

116. With respect to my past and present relationship with the parties, their legal advisors and the Arbitral Tribunal, I hereby declare the following:

- Mr. Andrew Swarthout, CEO of Bear Creek and witness in the arbitration, worked in SCC between 1996 and 1999. As “executive officers” of SCC, we coordinated works to help the mining operations of the Corporation. My connection with Mr. Swarthout was not direct or subordinate.
- Mr. Elsiario Antúnez de Mayolo, general manager of the Peruvian branch of Bear Creek and witness in the arbitration, joined the Peruvian branch of SCC in 1989 and worked at the company until 2010 as an engineer in Toquepala and later as Operations Manager of the Cuajone mine. My connection with Engineer Antúnez de Mayolo was not direct or subordinate.
- Mr. Alvaro Díaz, legal manager of the Peruvian branch of Bear Creek, worked as an attorney for SCC between 1994 and 2004. The Toquepala mine was his work headquarters, and from there he provided his services mainly to the departments of Arequipa, Tacna and Moquegua. During this period, Mr. Díaz performed his duties under my supervision.
- I currently have no relationship with any of the Parties, their legal advisors or the members of the Arbitral Tribunal.

The opinions expressed in this Expert Report express my genuine belief.

Lima, January 5, 2016.

[signature]

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Hans A. Flury