

RWS-005

Second Witness Statement of Fernando Gala

April 4, 2016

English Translation

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

*Bear Creek Mining Corporation*  
(Claimant)

v.

*Republic of Peru*  
(Respondent)

**ICSID Case No. ARB/14/21**

**Testimony of Luis Fernando Gala Soldevilla  
Vice Minister of Mines and Energy of Peru (June 2009–July 2011)**

**April 4, 2016**

**I. INTRODUCTION**

1. My name is Luis Fernando Gala Soldevilla, and currently I am a Voting Member of the Mining Council of the Ministry of Energy and Mines (“MINEM”) since July 2011. I was Chairman of the Mining Council<sup>1</sup> from 2014 to 2015, and I was Vice Minister of Mines from June 2009 to July 2011. This declaration supplements my first declaration dated October 6, 2015.

2. As I established in my first testimony, I had direct knowledge of the facts related to the 2011 Puno anti-mining protests, and particularly of the discussions with the protesters that took place in Puno and in Lima.

3. In this testimony I will respond to certain arguments presented by Bear Creek Mining Corporation (“Bear Creek” or the “Claimant”) in its Reply brief dated January 8, 2016 (“Reply”).<sup>2</sup> The Claimant argues in particular: (i) that the State did not have grounds for repealing

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<sup>1</sup> I was involved in the Mining Council between 2004 and 2009 and from 2011 to the present, having been Chairman from 2007 to 2008 and from 2014 to 2015.

<sup>2</sup> See Claimant’s Reply on the Merits and Counter-Memorial on Jurisdiction, January 8, 2016 (“Claimant’s Reply”).

the declaration of public necessity of the Santa Ana Project by means of Supreme Decree No. 032 of 2011 (“Decree No. 032”);<sup>3</sup> (ii) it is not true that the State became aware for the first time in June 2011 of the means used by Bear Creek to acquire the mining concessions of the Santa Ana Project;<sup>4</sup> and (iii) on several occasions I indicated in meetings with Bear Creek and publicly that Bear Creek had acted in a lawful manner and that the protesters’ demands were unlawful.<sup>5</sup> The Claimant is distorting most of the facts and taking my statements out of context. I will respond to these arguments in this declaration. In addition, the Claimant argues that the Peruvian state deliberately delayed review of the administrative appeal filed against the suspension of review of the Environmental Impact Study. This is also incorrect, as I will explain below.

## **II. CAUSES OF DECREE NO. 032 OF 2011**

4. In its Reply brief, the Claimant argues that Decree No. 032, which repealed the declaration of public necessity of the Bear Creek investment in the Santa Ana Project, was groundless.<sup>6</sup> The Claimant states that, contrary to what I stated in my first testimony, the discovery of the means used by Bear Creek to acquire the mining concessions of the Santa Ana Project was just an excuse that the government used to accede to the political requests of Mr. Walter Aduviri.<sup>7</sup> That is absolutely wrong. As I will describe in more detail below, the discovery of a possible constitutional violation by Bear Creek in the acquisition of the mining concessions was one of the causes for which Bear Creek’s declaration of public necessity was repealed. It was not an excuse to accede to political whims.

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<sup>3</sup> See Claimant’s Reply, paras. 106–131.

<sup>4</sup> See Claimant’s Reply, paras. 125–131.

<sup>5</sup> See Claimant’s Reply, para. 117.

<sup>6</sup> See Claimant’s Reply, paras. 106–131.

<sup>7</sup> See Claimant’s Reply, para. 20.

5. The Claimant argues, for example, that in the interview I had with a researcher in November 2013, I stated that the alleged constitutional violation by Bear Creek had been used only to conceal the real reason why Bear Creek's declaration of public necessity was repealed.<sup>8</sup> Bear Creek's statement is not true. The State did not attempt to conceal the reasons why Decree No. 032 was issued. In the interview, I said: "I would say that there are two reasons [for which Decree No. 032 was issued] from the State's point of view. One is formal in nature and one an internal reason that one does not want to mention... From the internal point of view, the reason was the social aspect. The State was nearing a state of crisis because of the matter of the Aymaras and Mr. Walter Aduviri..."<sup>9</sup> With this declaration, I did not say that the State was concealing an alleged surrender to the political whims of Mr. Aduviri. I intended to explain with such declaration, as I did in my first testimony, that there were two principal causes of Decree No. 032: the 2011 Puno protests, which caused a critical social situation for the region and the country (the internal reason) and the discovery of a possible constitutional violation by Bear Creek related to the acquisition of mining concessions of the Santa Ana Project (the formal reason). Below I will explain these two causes in detail.

6. The Claimant also argues that, given the two possible reasons for Decree No. 032, Peru had various mechanisms at its disposal instead of resorting to the expropriation of the Santa Ana Project.<sup>10</sup> This is incorrect. As I mentioned in my first testimony, at that time the combination of the violent events in Puno, which plunged the region into a terrible crisis, and the discovery of a

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<sup>8</sup> See Claimant's Reply, para. 20.

<sup>9</sup> Interview of Fernando Gala, Chairman of the Mining Council, Pontifical Catholic University of Peru, November 18, 2013, p. 114 [Exhibit C-0197].

<sup>10</sup> Claimant's Reply, para. 119.

possible constitutional violation put the State between a rock and a sword. The State acted reasonably and appropriately in that particular moment, faced with a unique situation.

**A. THE 2011 PROTESTS IN PUNO**

7. As I explained in my first witness statement, the Department of Puno suffered a social and political crisis in the first half of 2011 due to anti-mining protests that were carried out in the zone.<sup>11</sup> The protests caused deaths, injuries and material damages—the situation was critical.

8. At that time I held the position of Vice Minister of Mines, and as such I was in charge of heading the discussions that we held with representatives of the protesters in the Department of Puno and in Lima. For this reason, I heard first-hand the demands of residents during the protests. The Claimant argues in its Reply that my testimony is “surprisingly” largely based on the 2011 Memorandum.<sup>12</sup> The Claimant seems to insinuate that this is not a reliable document because it does not establish who the author of that document is or the date it was created. This is incorrect: the Memorandum that I cite in my first testimony is a reliable document, and it is the best source for understanding the events of 2011 and the measures adopted by the government. The Memorandum is a document that I personally drafted once all the discussions were over, which I prepared at the request of several Ministers and delivered to the Prime Minister, among other officials, as a record of the events. I drafted the Memorandum because it was deemed important to leave a record for the incoming administration regarding the events and the measures adopted by the government. It is logical for me to refer to it regularly to refresh my memory, since in this case we

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<sup>11</sup> See First Witness Statement of Fernando Gala, October 6, 2015 (“First Gala Witness Statement”), paras. 5–17 [Exhibit RWS-001].

<sup>12</sup> Claimant’s Reply, para. 138.

are referring to events that occurred almost five years ago. The document is my recollection of the events, so I prefer to refer to it.

9. In my first testimony I explained that these protests were divided into three different areas (Northern Zone 1, Northern Zone 2 and Southern Zone), but all had a common complaint—they were all anti-mining protests.<sup>13</sup> In its Reply brief, the Claimant insists that these protests had nothing to do with the Santa Ana Project, and that proof of this is that none of the protests were carried out at installations of the Project.<sup>14</sup> However, Bear Creek’s description is mistaken. The protests in the Southern Zone were the first to break out, and they were the longest (in March through June 2011). From the beginning, these protests demanded the cancellation of all the mining concessions in the zone, and they particularly demanded the cancellation of the Santa Ana Project. At that time, the Santa Ana Project was the only mining project in the zone that had completed the exploration phase and was beginning the necessary studies for the exploitation phase. That is to say that the protests in the Southern Zone were directly related to the Bear Creek mining activities in the Santa Ana Project.

10. In my first declaration I gave a detailed account of the events that occurred in these protests between March and June 2011.<sup>15</sup> These protests were particularly violent. For example:

- On April 25, blockades began to go up in the city of Desaguadero (the principal border city with Bolivia). The city was blockaded for almost two full months, during which the social situation of the zone deteriorated. Among the principal blockades, the one located at the bridge of Desaguadero was critically obstructing trans-border commercial traffic. Moreover, the protesters were blocking the city’s highways to other main cities of the country, such as Tacna on the border with Chile.

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<sup>13</sup> See First Gala Witness Statement, paras. 5–17 [Exhibit RWS-001].

<sup>14</sup> See Claimant’s Reply, para. 3.

<sup>15</sup> See First Gala Witness Statement, paras. 18-40 [Exhibit RWS-001].

- On May 9, a meeting with the community members in the city of Puno had to be abruptly suspended due to the protests. This was the first attempt at holding discussions with the protesters and participating communities to explain the scope of the Santa Ana Project to residents. However, this attempt failed, since the meeting could not be held safely because of the protesters.
- The last of the three discussion meetings of the High-Level Commission (of which I was a member) with the protesters was abruptly suspended because of the imminent danger to our physical safety. As I explained in my first witness statement, due to the rapid escalation of protests in April and the beginning of May 2011, the Prime Minister appointed a High-Level Commission to meet with the protesters and reach an agreement. The Commission held three meetings in which partial agreements were reached, which were not conclusive because the protesters refused to yield in their demands, which included cancellation of the Santa Ana Project.
- After the abrupt termination of the discussion meetings on May 26, 2011, protesters looted various municipal offices in the city of Puno, including the government management office, the office of SUNAT [National Superintendent of Tax Administration] and the office of the comptroller.

11. The protests in the Puno region resulted in unquantifiable damage to human life and material damages that affected the region as well as the entire country. The inhabitants of the region were living under a constant threat of violence. This critical situation lasted until a solution was reached, after many hours of discussion with the protesters in Lima between June 17 and 23. The critical situation involving the safety and stability of the Department of Puno, due to the anti-mining protests that included demands for cancellation of the Santa Ana Project, meant the end of any social grounds for the declaration of public necessity of the Project.

12. The Claimant, aside from insisting that the Southern Zone protests had nothing to do with the Santa Ana Project (which is not true), also argues that these protests were organized exclusively for political reasons by Mr. Walter Aduviri and the *Frente de Defensa de Recursos Naturales* [Front for the Defense of Natural Resources].<sup>16</sup> However, this is a simplistic description of the conflict. Mr. Aduviri may have had political ambitions, but that does not mean that almost 20,000 community

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<sup>16</sup> See Claimant's Reply, para. 112.

members who blocked the cities of Puno and Desaguadero did not have anti-mining complaints or that the residents were not genuinely angry about the Santa Ana Project.

13. In addition, Bear Creek’s argument does not make sense. If the protests had only been politically motivated, it would not make sense for the government of President Alan García (whom Mr. Aduviri was supposedly against) to decide to “collaborate” and “favor” Mr. Aduviri’s movement by repealing the Santa Ana Project. When Decree No. 032 was adopted, it was already known that the next president of Peru would be Ollanta Humala, who presumably favored Mr. Aduviri. Therefore, if the protests had been merely “political,” the government of Garcia would not have taken any measure that would presumably favor the next opposing government. Such a measure would not make sense politically. Consequently, Bear Creek’s explanation is ruled out. Bear Creek does not want to accept the fact that we were being overwhelmed by the social conflict, which required our immediate attention and which was caused in large part by poor management of the Santa Ana Project with the communities.

**B. POSSIBLE CONSTITUTIONAL VIOLATION BY BEAR CREEK**

**1. The acquisition by Bear Creek of the Santa Ana Project concessions through Ms. Villavicencio was an additional fact that we discovered in June 2011**

14. In its Reply brief, Bear Creek and its witnesses argue that Peru was fully aware of the relationship between Ms. Jenny Karina Villavicencio and the company. Specifically, they argue that on June 2011 there was no “discovery” of information that could cause the repeal of the declaration of public necessity.<sup>17</sup> Bear Creek also argues that the State is using the relationship between the company and Ms. Villavicencio as an “excuse” to justify the repeal of declaration of

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<sup>17</sup> See Claimant’s Reply, paras. 125–131.



public necessity of Bear Creek.<sup>18</sup> These arguments are incorrect. As I established previously, the possible constitutional violation was not an “excuse;” it was one of the causes of the repeal of the declaration of public necessity of Bear Creek.

15. The discovery of the possible constitutional violation by Bear Creek is not an excuse; it is one of the reasons why the declaration of public necessity was repealed. The State acted appropriately, within the framework of legality. The following are the facts that led to the discovery of the possible constitutional violation.

16. As I explained in my first witness statement, the government held round table dialogues with the three protest areas from Puno in Lima in June 2011. The round table dialogues with protesters from the Southern Zone were held between June 17 and 23 of 2011, all in the offices of the Ministry of Energy and Mines in Lima. I was present at all the meetings. These meetings were attended by various members of the Aymara communities, protest leaders and Congressional representatives for the Department of Puno (including Congressman Yohnny Lescano). In these meetings, the protesters again presented their demands: (i) the cancellation of all mining and petroleum concessions in the south of Puno; (ii) shut down and cancellation of the Santa Ana Project; and (iii) repeal of the declaration of public necessity of the Santa Ana Project.

17. During these meetings the government representatives insisted, as we had previously, that we could not cancel the mining concessions that were already granted, unless there was a court order in that respect. At that time we understood that the mining concessions of the southern zone of Puno, including the Santa Ana Project mining concessions, had been acquired appropriately. In answer to this, the protesters’ representatives, among them Congressman Yohnny

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<sup>18</sup> See Claimant’s Reply, paras. 20, 107.

Lescano, argued that Bear Creek had not obtained the concessions appropriately. They showed us the documents that indicated that there was a relationship between Ms. Jenny Karina Villavicencio and the Bear Creek company. They showed us the option contracts between the parties for the acquisition of the mining concessions; they told us that they believed that Ms. Jenny Karina Villavicencio was an employee and legal representative of the company and, generally speaking, the community representatives led us to understand that the company had been present in the area long before the declaration of public necessity was approved. Once we obtained this information, there were serious doubts about the constitutional legality of the acquisition process of the Santa Ana Project. Taking into account the situation we were in, we considered that the most reasonable alternative was to repeal the declaration of public necessity, because we had significant evidence that a constitutional violation had occurred.<sup>19</sup> This information, as well as the prolonged and violent protests against mining, including the Project, made the declaration of public necessity unsustainable.

18. Therefore, contrary to the statements of the Claimant, this was not an “excuse,” it is the legal rationale for having to derogate the declaration of public necessity. Moreover, I reiterate what I stated in my first witness statement, this was not the only measure that was adopted in order to end the protests. It was one of several measures adopted.

**2. Contrary to the arguments of the Claimant, before June 2011 I did not know that Bear Creek had acquired the concessions of the Santa Ana Project through Ms. Villavicencio**

19. The Claimant argues in its Reply that I was aware of the relationship between Jenny Karina Villavicencio and Bear Creek and the details of the acquisition of the concessions of the Santa Ana Project long before Decree No. 032. This is not true, and I should add that the

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<sup>19</sup> It is important to clarify that Supreme Decree No. 032 repealed the declaration of public necessity of Santa Ana; it did not cancel the mining concessions. A judicial process was initiated for the cancellation of the mining concessions, as is required, which I understand is still in progress.

declarations used by the Claimant to support its argument are surprising at the very least. I had no knowledge of the aforesaid possible violation until June 23, when the protesters' representatives demonstrated to us that Bear Creek had acquired the concessions through Ms. Villavicencio before obtaining the declaration of public necessity.

20. Mr. Antunez de Mayolo and Bear Creek argue that at the meetings I held with him in March and June, he explained to me “the details of the acquisition by Bear Creek of the Santa Ana concessions.”<sup>20</sup> That is not true. Mr. Antunez de Mayolo never explained to me, as he has done in this arbitration, that when Bear Creek had discovered the mining deposit in Huacullani, he had suggested to Jenny Karina Villavicencio, who was the legal representative and employee of Bear Creek, that she should apply for the concessions while the company obtained the declaration of public necessity.<sup>21</sup> Nor did Mr. Antunez de Mayolo explain to me that as a result of that proposal, Ms. Villavicencio applied for the concessions and then entered into option contracts with Bear Creek for the concessions—much less explain to me the terms of said contracts. I must add that it is curious that Mr. Antunez de Mayolo argues that he described the entire situation to me in March and June, because I do not see why they would have had the need to explain to me how the concessions were acquired. It was not until June 23, 2011, that the matter of the legality of the acquisition of the concessions by Bear Creek became part of the discussion; [until then] we understood that this had been done appropriately. I do not understand why Bear Creek would have wanted to explain to me “the details of the acquisition.” Nor is it logical that they explained it to me,

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<sup>20</sup> Claimant's Reply, para. 130; *See also* Second Witness Statement of Elsiario Antunez de Mayolo, January 8, 2016 (“Second Witness Statement of Antunez de Mayolo”), para. 54.

<sup>21</sup> *See* Claimant's Memorial on the Merits, May 29, 2015 (“Claimant's Memorial”), para. 25.

given that if they were looking for confirmation about their actions, I was not the appropriate official to issue any opinion of value about whether the acquisition was appropriate or not.

21. Bear Creek also argues that as of June 22, 2011, when I had a meeting with the company's representatives, I had to have known that we had information that indicated the possible constitutional violation.<sup>22</sup> This also is not true. As I indicated previously, I remember only having known of the facts on the last day of the discussion meetings, June 23, 2011. That day the discussions ended in the early morning hours, and the next day Decree No. 032 was issued. The declaration of public necessity was repealed because of awareness of the possible constitutional violation.

22. Therefore, contrary to what the Claimant argues, I was not aware (nor should I have been aware) of the possible constitutional violation until participants in the discussions in Lima, particularly Congressman Yohnny Lescano, furnished us the documents on the last day of the meetings, June 23, 2011. Moreover, as I understand it, the MINEM officials were not aware of the real relationship between Ms. Villavicencio and Bear Creek when evaluating Ms. Villavicencio's application for the mining concessions, nor when evaluating the application of Bear Creek to obtain the declaration of public necessity.

23. Bear Creek argues that in an alleged meeting that was held among company representatives, Minister of Energy and Mines Pedro Sánchez and myself, days after Supreme Decree No. 032 was issued, Minister Sánchez stated that he had no reason to believe that Bear Creek had acquired the concessions inappropriately.<sup>23</sup> As I established in my first testimony, I do not remember having been at the aforesaid meeting, nor do I remember that the conversation

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<sup>22</sup> See Claimant's Reply, para. 126.

<sup>23</sup> See Claimant's Reply, para. 148.

alleged by Bear Creek took place.<sup>24</sup> Moreover, I do not think it would make sense for Minister Sánchez to have made those statements, since he was part of the decision-making process about repealing the declaration of public necessity of Bear Creek when we became aware of the possible constitutional violation.

### **III. PUBLIC DECLARATIONS ABOUT CANCELLATIONS OF THE MINING CONCESSIONS**

24. The Claimant argues that statements of various officials of the State, including my own, are evidence that the Puno protests were only due to political interests and that the demands of the protesters were unlawful. However, I think that my statements in that respect are taken out of context.

25. The Claimant cites a press release from the Ministry of Energy and Mines to claim that I considered the protesters' demands to be unlawful.<sup>25</sup> The aforementioned press release is from May 26, 2011. As I indicated in the previous section, at that time I acted under the impression that Bear Creek had acted appropriately. At that time I was not aware of the possible constitutional violation of Bear Creek in the acquisition of the mining concessions. For this reason I considered that cancellation of the concessions was illegal. Peru has always been mindful of conducting itself as a country governed by rule of law and protecting investments. However, when the investor is found to have acted in a manner contrary to the law, the State can take the appropriate legal measures to penalize the aforementioned violation.

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<sup>24</sup> See First Gala Witness Statement, paras. 48 [Exhibit RWS-001].

<sup>25</sup> See Claimant's Reply, para. 117; *Discussions in Puno were not successful due to inflexibility of the leaders*, MINISTRY OF ENERGY AND MINES, May 26, 2011 [Exhibit C-0095].

26. The Claimant also argues that in 2011 it was reported that then candidate Ollanta Humala met with Walter Aduviri to agree on halting the protests so that elections could be held, of which Humala was the winner.<sup>26</sup> I have no knowledge that such a meeting took place.

27. [Claimant] also argues that on several occasions they were assured that the company's rights would be protected. Mr. Antunez de Mayolo particularly affirms that he met several times with me in March and June 2011 and that I assured him that the company's rights would be respected as well as the principle of legal certainty.<sup>27</sup> It should be noted that until the very end, the State was acting with the understanding that Bear Creek had acted appropriately. Neither I nor the officials of the government who were handling this matter knew that there was a possible constitutional violation, so we were doing everything possible to maintain the viability of the Santa Ana Project. It was only when we became aware of the possible violation that we found ourselves in the position of adopting the appropriate penalties, given the possible violation.

#### **IV. SUSPENSION OF THE ENVIRONMENTAL IMPACT STUDY AND REVIEW OF THE DECISION BY THE MINING COUNCIL**

28. The suspension of the review of Bear Creek's Environmental Impact Study on May 3, 2011, was not arbitrary and in fact was necessary to protect the rights of Bear Creek. Given the rapid escalation of the protests in Puno, on May 30, 2011, the Ministry of Energy and Mines decided to suspend the process of evaluation of the Santa Ana Project Environmental Impact Study due to the critical social situation in Puno at that time. The Ministry considered that there were no social licenses for considering the approval of the Study at that time, and therefore it was decided to suspend the evaluation and wait for the social situation to improve and provide the Project with

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<sup>26</sup> See Claimant's Reply, para. 113.

<sup>27</sup> See Claimant's Reply, para. 122; Second Witness Statement of Antunez de Mayolo, para. 49.

greater support from the communities. In this manner the rights of Bear Creek were protected, and rejection of the Environmental Impact Study was avoided, which would have necessarily led to the failure of the Project.

29. The Claimant's Reply establishes that it submitted a petition for review of that decision to the Mining Council on June 17, 2011, but the petition was not reviewed until 2014.<sup>28</sup> I believe it is important to clarify the facts in this respect. The Mining Council is made up of five members, who are voting members. At the time that the petition submitted by Bear Creek was going to be reviewed, I had already been appointed a voting member. That is to say that at that time there were four voting members, which constituted the quorum necessary to review most of the cases. However, due to my indirect participation in the suspension of the Environmental Impact Study, I had to abstain from participating in the review of that case to ensure an independent and objective review of the case. For that reason, there was no quorum for review of the Bear Creek case, and it was only in 2014 that the necessary voting members were appointed to review the case. I do not know why there was a delay in appointing the fifth voting member, but I am sure that it is completely separate from the possible review of the Bear Creek case.

30. The Claimant also describes the proceeding before the Mining Council erroneously. The Claimant argues that in the proceeding before the Mining Council, the DGAAM did not submit arguments in its favor, which demonstrates that the suspension of the EIA process was unlawful and that the DGAAM had no arguments to defend the measure that was taken.<sup>29</sup> This is absolutely incorrect. The proceeding before the Mining Council was not a litigation proceeding in which two parties submit their arguments to a court. It is a process in which the subject of the administrative

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<sup>28</sup> See Claimant's Reply, paras. 123–124; Second Witness Statement of Antunez de Mayolo, paras. 42–43.

<sup>29</sup> See Claimant's Reply, paras. 123–124.

action appeals to a higher administrative level. The Council does not give nor does it have to give the opportunity to the entity of the Ministry of Energy and Mines to defend the adopted measure. The Council makes a higher level review based on the appeal that was presented and the file documenting the administrative action. The DGAAM must only present an additional written submission if the Council asks questions or requests clarifications. Therefore, the fact that the DGAAM did not present arguments to the Mining Council is the result of a normal process before the Mining Council and does not mean under any circumstances that the DGAMM considers the suspension to have been unlawful.



The information contained in this declaration is true to the best of my knowledge and understanding.

Signature

Luis Fernando Gala Soldevilla

Date: April 4, 2016