

REX-008

Second Expert Report of  
Antonio Alfonso Peña Jumba

April 13, 2016

English Translation

BEFORE THE INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES

**Bear Creek Mining Corporation**  
*Claimant,*

v.

**Republic of Peru.**  
*Respondent*

Case No. ARB/14/21

**SECOND REPORT OF THE EXPERT IN SOCIOLOGY AND ANTHROPOLOGY OF  
THE LAW**

**ANTONIO ALFONSO PEÑA JUMPA**

APRIL 13, 2016

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## I. INTRODUCTION

1. This report is supplementary to the report dated October 6, 2015, which was submitted for the defense of the Peruvian State in the arbitration proceeding instituted by the company Bear Creek Mining Corporation (“Bear Creek”) against the Republic of Peru.<sup>1</sup> In addition, this report is issued in response to the arguments submitted by Bear Creek in its Reply of January 8, 2016.<sup>2</sup> Its content has been written with absolute independence, based on facts known directly and indirectly in the Aymara *comunidades campesinas* and the districts that are involved in the conflict.

2. For the preparation of this report, a third field survey was performed in the company of an assistant in the Aymara *comunidades campesinas* of the districts of Huacullani and Kelluyo, from March 3 to March 6, 2016, supplemented with field work in the city of Puno on March 8 and 9, 2016. After this field work, the information obtained in the two previous field surveys is confirmed; their conclusions were summarized in the previous report, which, in turn, is the basis for this report. In addition, the understanding of the causes and effects of the social or trans-communal conflict that occurred in Puno in 2011 and its direct connection with the Santa Ana Project of Bear Creek was confirmed. During the third field survey the constant tension that to this day is experienced in the communities of Huacullani and Kelluyo (Chucuito Province) because of the Santa Ana Project was also confirmed.

3. The purpose of this report is to specify and supplement the previous report in two main aspects: first, to analyze the background of the social conflict that occurred in Puno region

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<sup>1</sup> See First Expert Report of Antonio Alfonso Peña Jumpa, October 6, 2015 (“First Peña Report”) [Exhibit REX-002].

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

in 2011 (the “social conflict”), known as the “Aymarazo,”<sup>3</sup> [Aymara Protest] and second, to specify the causal link between the Santa Ana Project of the company Bear Creek and that social conflict in which the community members of Puno region fought to protect their livelihood, such as their Pacha Mama (mother earth) and the natural resources that it provides. In its reply, Bear Creek alleges that the social conflict has no relation with the Santa Ana Project, or with the company Bear Creek.<sup>4</sup> This is absolutely incorrect. As I have verified in the investigative work that I have performed, there was a direct causal link between the activities of Bear Creek in Huacullani, through its Santa Ana Project, and the social conflict.

4. This report will outline the following: First, it will analyze the events that preceded the social conflict, such as the burning and looting of the Santa Ana Project camp in 2008 and the public hearing held by Bear Creek in February 2011, to show the causal link between the activities of Bear Creek at the Santa Ana Project and the social conflict. Second, it will analyze the alleged sale agreement of the plot of land where the Santa Ana Project would be developed with the Community of Ingenio (Huacullani), to show that the transaction does not comply with social, cultural, and legal requirements that limit its validity. Third, it will show that Bear Creek never had and does not have the support of the communities necessary to develop the Santa Ana Project. Finally, I will respond to Bear Creek's arguments about my alleged bias against foreign mining companies.

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<sup>3</sup> In the first report I explained that the conflict in the Department or Region of Puno unfolded in the cities of Desaguadero (Chucuito), Puno, and Juliaca, reaching even Lima. *See* First Peña Report, para. 88 [Exhibit REX-002]. The protests were different in each city, but they had a common denominator: a complaint against the mining activities in the area. This report focuses on the protests that unfolded in the south of Puno Department, particularly in the province of Chucuito, where the Santa Ana Mining Project is located. This focal point of the conflict was directly linked to the activities of Bear Creek in the area, and its protests were carried out for the most part in the cities of Desaguadero and Puno. The totality of these protests is known as the “Aymarazo,” because it was led by the Aymara communities of the region.

<sup>4</sup> *See* Claimant's Reply, para. 3.

5. Before proceeding to the content of the report, it is important to clarify an observation of methodological application made about our previous report. Bear Creek alleges that the Tribunal should discard the content of my previous report because it is based on knowledge acquired indirectly through interviews conducted four years after the events.<sup>5</sup> In addition, it alleges that the interviews are not credible because [the report] does not specify who was interviewed.<sup>6</sup> Finally, it alleges that my position is biased against foreign mining companies.<sup>7</sup>

6. First, the methodology that I use is entirely appropriate and is standard in the professional field of anthropology and sociology. It is not necessary to live the events to understand them and draw anthropological or sociological technical conclusions from them. As I established in my first expert report, I have broad experience working with the Aymara communities of Puno, and for this reason I have learned to know and understand their customs and traditions. My work as legal anthropologist and sociologist is based on field work with the communities that allows me to interpret the events that occurred in connection with a particular event and draw conclusions from the same. A well-known expression in my profession states: “It is not necessary to be Caesar to understand Caesar,” which means that it is not necessary to have lived as Caesar to understand who he was.<sup>8</sup> Similarly, applying this concept to the development of my report, I can state that it is not necessary to be part of the company Bear Creek or the

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<sup>5</sup> See Claimant's Reply, para. 69.

<sup>6</sup> See Claimant's Reply, para. 69.

<sup>7</sup> See Claimant's Reply, para. 69.

<sup>8</sup> Sentence quoted by Max Weber (published originally in 1922, revised edition of 1974: *Economy and Society: Outline of Interpretive Sociology*, Mexico, Economics Culture Fund) when he develops his concept of subjective meaning. This author expressly considers that “... it is also not necessary to produce oneself an action similar to someone else's action to be able to understand it: ‘it is not necessary to be a Caesar to understand Caesar.’ Being able to fully ‘relive’ something is important for evidence of the understanding, but it is not an absolute condition for the interpretation of the meaning...” Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, Mexico, ECONOMICS CULTURE FUND (1974), page 6 [Exhibit R-370].

Aymara Communities of Huacullani or Kelluyo to understand or grasp the meaning of their social actions in 2008 or earlier, or in 2011, and thus understand what they are or what they were.

7. In addition, it should be kept in mind that not only interviews (necessarily anonymous, with a few exceptions) have been used to prepare both the previous report and this one. We have also reviewed official and private documents, public news from the time of the events, essays, and monographies of authors who experienced the events more closely, as well as the testimony (also necessarily anonymous), and in particular the participating observation in the area, with members of the communities and districts, with community members and authorities, to understand the meaning of their social actions today, in their projection to the past and the future.<sup>9</sup>

8. Second, as I explained in my first report, the interviews were anonymous because of the existing tension and distrust of the community members with regard to the issue of the Santa Ana Project. In these circumstances, it is methodologically inappropriate and risky to name the persons who provide us or have provided us information. The ethics of my professional career would be ruined, and it would expose the physical safety of those who are identified. As I have explained in my reports, the social situation is so intense that the persons with whom I spoke have very good reasons to be afraid of being identified; their life in the community and their physical safety would be at risk. Given that the members of the different communities of both districts interact regularly, and given that through their leaders they can directly or indirectly access the [case] documents published on the Internet, the identification of their names may cause new internal conflicts or create the risk of being a victim of one group or another,

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<sup>9</sup> This explanation partially adds to what we call the methodology of the social-anthropological analysis of the law (Antonio Peña Jumba, *A Social-Anthropological Analysis of the Law in Perú*, RIVA AGÜERO INSTITUTE BULLETIN–BIRA NO. 28, 2001, pages 433-456 [Exhibit R-371].)

depending on whether one is in favor or against the mining project, if the social conflict intensifies again.

9. Third, my position in this report and my previous report is independent and does not reflect any bias on my part. As I have explained above, the information presented has been obtained by means of interviews and the review of documents. I have objectively interpreted the facts from this investigation. In this regard, Bear Creek's allegations lack support.

## **II. BACKGROUND OF THE VIOLENT EVENTS OF THE 2011 SOCIAL CONFLICT IN THE DEPARTMENT OR REGION OF PUNO**

10. In my first report I established that Bear Creek had serious shortfalls in its strategy to establish stable relations with the local communities that would be affected by the Santa Ana Project. The presence of the Project accentuated or generated certain rivalries between the communities that led to violent events, such as the burning and looting of the camp in 2008 and the 2011 protests.<sup>10</sup> Below I explain again the background of the social conflict, confirming what I explained in the first report and adding the conclusions obtained from the review of subsequent documents, together with our recent field work (March 2016).

11. In particular, first I explain below the agreements and disagreements that existed between Bear Creek and the communities before 2008, when there was a first significant expression of the communities' disagreement with the looting and burning of the mining camp. Second, I analyze the facts related to the looting and burning of the mining camp. Third, I explain the new agreements and disagreements of the company with the communities as a result of the burning between 2008 and the public hearing that took place on February 23, 2011 as an implementation of the Citizen Participation Plan of Bear Creek (the "public hearing"). Fourth, I evaluate the facts related to the 2011 public hearing. A detailed review of all this background

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<sup>10</sup> See First Peña Report, paras. 64-75 [Exhibit REX-002].



leaves no doubt about the direct relationship between the social conflict and Bear Creek's activities with its Santa Ana Project.

**A. AGREEMENTS AND DISAGREEMENTS OF THE COMPANY BEAR CREEK WITH THE COMMUNITIES, PRIOR TO THE LOOTING AND BURNING OF THE MINING CAMP (OCTOBER 17, 2008)**

12. The company Bear Creek began its presence and work in the communities of the area of influence of the Santa Ana mining project before it acquired the mining concession and before it obtained the extraordinary authorization from the central government of the day to operate the aforementioned project. This assertion is based on two facts: the hiring of community members from the area of direct influence of the mining project in 2007<sup>11</sup> and the date of publication of the Supreme Decree that authorizes the company Bear Creek to carry out activities within fifty kilometers of the border area.

13. As I indicated in the report dated October 6, 2015, in 2007, the company Bear Creek had already begun its plan to hire workers from the communities in the area of direct influence, in particular from four of the five favored communities: the *Cóndor de Ancocahua Parcialidad*, the *Challacollo Comunidad Campesina*, the *Ancomarca Comunidad Campesina*, and the *Concepción de Ingenio Comunidad Campesina*.<sup>12</sup> The table mentioned in our previous report, which we reproduce below, shows how this hiring was made for an average of 10 community members from the *Cóndor Ancocahua Parcialidad* and an average of five community members from the other three communities, which led to a total of 25 community members hired by the company in 2007:

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<sup>11</sup> It is worth specifying that in order to begin the hiring of community members in a coordinated manner and based on a collective agreement, work must have been carried out at least a month before the commencement of the hiring, that is, at least from November 2006.

<sup>12</sup> See First Peña Report, para. 58 [Exhibit REX-002].

<b>Number of jobs assigned by the Mining Company Bear Creek to the Communities or Parcialidades of Huacullani district 2007-2011</b>						
<b>Year of the Agreement</b>	<b><i>Comunidad Campesina, Urban Community, or Parcialidad</i></b>					<b>Total</b>
	<i>Cóndor Ancocahua Parcialidad</i>	<i>Challacollo Comunidad Campesina</i>	<i>Ancomarca Comunidad Campesina</i>	<i>Concepción Ingenio Comunidad Campesina</i>	<i>Huacullani Urban Community</i>	
2007	10	5	5	5	0	25
2008	15	10	10	10	3	48
2009	35	25	25	15	10	110
2010	35	25	25	15	10	110
2011 (January)	35	25	25	15	10	110

Source: Interview with a community member of the Parcialidad of Cóndor Ancocahua, July 20, 2015, and interviews with community members of Huacullani on July 29 and 30, 2015; my own preparation.<sup>13</sup>

14. On the other hand, the authorization granted by the central government to the company Bear Creek, by means of Supreme Decree No. 083-2007-EM, is dated November 29, 2007, that is, one month before the end of 2007.<sup>14</sup> The aforementioned Supreme Decree only authorized or decreed two specific actions for the company Bear Creek from that date:

a) “may acquire and possess concessions and rights over mines and additional resources for a better development of its productive activities, within fifty (50) kilometers from the southern border of the country...

b) “authorize BEAR CREEK MINING COMPANY SUCURSAL DEL PERÚ [Bear Creek Mining Company Peru Branch] to acquire seven (7) mining rights, located in Puno department, in the area of the border with Bolivia...”<sup>15</sup>

<sup>13</sup> First Peña Report, para. 58 [Exhibit REX-002].

<sup>14</sup> See Supreme Decree No. 083-2007-EM, November 29, 2007 [Exhibit C-0004].

<sup>15</sup> See Supreme Decree No. 083-2007-EM, November 29, 2007, Articles 1 and 2 [Exhibit C-0004].

15. The community members of Huacullani whom we interviewed, with my assistants, in our first two field surveys<sup>16</sup> were explicit in indicating that the mining company Bear Creek had been operating in the communities for several years, from the beginning of the 2000s. The community members of Huacullani and Kelluyo mention that a young woman, who we believe was Ms. Jenny Karina Villavicencio Gardini, was present in the communities as the holder of the mine site, but at the same time as the representative of the mining company Bear Creek.<sup>17</sup> The word “front person” is used in particular by the community leaders of Kelluyo. The community members also remember seeing this young woman accompanied by other persons from the mining company Bear Creek.<sup>18</sup>

16. The aforementioned facts show that from the beginning the mining company Bear Creek did not act with transparency and with legal and constitutional authorization in the region. On the one hand, it began the hiring of groups of community members in a discriminatory manner, favoring only four communities, and, on the other hand, it began its work in the communities without having the authorization of the central government to operate effectively in the communities of Huacullani and Kelluyo, within the 50 kilometers of border area.

17. The manner of preferential hiring of the community members would be repeated in 2008, when the San Pedro de Huacullani urban community is added as a favored community. In that year, according to the table mentioned in paragraph 13, Bear Creek increased the hiring of community members from the four communities with which it began the hiring system: the Cónдор de Ancocahua Parcialidad went from 10 to 15 hired community members, whereas the

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<sup>16</sup> Field work of July 18-22, 2015 and July 28 to August 1, 2015.

<sup>17</sup> Testimony of the community authorities of Kelluyo (March 5, 2016) and interviews in Huacullani (July 20, 2015 and July 29-31, 2015).

<sup>18</sup> Testimony of the community authorities of Kelluyo (March 5, 2016) and interviews in Huacullani (July 20, 2015 and July 29-31, 2015).

communities of Challacollo, Ancomarca, and Concepción de Ingenio went from five to ten hired community members. The Huacullani urban community began with three hired community members.

18. As I mentioned in my previous report, all the communities of Kelluyo district and the majority of the communities of Huacullani district were not considered in the hiring system of the company Bear Creek, even when they had been considered as communities within the area of influence of the mining project.<sup>19</sup> A total of 26 communities (including *Parcialidades*) are recognized in Kelluyo district. None of these were favored by the hiring system of the company Bear Creek in 2007 and 2008, or in subsequent years. 22 communities (including *Parcialidades*) are recognized in Huacullani district, only 5 of which were favored by the hiring system of the company Bear Creek, and 17 communities were excluded. The following table shows the communities affected by the discriminatory or exclusionary hiring system:

<b>Comunidades and Parcialidades excluded from direct benefits by the company Bear Creek</b>		
<b>No.</b>	<b>Comunidades Campesinas and Parcialidades of Huacullani District</b>	<b>Comunidades Campesinas and Parcialidades of Kelluyo District</b>
1	Community of Aurincota	Community of Arconuma
2	Community of Callaza	Community of Totoroma
3	Community of Chacachallo	Community of Alto Aracachi Kelluyo
4	Community of Laca Laca	Community of Carique Challacollo

<sup>19</sup> See First Peña Report, para. 58 [Exhibit REX-002].

5	Community of Laca Jaqui or Laca haqui or Laca hache	Community of Centro Aracachi Chiaraqui
6	Community of Marca Ayllu Huancasama	Community of Kapia Pusuma
7	Community of Tarapoto	Community of Maycu Phujo
8	Community of Alto Andino Vilachave	Community of Perca
9	Community of Vilachave 1	Community of Pérez
10	Community of Yorocco or Yorohoco	Community of Pilco
11	Community of Sillicachi	Community of Tulacollo
12	Cangachi <i>Parcialidad</i>	Community of Tuntipucara
13	Ancohaqui <i>Parcialidad</i>	Parcialidad of Aracachi Chura
14	Carhuankuyo <i>Parcialidad</i>	Community of Jahuerha Chura
15	Quinbalita or Quimbalita <i>Parcialidad</i>	Community of San Juan de Aracachi
16	Community of Isruni	Community of Jahuerja San Pedro
17	Community of Arconuma [de Huacullani]	Community of Chacocollo
18		Community of Sacacani Huma (former <i>Parcialidad</i> )
19		Community of Rio Arenales
20		Chuncarcollo <i>Parcialidad</i>
21		Chipana San José <i>Parcialidad</i>
22		Circa Kenturani <i>Parcialidad</i>
23		Chipana Nueva Alianza <i>Parcialidad</i>
24		Vilcanqui Challacollo <i>Parcialidad</i>

25		<i>Vilaque Parcialidad</i>
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**Source: Interviews with community members of Huacullani and Kelluyo, July 20, 21, 29-31, 2015, March 4 and 5, 2016.<sup>20</sup> The list of names of the communities has been obtained from municipal registers and the information provided by the local community authorities in both districts.<sup>21</sup>**

19. This discriminatory situation in the hiring system of community members and other benefits, such as donations in money or in kind, little by little fed the rejection against the mining company. The community members' complaints against the company and against the communities that worked with the mining company were first private and later public.

20. The Aymara communities of the districts of Huacullani and Kelluyo, and of all the neighboring districts (Pizacoma, Zepita, Pomata, Desaguadero, Yunguyo, among others) were not familiar with mining activity. They only knew about this activity from the stories of their grandparents or older relatives when they told them that Spanish colonists or creoles extracted mineral from the underground mines by means of the forced labor or exploitation of their Aymara ancestors.<sup>22</sup> The Santa Ana Mining Project was the first one that took place in the area after the Spanish and Creole period. For this reason there was a high degree of lack of information, fear, and apprehension about the possible effects of the mining activity. In addition, given the news known in the region about the pollution of rivers and lakes that was taking place in the Quechua side of the region, attributed to illegal and formal mining, and the strong community economic identity based on agriculture and farming, they fully distrusted the company Bear Creek and its Santa Ana Mining Project.

21. The community members of Huacullani and Kelluyo, and of the neighboring districts, had, in particular, complaints about the risk of environmental damage, the lack of

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<sup>20</sup> See First Peña Report, paras. 59-61 [Exhibit REX-002].

<sup>21</sup> Field visits in July and August 2015.

<sup>22</sup> Testimony of community members of Huacullani and Kelluyo, provided during festive activities on July 20, 21, 29-31, 2015, and confirmed in March 2016. See also Interview with Mallku or Teniente Governor from a Kelluyo District [Exhibit R-378].

consultation about the concession and commencement of mining activities, and the lack of benefits.<sup>23</sup> Bear Creek did not make sufficient efforts with the communities to overcome this feeling of distrust, which led to a situation of protest. The first signs of protest were the protests organized on October 14, 2008, during which, for reasons not explained in the prosecutorial investigation, the looting and burning of the mining camp of the company Bear Creek later occurred.<sup>24</sup>

**B. THE LOOTING AND BURNING OF THE CAMP OF THE SANTA ANA PROJECT**

22. Bear Creek alleges that the looting and burning of the camp of the Santa Ana Project was a minor event that does not show any sort of disagreement of the communities with the Project.<sup>25</sup> Again, Bear Creek's description of the events is incorrect and inconsistent with reality.

23. The looting and burning of the camp of the Santa Ana Mining Project of the company Bear Creek that occurred on October 14, 2008 was a manifestation of a set of attitudes accumulated over months and years in the communities that were against the mining project and the company. There are fears, threats, isolation, and anger on the part of the thousands of community members who took part in the event. Behind these attitudes, however, there are reasons that lead to the cause of the event, which were not understood or addressed. In my report dated October 6, 2015, I systematized the four reasons that explain, from that date, this cause that led to the regrettable result: 1) The risk of environmental damage; 2) the lack of consultation concerning the concession and the commencement of mining activities; 3) the declaration of

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<sup>23</sup> See First Peña Report, para. 65 [Exhibit REX-002].

<sup>24</sup> See First Peña Report, para. 66 [Exhibit REX-002]. The lack of definition of the causes that led from the protest to the acts of violence are unknown, according to the prosecutorial report that orders the dropping of the case, without a challenge from the mining company, as we explain below. See paras. 22 *et seq. infra*.

<sup>25</sup> See Claimant's Reply, para. 75.

“public necessity” that favored the company Bear Creek; 4) the omission of benefits for all the communities that felt affected, such as the remainder of the communities of Huacullani and Kelluyo, and other districts such as Zepita, Pizacoma, Desaguadero, Pomata, among others.<sup>26</sup>

24. The company Bear Creek knew about the build-up of this feeling of rejection in the communities, and had known for days and months that these communities had prepared acts of protest against it. In order to prove that situation, we turn to the prosecutorial file or folder that recorded the facts investigated by the police under the direction of the Provincial Prosecutor<sup>27</sup> in charge. This is the prosecutorial folder of the Office of the Prosecutor related to the looting and burning event of the camp of the Santa Ana Mining Project, identified with record number 277-2008-PE and 0049-2010, of the Second Provincial Office of the Prosecutor for Civil and Criminal Matters of Chucuito-Desaguadero. That file or folder is created because days before October 14, 2008, the company Bear Creek requested the Prosecutor’s verification through a crime-prevention proceeding. The initial part of the corresponding prosecutorial decision<sup>28</sup> states the following:

“HAVING REVIEWED: The petition of Verification for Prevention of Crime, requested from this Prosecutor’s Office by Mr. Fernando Grados Rodriguez, dated October 13, 2008, requesting VERIFICATION BY THE PROSECUTOR’S OFFICE FOR PREVENTION OF THE CRIMES OF HOMICIDE, INJURY, COERCION, KIDNAPPING, THEFT, DAMAGES, DISTURBANCES, ADVOCATING CRIMINAL BEHAVIOR and CONSPIRACY in the BEAR MINING COMPANY camp,

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<sup>26</sup> See First Peña Report, para. 65 [Exhibit REX-002].

<sup>27</sup> The Provincial Prosecutor is the person who is responsible for a provincial Office of the Prosecutor, which is responsible for investigating crimes and bringing the corresponding charges before criminal judges, when this is appropriate.

<sup>28</sup> “Decision” is the term that is often used by the Peruvian Office of the Prosecutor, into which the Provincial Office of the Prosecutor is integrated, and is equivalent to the concept of “Order” used in the Judiciary.



located in the territory that includes the Community of Concepción–Ingenio (...)<sup>29</sup>

25. As can be seen from the “whereas” section of the aforementioned prosecutorial order, the company Bear Creek knew of the preparations for the protest, and, therefore, it could clearly understand that there were persons and communities dissatisfied with its presence and conduct. It was able to learn about this rejection from its employees who worked in the communities. Nevertheless, the same verification request for prevention one day before the event was not sufficient to prevent damage. This can be read from the same aforementioned prosecutorial decision order, in the recitals section, in which, in turn, the position or perspective of the company with respect to the persons who would be against it can be gleaned:

“...CONSIDERING: ONE: According to Article 1 of the Organic Law of the Prosecutor’s Office, the functions of the Prosecutor’s Office are: “...Defense of lawfulness, citizens’ rights and public interests...also to prevent crime within the limitations established in this law...” (...) TWO: The text of the petition for verification states among other facts that on the date of presentation of the petition, the mining company was carrying out exploration activities normally and there were no problems with the nearby communities, and they have all the legal authorizations. However, it also states that a month before, there were groups of political extremists encouraging the population of the province of Chucuito and El Collao [- Ilave] to stage violent demonstrations and to damage the assets and installations of the mining company, which would take place on October 14, 2008. Therefore, the danger was imminent.; THREE: Carrying out the Verification on the 14th of this month and year, at 2:00 p.m., the installations of the mining company had already been set on fire. They were also completely LOOTED. The criminal acts had therefore already taken place, and it was no longer a case of crime prevention...”<sup>30</sup>

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<sup>29</sup> Resolution No. 468-2008-MP-2da.FPMCH.DESAGUADERO, page 190 [Exhibit R-051bis].

<sup>30</sup> Resolution No. 468-2008-MP-2da.FPMCH.DESAGUADERO, pages 19-20 [Exhibit R-051bis]. (emphasis added)

26. The company Bear Creek knew the exact date on which the protest would take place against it and its mining project, and given the content of the grounds of its request before the Office of the Prosecutor, it also knew the dimension of its effects. The types of crimes identified in the document of the verification request by means of a prevention proceeding (ranging from homicide to conspiracy to commit crimes, including kidnapping) show that the relations with the communities adjacent to its nearby environment (the five communities favored with its system of temporary hiring) had reached the extreme of putting at risk or danger the life of its employees and its assets.

27. The company, however, did not take the necessary precautions, particularly those concerning its employees who remained at the camp, as we explain below, and as it is evident from the same prosecutorial file or folder, on the contrary, the company found as a justification to report as the alleged culprits of the event “were groups of political extremists encouraging the population of the province of Chucuito and El Collao [- Ilave] to stage violent demonstrations and to damage the assets and installations of the mining company.”<sup>31</sup> This is reported even when it was known, based on the information provided by its employees, that the alleged “political groups” from outside the community consisted of community members or leaders of the same nearby communities of Huacullani and even of the same communities that benefited from the temporary hiring system provided by the company, because it had verified irregularities in the conduct of the officers of the company Bear Creek and because they felt they were being deceived, as we explain below.

28. The protests of October 14, 2008, when the looting and burning of the camp of the Santa Ana Mining Project occurred, not only involved the communities that did not receive

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<sup>31</sup> Resolution Order No. 468-2008-MP-2da.FPMCH.DESAGUADERO, pages 19-20 [Exhibit R-051bis].

benefits after the hiring system, but also numerous families of this group of communities favored by the hiring system and other benefits granted by the company. These families questioned the vertical, authoritarian, or paternalistic attitude of the officers of the company, as I have explained based on the testimony of members of the Challacoyo *Comunidad Campesina*, quoted in my previous report.<sup>32</sup> Given this dissatisfaction, the community members went so far as to use force to the detriment of the officers or employees of the mining company Bear Creek. This occurred in the Ancomarca *Comunidad Campesina* on September 4, 2008, one month and ten days before the looting and burning of the mining camp, when a group of employees of the company Bear Creek was “retained” or “kidnapped,” as the employees themselves reported in their statement before the police on the looting and burning of the mining camp.<sup>33</sup> One of the employees made the following statements:

“... on September 4, 2008, we went to the community of Ancomarca to attend the community meeting[. During] that meeting we received threats from Héctor LT and Salomón LT, who said ‘on October 14 you will and they locked the door preventing us from leaving for four to five hours. I was with Jorge AGUILAR GOMEZ, BACIANA BRAVO ZAMALLOA, AND Guillermo RAMOS OCHOA. They demanded that we agree to support the community with various things such as lightning rods, PCs, laptops, alfalfa seeds, implementation of the health center, and others, forcing us to sign an instrument that they drafted in their community After signing they could leave. It was just that instance...”<sup>34</sup>

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<sup>32</sup> See First Peña Report, paras. 59, 60 [Exhibit REX-002].

<sup>33</sup> See Deposition of Leon Jorge Aguilar Gomez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, October 20, 2008, page 92 [Exhibit R-342]; Deposition of Miguel Ángel Sancho Machaca, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, October 20, 2008, page 50 [Exhibit R-324].

<sup>34</sup> Statement before the police of Miguel Sancho Machaca, 50 years old, agricultural engineer hired in the environmental department of the Santa Ana Mining Project. He provides the statement as part of the investigation of the events, in the background section. Deposition of Miguel Ángel Sancho Machaca, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, October 20, 2008, page 50 [Exhibit R-324].

29. This event of September 4, 2008 that occurred in the community of Ancomarca was verified in the same police-prosecutorial investigation, after the statement of a community member of the aforementioned community, Pedro Salomón LT. The community member provided the following response to the question asked by the police officer and the prosecutor about the events of that day:

“10. QUESTIONING THE DEPOSED: For what reason on September 4, 2008 at the meeting held in the Ancomarca [sic] community did you and your brother HECTOR LUNA TAPIA THREATEN *the representatives of the Mining Company [Santa Ana], indicating what was going to happen on October 14, even depriving Jorge AGUILAR GOMEZ, BACIANA BRAVO SAMALLOA, GUILLERMO RAMOS OCHOA of their liberty, and forcing them to sign a document whereby the Mining Company [Bear Creek] would give [you/them] lightning rods, computers, alfalfa, implementation of a Health Center, and other things?* Stated: -----

“-----Yes, I attended that meeting, as it was a meeting to discuss various problems with documents that the Mining Company was falsifying, and at the meeting *my brother Héctor got up from his seat and began to complain*, and at that moment Jorge AGUILAR GOMEZ said, "WHO ARE YOU TO BE COMPLAINING ABOUT THESE THINGS, NOW YOU'LL SEE", and the residents also complained about previous documents, as the mine had agreed to purchase geomembranes and sheep, and the people complained, and began to insist that they keep their promises, but the mine never brought geomembranes or sheep, and to the contrary it delivered to the Town in cash, and we never threatened them or forced them to sign, and especially never deprived anyone of their liberty.”<sup>35</sup>

30. The facts stated by the employees of the company Bear Creek and clarified by community members of one of the communities favored by the very hiring system of the company, the community of Ancomarca, confirm the facts that we referenced from the

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<sup>35</sup> Deposition of Pedro Salomón Luna Tapia, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, December 22, 2008, page 262 [Exhibit R-372]. (Emphasis added)

community of Challacollo, just as we stated in our previous report, which shows actions limited and contrary to all the communities of the area of direct and indirect influence of the Santa Ana Mining Project by the same company Bear Creek. It does not consist of the dissatisfaction of “extremist politicized groups,” but of community members within its immediate vicinity, who were dissatisfied with the hiring policy and the provision of money by the mining company Bear Creek. In addition, those dissatisfied community members were not a group, but thousands who joined from many communities of Huacullani district, from all of the communities of the district of Kelluyo, and from many communities of the neighboring districts of Pizacoma, Zepita, among others. All of them joined together on October 14, 2008 in Huacullani to show the first mass protest against the mining company Bear Creek, which regrettably ended in acts of violence that affected the mining camp.<sup>36</sup>

31. The scope of the events that occurred on October 14, 2008, when the first mass protest against the Santa Ana Mining Project and the company Bear Creek took place, is appreciated from the testimony of the company's employees. These employees, although the danger to which they were exposed was known because of information that the company Bear Creek knew (according to its aforementioned verification request by means of a crime-prevention proceeding), remained near the mining camp or in it, and they were witnesses and personal victims of the regrettable events.<sup>37</sup> Marco Antonio Maita Rodríguez, 30 years old,

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<sup>36</sup> Facts that are obtained from the statements and testimony of employees, police officers, and community members, which appear on file No. 277-2008-PE and 0049-2010 concerning the looting and burning of the mining camp. That file is closed, *see* Resolution Archiving Investigation, Resolution No. 02-2010-MP-FPM-D, Criminal File No. 277-2008-PE y 0049-2010, page 599 [Exhibit R-373].

<sup>37</sup> *See* Deposition of Miguel Ángel Sancho Machaca, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, October 20, 2008, pages 48-55 [Exhibit R-324]; Deposition of Marco Antonio Maita Rodríguez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, October 20, 2008, pages 56-63 [Exhibit R-331]; Deposition of Guillermo Jorge Ramos Ochoa, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, October 20, 2008, pages 64-69 [Exhibit R-337]; Deposition of Basiana Bravo Zamalloa, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, October 20, 2008, pages 70-77 [Exhibit R-338];

employee of the administrative department of the Santa Ana Mining Project, relates the following facts in response to the police officer's question:

“4. THE DEPOSED: Tell us in detail the manner and circumstances in which you fell victim to assault, robbery, damages, and fire, caused by protesters, committed against your person and against the Santa Ana Mining Exploration company, occurring on October 14, 2008, in the Community of Ingenio, Huacullani. Stated:

---On that day at 11:15 a.m., I was performing my work as normal, at my office in the Santa Ana Encampment, and Mr. FELIX VILCANQUI QUENTA came to me, indicating that in the town [center of Huacullani district] protesters were gathering to come to the Project Site [located approximately three kilometers away], and he wanted to talk to Mr. JORGE AGUILAR and Engineer RENE TONCONI, who as of that time had not made any decision to safeguard our personal belongings and those of the office, and I went to the dining hall and then we saw the protesters who were going to the [Contractor Company] BRADLEY [hired by the company Bear Creek] Encampment, approximately TWO THOUSAND EIGHT HUNDRED people, such people who were throwing rocks at the trucks and at the encampment, hearing at all times HLT, SLT, LWLT, LLV, EQM, ETCH, MCC, ELB, BMV, AM, as well as the Mayor of Kelluyo DSC, and the Mayor of Pizcoma NJCC[;] they were yelling and inciting the people to throw rocks and light the encampment on fire and to burn those of us working at the Project alive, and later they got closer to the dining hall and they began to break the windows and kick the doors of all the rooms, which were locked with padlocks, after forcefully kicking open the door of the dining hall, they kicked me and dragged me out, and I was able to identify the direct perpetrators of my assault, (...), who after violently removing me stole all of the belongings I had on my person, which were: a Porta brand backpack in which there was a 2GB USB drive, three stamps of the JONSTEC SAC Corporation, accounting documents,

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Deposition of Cesar Tapia Tumba, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, October 20, 2008, pages 78-81 [Exhibit R-339]; Deposition of Julio Quino Saavedra, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, October 20, 2008, pages 82-85 [Exhibit R-340]; Deposition of Miguel Ramos Fuentes, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, October 20, 2008, pages 86-89 [Exhibit R-341]; Deposition of Leon Jorge Aguilar Gomez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, October 20, 2008, pages 90-97 [Exhibit R-342]; Deposition of Rene Charles Tonconi Condori, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, October 20, 2008, pages 98-100 [Exhibit R-343].

invoices, glasses, a leather hat, a SAMSUNG digital camera, (...) approximately one thousand nuevos soles in coins, which was for payments for the workers, all of these things they stole from me while they physically assaulted me with kicks, punches, and strikes with blunt objects in various parts of my body, despite the fact that I asked the indicated individuals to calm themselves and the rest of the people, they said I'LL GIVE YOU FIVE MINUTES TO GET OUT OF THE ENCAMPMENT, IF NOT WE'LL KILL YOU, those were the literal words of HLT and they forced me to the highway kicking and punching me, walking within the crowd and observing at all times that they were also hitting my coworkers JORGE AGUILAR, RENE TONCONI, BACIANA ZAMALLOA, unable to do anything about the violent acts of the mob (...) as well as the Police Officer [security guard privately hired by the company] with last name QUILLA, I saw that they were physically assaulting him and taking his possessions[;]with him we walked to the Huacullani Police Department [three kilometers downhill from the mining camp], where I remained for about three hours, seeing from there how the encampment was up in flames...”<sup>38</sup>

32. The narrated facts are regrettable. They show a massive movement of persons, Aymara community member or not, excited with rage against the Santa Ana Mining Project and the company Bear Creek. Nevertheless, after the description of the regrettable violent events, the motive that caused that situation is not apparent. The statement of another employee, agricultural engineer Miguel Angel Sancho Machaca, 50 years old, an employee in the Environment department of the Santa Ana Project, reveals the origin of the protests that occur in the town before going up to the mining camp. This statement confirms the spirit of rejection of the population made up of the communities of Huacullani district and neighboring districts such as Kelluyo, Pizacoma, and others, against the Santa Ana Mining Project and the company Bear

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<sup>38</sup> Deposition of Marco Antonio Maita Rodriguez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, October 20, 2008, pages 56-57 [Exhibit R-331]. (Only the initials of the community members have been given)

Creek.<sup>39</sup> The explanatory part of this statement, obtained from the police investigation of the case, is the following:

“--On Oct 14, 2008, beginning at about 9:00 a.m., I was in the main square of Huaculiani, since that day was a Tuesday fair day. I then saw trucks arriving with a lot of people from Kelluyo, Pizacoma. They all began to get out at the fair, pretending to be participants. There I could see they had banners, which were rolled up. Then, they began to gather themselves at different sites in the town of Huaculiani, and then they gathered in the Plaza de Armas [the main square] in front of the municipal building. From there they brought out loudspeakers and amplification equipment, in a sort of rally where several speakers participated, representing different sectors. They spoke against the environment and against the mining concessions. There I could see that they were talking about the mine near Huaculiani that was a mine that was polluting the environment, I could also see the banners, which read, "DOWN WITH THE MINING COMPANY SANTA ANA," "GET OUT." After all the leaders had spoken, one of them is HLT, STT, HLS, UCH, and others) they then marched once around the Tuesday fair all of them shouting and chanting things like: the people united will never be defeated, and against the Santa Ana mining company and pollution. They then returned to the main square [where] they gathered. Again they had a kind of rally, where all the leaders participated, with the presence of ETC, MCC, FCV, SLT, WLT, LLV and they had a megaphone; ACT spoke and stirred up the people, saying that they [the mining companies] were pillaging the resources and polluting the environment;. HLS, who instigated the people, making a speech; he said that we are going to make our voices heard in the Project, that they must receive us there. EQM was receiving or welcoming all the delegations that arrived in the morning at the entrance to the school, with several leaders. Kelluyo Mayor DSC and Pizacoma Mayor NJCC also spoke (...); The governor of Kelluyo, AM, was also there. I noted a crowd of about two thousand eight hundred to three thousand men, women, youths and children, who, after the rally held (...) said we should travel to the mine, so they will listen to us. A great many people simply obeyed the instructions from these leaders and assembling quickly they went to the Project. They said they must receive us and listen to us now or never, only in this way will they leave. This march

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<sup>39</sup> Deposition of Miguel Ángel Sancho Machaca, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, October 20, 2008, pages 48-51 [Exhibit R-324].



was headed by the same leaders mentioned above at approximately 11:00 a.m.. (...)”<sup>40</sup>

33. The actions and events related in the statements of the employees of the company Bear Creek concerning the day of the looting and burning of the Santa Ana mining camp show that thousands of community members or citizens participated, including leaders of the communities, and not only “a group of politicized extremists.”<sup>41</sup> This participation materialized through community members from Huacullani, but above all from communities of neighboring districts such as Kelluyo, Pizacoma, among others. They arrived in large vehicles, at a specific time, with banners, to join and begin the protests. Unfortunately, the events ended in personal injury to the employees of the company Bear Creek and property damage in the mining camp. Unfortunately, the company failed to take precautions to guarantee the physical safety of its employees. The 2,800 to 3,000 Aymara citizens or community member that took part in the acts of protest had high levels of frustration, which exploded on October 14, 2008. This accumulated negative attitude is not the product of a day or a month of experience, but is the product of years or months of an experience of dissatisfaction, including lack of communication.

34. The company Bear Creek knew about this attitude on the part of the majority of the community members of the area of direct and indirect influence of its Santa Ana Mining Project. But it did not understand its effects; it did not understand that the people felt dissatisfied and that they already rejected it. The facts and the results of the prosecutorial and police investigation of the event, summarized in file number 277-2008-PE or 0049-2010, show that lack of understanding or incompetence. At the end of that prosecutorial and police investigation the

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<sup>40</sup> Deposition of Miguel Ángel Sancho Machaca, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito Desaguadero, October 20, 2008, pages 48-49 [Exhibit R-324]. (Only the initials of the community members have been given)

<sup>41</sup> Expression used by the company Bear Creek before the Provincial Prosecutor in its verification request by means of a prevention procedure. *See* paragraphs 22 *et seq. supra*.

case was closed, because it was not possible to identify the perpetrators of the events; in addition, the company was not able to show “ownership of the premises” and of the damaged property.

The provincial prosecutor responsible for the investigation decided “NOT TO FORMALIZE A PRELIMINARY INVESTIGATION” and, as a result, orders “CLOSE PERMANENTLY” the proceedings, and the company Bear Creek has not challenged that decision.<sup>42</sup>

35. After the looting and burning of the camp of the Santa Ana Mining Project, the company Bear Creek would apply a new strategy with the communities of the area of direct and indirect influence of the aforementioned project, without obtaining a hoped-for result. The new strategy included getting closer to the communities of the area of influence, without having achieved the acceptance of the communities, as I explained in my previous report.<sup>43</sup> After the looting and burning of the camp of the Santa Ana Mining Project, it was clear that the majority of the population of the communities of the districts surrounding the mine site wanted neither the mining project nor the company Bear Creek, which was very difficult to undo. Therefore, subsequent events such as the public hearing of February 23, 2011, during which the company presents its Environmental Impact Assessment (EIA), would reconfirm that trend.

**C. NEW AGREEMENTS AND DISAGREEMENTS OF THE COMPANY BEAR CREEK WITH THE COMMUNITIES AFTER THE LOOTING AND BURNING OF THE CAMP**

36. After the looting and burning of the mining camp on October 14, 2008, the company Bear Creek withdraws from the communities of the area for the remaining months of the year 2008.<sup>44</sup> In January 2009, the company returns and continues its activities with apparent calm until February 2011.

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<sup>42</sup> Resolution Archiving Investigation, Resolution No. 03, Criminal File No. 277-2008-PE y 0049-2010, January 28, 2010 [Exhibit R-377]; Resolution Archiving Investigation, Resolution No. 02-2010-MP-FPM-D, Criminal File No. 277-2008-PE y 0049-2010, December 3, 2010, page 599 [Exhibit R-373].

<sup>43</sup> See First Peña Report, paras. 72-75 [Exhibit REX-002].

<sup>44</sup> Interviews in Huacullani, July 20, 29-31, 2015, and March 4, 2016.

37. In January 2009, the company Bear Creek implements the same strategy of community relations as in previous years. As was previously described, this strategy focused only on certain communities, which created a tense situation in the area. This time the number of jobs doubles or triples, but always is concentrated in favor of the same five communities that the company identified as its area of direct influence: the C6ndor Ancocahua *Parcialidad*, the communities of Challacollo, Ancomarca, and Concepci6n de Ingenio, in addition to the Huacullani urban community. As illustrated in the table that contains the employment agreements of the company with the communities (paragraph 13 *supra*), the C6ndor de Ancocahua *Parcialidad* goes from an average of 15 to 35 hirings of community members in its favor. Similarly, the communities of Challacollo, Ancomarca, and Concepci6n de Ingenio go from an average of 10 to 25 hirings, whereas the Huacullani urban community goes from an average of 3 to 10 hirings.<sup>45</sup>

38. In 2010, until January 2011, the company Bear Creek repeats the same system of temporary hiring in numbers in favor of the same five preferred communities. No other community of Huacullani district or Kelluyo district benefited from this hiring system. The scheme adopted by Bear Creek continued to be exclusionary, causing great disagreements between the communities.

39. During this same period, the company tried to obtain land use agreements with the community members. In August 2010 and the following months, approximately twelve attorneys arrived in the city of Desaguadero; they took turns for weeks or months, with the final goal completion of the Santa Ana Mining Project.<sup>46</sup> They were hired by the company Bear Creek to work with the *comunidades campesinas* of the area surrounding the mining project; they had

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<sup>45</sup> See First Pe6a Report, para. 58 [Exhibit REX-002].

<sup>46</sup> Testimony of a citizen involved in the tourism business in the south region, in Desaguadero, March 5, 2016.

meetings in the city of Desaguadero, and they had lunch and dinner with the leaders of the communities.<sup>47</sup> The type of work performed by the hired attorneys was to clear or regularize the communities' title deeds, in order to facilitate the transfer of lands in favor of the company Bear Creek.<sup>48</sup>

40. The company Bear Creek established a policy of focusing its community relations on the communities identified as part of its area of direct influence, including the matter of legal advice in its favor, ignoring the customs, traditions, and local rules of the communities. As I explained in my first report, the Aymara communities have historically lived together under social, economic, cultural, and legal relationships of a collective nature.<sup>49</sup> Under this idea or balance, it is difficult for them to allow the entry of persons or activities from outside their lands, unless it consists of a collective or general benefit. As a result, when the five favored communities were induced to the logic of individual benefit through the hiring system promoted by the Santa Ana Mining Project, the other communities felt the responsibility to fight against that mining project because it affected that idea [of collective benefit], but also because they perceived that they likely would be affected by pollution. Therefore, when the public hearing was announced, when the development of the mining project was imminent, the majority of the communities of the districts involved and neighboring districts began protests against it. To that end, the community members sought to reimpose community order, defending themselves from the environmental risk, the lack of consultation in the concession and commencement of mining

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<sup>47</sup> Testimony of a citizen involved in the tourism business in the south region, in Desaguadero, March 5, 2016. In addition, testimony of community members in Huacullani and Kelluyo, March 4 and 5, 2016.

<sup>48</sup> This fact is verified with the alleged sale of land of the community Concepción de Ingenio that Bear Creek tried to accomplish. *See paras. 59 et seq. infra.*

<sup>49</sup> *See First Peña Report, paras. 7-27 [Exhibit REX-002].*

activities, rejecting Supreme Decree No. 083-2007-MEM, which favored the mining company, in addition to rejecting the exclusion of benefits to which they were subjected.<sup>50</sup>

**D. THE PUBLIC HEARING OF FEBRUARY 23, 2011**

41. The public hearing during which the Environmental Impact Study (EIA) for the exploitation of the Santa Ana Project was presented to the communities was held on February 23, 2011, as a part of Bear Creek's Citizen Participation Plan. This hearing was a milestone event to understand the anti-mining protests that unfolded months later in the region. It had broad attendance, given the interest and concern of adjacent communities and those surrounding the Santa Ana Mining Project. For this reason, it must not be surprising that a great number of community members attended the event. In addition to community members from Huacullani and Kelluyo, community members from the districts of Desaguadero, Pizacoma, Zepita, Pomata, and from the provinces of Ilave and Yungullo were present.<sup>51</sup> I have reviewed the minutes of the hearing, but unfortunately they do not provide further details about the events that occurred during the hearing. For this reason, during my field visit in March 2016, I interviewed community members who were present, as well as community and environmental rights advocates who attended, in order to know in detail the events that occurred.<sup>52</sup>

42. The public hearing revealed a second sign of rejection of the mining project. The Aymara population that attended was divided between those authorities or community members that belonged to the small group of communities favored by the temporary hiring system and other benefits provided by Bear Creek, and those authorities and community members who had

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<sup>50</sup> See First Peña Report, para. 65 [Exhibit REX-002].

<sup>51</sup> Field visit of March 4 and 5, 2016 in Huacullani and Kelluyo.

<sup>52</sup> Field visit of March 4 and 5 2016 in Huacullani and Kelluyo; in addition, interviews in Puno, March 8 and 9, 2016. The community and environmental rights advocates interviewed self-identify as "lucapas advocates" for purposes of this document.

not received benefits and feared the pollution that the mining project would cause, and for this reason they distrusted it and rejected it.

43. Minutes were taken during the public hearing. These minutes consist of a very simple document, which does not include all the actions or activities carried out, such as interventions, questions, and answers, and all the events such as the total list of attendees, previous or subsequent events, or the presentation of the EIA, and the actual mood of the attendees.<sup>53</sup> The minutes also indicate that the details of the hearing were recorded by audiovisual means; these means, however, were not offered by the company Bear Creek as evidence in this arbitration.<sup>54</sup> According to the content of the minutes registered after the Public Hearing, and according to the testimony obtained in Huacullani, Kelluyo, and Puno from persons who attended the Hearing or were outside the premises of the Hearing, the facts can be classified into a set of characteristics that summarize the preliminary cause of rejection and possible prevention of the regrettable events that occurred in the following months.

44. According to the minutes taken after the hearing, and the testimony obtained by those who took part in the hearing, we can highlight the following characteristics:<sup>55</sup>

- i. The hearing took place in the premises of the governor's office, located in the main square, which can hold approximately 250 seated persons. In addition, an area was set up by the entry to the premises to include more attendees. According to the minutes, 380 people were listed at first, and then a total of 729 attendees. A large group of community members, however, was not listed; they came from the communities of the neighboring districts that arrived in trucks or collective transport vehicles, and remained outside the premises of the hearing because they were not

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<sup>53</sup> See Minutes of the Public Hearing-Mineral Subsector 007-2011/MEM/AAM, February 23, 2011 [Exhibit C-0076].

<sup>54</sup> See Minutes of the Public Hearing-Mineral Subsector 007-2011/MEM/AAM, February 23, 2011 [Exhibit C-0076]. It must be kept in mind that, in addition, we have had no access to the audiovisual media for the preparation of this part of this report.

<sup>55</sup> Field visit of March 4 and 5, 2016, in Huacullani and Kelluyo; see also Minutes of the Public Hearing-Mineral Subsector 007-2011/MEM/AAM, February 23, 2011 [Exhibit C-0076].

able to enter. This group of community members was found outside the premises and the additional set-up area. This group of community members consisted of several hundred people, perhaps 300 to 500 additional persons.<sup>56</sup>

- ii. Among the attendees who were located inside the governor's office premises and were listed as attendees of the Public Hearing for the EIA of the Santa Ana Mining Project, two extreme groups with regard to the mining project and the company Bear Creek could be identified before the presentation and debate: a first group was observed objectively in favor of the Santa Ana Mining Project and the company Bear Creek, and under this position it would also be in favor of the EIA that would be presented, and a second group, which agreed with the hundreds of community members who were outside the building, was observed objectively against the mining project and the company, and it would also be against the Environmental Impact Assessment. Between these two extremes there was a third group of community members who were in an apparent state of indifference with regard to the project and the company. The members of this third group attended the Public Hearing because they had earlier received a gift from the mining company's employees, and they "felt themselves obligated to attend."<sup>57</sup>
- iii. The hearing was conducted predominantly in Spanish. There was an Aymara translator, but he was inadequate because of the specialized subject matter addressed. He was not able to translate the technical explanations or words of the professionals in attendance.<sup>58</sup>
- iv. As a result of the limitations in communication, the majority of the attending public did not understand the definitions or the technical concepts. As a result, the presentation of the explanations was focused, on the one hand, on defending the EIA, and on the other hand, on claiming that there would be no pollution. In both cases, the majority of the attending population did not understand the positions or the explanations provided during the hearing.<sup>59</sup>
- v. The questions were restricted. There were a total of 20 oral questions that were able to be asked in a maximum of three minutes per participant, and a total of 83 written questions, whose responses are unknown. The

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<sup>56</sup> Testimony of a community member of Huacullani who did not attend the hearing but who walked around the main square to find out what happened, Huacullani, March 4, 2016.

<sup>57</sup> Testimony of persons identified as Lupacas advocates, Puno March 8, 2016. The obligation to attend felt by this group of community members was caused by a sense of reciprocity: after receiving a favor (the gift), they felt an obligation to return the favor (attend the Public Hearing). *See also* Minutes of the Public Hearing-Mineral Subsector 007-2011/MEM/AAM, February 23, 2011 [Exhibit C-0076].

<sup>58</sup> Testimony of Lupacas advocates, March 8, 2016.

<sup>59</sup> Interviews with community members of Huacullani, July 20, 29-31, 2015.

representative of the company Bear Creek determined which specialist or professional answered the question.<sup>60</sup> This procedure limited even further the work of the Aymara translator, who was not able to follow the technical responses that were provided. If the technical concepts and definitions of the EIA are difficult for professionals of other careers who handle similar technical definitions, all the more reason why those concepts or definitions will be less understandable to those who are not professionals, such as in this case the Aymara community members attending the Public Hearing.

- vi. At all times there was a tense context within the premises where the hearing was held. The opposition to the EIA and the mining project itself grew as the meeting unfolded.<sup>61</sup>
- vii. The community members in attendance who were outside the premises of the hearing did not participate in the presentation of the EIA or in the questions. There were no speakers for them or accommodation to participate in the meeting. On the contrary, this largest group of attendees to the hearing was convinced beforehand of its rejection of the EIA of the Santa Ana Mining Project, without having the alternative to listen to and understand the content of that EIA.
- viii. At the end of the hearing, the attendees who were against the mining project reassembled in the main square and began a demonstration with a protest march against the mining project and the company Bear Creek.<sup>62</sup>

45. Given the aforementioned characteristics, contrary to what the company argues, it cannot be established that the hearing was a success. First, the hearing did not take place peacefully; a group of attendees was in favor of the mining project and its EIA, but there was also a multitude of attendees who were concerned and against the mining project and its EIA. Second, not all the community members' concerns were addressed; there were 83 unanswered questions, in addition to the difficulty of understanding the translation of the 20 oral questions. Finally, the acts of protest at the end of the hearing show that the company was far from obtaining the absolute or overwhelming support of the communities.

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<sup>60</sup> Testimony of Lupacas advocates, March 8, 2016. *See also* Minutes of the Public Hearing-Mineral Subsector 007-2011/MEM/AAM, February 23, 2011 [Exhibit C-0076].

<sup>61</sup> Testimony of Lupacas advocates, March 8, 2016.

<sup>62</sup> Interviews in Huacullani, July 29-31, 2015, and testimony of a community member who was outside the hearing, March 4, 2016.



46. After the day of the hearing, the community members who were dissatisfied with the explanations about the EIA of the Santa Ana Mining Project and those who were against the mining project began a series of actions aimed at seeking the cancellation of the mining project and the withdrawal of the company Bear Creek. Thus, they met in the district of Desaguadero on February 24, 2011, and then met in the community and population center of Yorohoco (located to the side of the Desaguadero-Moquegua/Tacna highway, in the same Huacullani district), where two days later, on February 26, 2011, they held a massive meeting. In the following days, until March 2, 2011, they held massive meetings, interspersed between Yarohoco and Desaguadero.<sup>63</sup> In these meetings, which included community representatives from the districts of Huacullani, Kelluyo, Desaguadero, Pizacoma, Pomata, and the provinces of Ilave, Yunguyo, and Puno, the creation of the Southern Puno Natural Resources Defense Front (“FDRNSP” for its initials in Spanish) was agreed, the managing board was elected, and specific actions to prevent the development of mining activities in the region are agreed.<sup>64</sup> The meetings continued during the following days, convening new communities of the aforementioned districts. A massive call of the community members of Huacullani and Kelluyo districts, as well as those of Zepita, Pizacoma, Pomata, Desaguadero districts of the province of Chucuito, and leaders and community members of the communities of the provinces of Ilave, Yunguyo, and Puno, is made for March 22, 2011. Approximately between 20,000 and 25,000 people met in the community

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<sup>63</sup> Interviews in Huacullani and Kelluyo, March 4 and 5, 2016.

<sup>64</sup> Testimony of community members of Huacullani and Kelluyo, March 4 and 5, 2016. In addition, the newspaper *Los Andes* publishes a summary of the events on March 3, 2011, providing an account of the effects of the public hearing for the EIA of the Santa Ana Mining Project, the community members' rejection, and the protests that were carried out in Desaguadero on March 2, 2011. See “Mayors, Governors and Population Respect Santa Ana,” *Los Andes*, March 3, 2011, page 11 [Exhibit R-374].

and population center of Yorocho, according to the testimony of those present.<sup>65</sup> This caused great confidence in the leaders to protest with a greater public impact in the region.

47. After the public hearing of February 23, 2011, the FDRNSP is constituted and consolidated. With the presence of the FDRNSP as a collective actor, and its platform of struggle against the mining project, the conflict intensifies. That is when members of the five beneficiary communities, as well as the mayor of Huacullani district, are pressured into withdrawing support for the mining company and joining the agreements of the majority of the communities of Huacullani district and of the districts gathered under the FDRNSP. The five beneficiary communities and their mayor were publicly summoned under threats of looting and burning of their property.<sup>66</sup> That was how these communities appointed a spokesman and gave in to the protests against the mining company. Through this spokesman, the five communities and the mayor of Huacullani agreed to adhere to the declarations of protest, and to join the marches in which they would participate “on the front line” in Chucuito province, by means of the permanent closing of the Desaguadero-Tacna international road, and in Puno province, by means of the taking of the city. Furthermore, we are told by a group of community leaders of the time that the representatives of the five adhering communities had to finance the trip of at least one person who would accompany the leaders of the FDRNSP during its protests in Lima.<sup>67</sup>

48. These events mark the start of the protest that led to a major social conflict in Puno. I refer to my first report for an account of the events that occurred in Puno between March and June 2011.

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<sup>65</sup> Interviews in Huacullani and Kelluyo, July 20, 29-31, 2015, and March 4 and 5, 2016.

<sup>66</sup> Testimony of community members interviewed in Huacullani, July 20, 29-31, 2015, and confirmed in March 2016.

<sup>67</sup> Interviews with community leaders of Huacullani, July 29-31, 2015.

**E. THE SANTA ANA PROJECT WAS DIRECTLY LINKED TO THE SOCIAL CRISIS OF PUNO DEPARTMENT IN 2011**

49. After the looting and burning of the Santa Ana Mining Project of the company Bear Creek (10-14-2008), and after the protests that followed the Public Hearing for the Environmental Impact Assessment (EIA) of the Santa Ana Mining Project (02-23-2011), both identified as the initial causes of the social conflict that unfolded in Puno between March and June 2011, the request to cancel the Santa Ana Mining Project and the withdrawal of the company Bear Creek from Huacullani and Kelluyo was the final cause. The protests that continued without interruption after the EIA hearing sought to achieve that final goal, first through regional measures, and later through national measures. The protests of the Aymara population did not conclude until the issuance of Supreme Decree No. 032-2011-EM, published on June 25, 2011, when that final goal was achieved. The aforementioned Supreme Decree No. 032-2011 repeals Supreme Decree No. 083-2007-EM, which had previously declared the public necessity of the Santa Ana Mining Project, authorizing its concession to the company Bear Creek. The Aymara communities of Puno region return to their lands, halting their protests only after the repeal of this Supreme Decree No. 083-2007-EM.<sup>68</sup>

50. Two facts or sets of facts that strengthen the statements put forward are added to the facts explained and the documents included in our previous report of October 6, 2015 about the protests that sought the cancellation of the Santa Ana Mining Project and the withdrawal of the company Bear Creek. These facts were known in particular by the local and regional population. The first set of facts concerns the diffusion and understanding of the number of mining concession applications and concessions that was unknown in the region and that was a surprise for the local population, leading to the greatest participation and commitment of the

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<sup>68</sup> See First Peña Report, paras. 82-92 [Exhibit REX-002].

Aymara communities for and with the protest. The second set of facts concerns the conclusions reached by the investigation of the Office of the Prosecutor and the Judiciary of the region in the court proceeding that was brought against the leaders of the protest, which summarize the reasons and the results of the events. Let us see separately each one of these facts.

51. The first set of facts, concerning the information and understanding of the number of mining concession applications and concessions in Puno region and its connection to the social conflict, begins with the news about the issue disseminated by the regional media at the end of January 2011. On January 25, 2011, the regional newspaper *Los Andes* brought the issue to light for the region's politics with the following title: “Puno is a champion in mining concession applications, but is the fifth poorest region in Peru.”<sup>69</sup> The story includes the following:

“(…) 9,638 mining concession requests throughout the national territory, out of which 1,656 are located within the jurisdiction of Puno.

“A publication by the Ministry of Energy and Mines reveals that according to the [National] Geological, Mining, and Metallurgical Institute (Instituto [Nacional] Geológico Minero Metalúrgico – INGEMMET), Puno records the largest number of mining concession requests. Taking into account the exploitation of mineral resources since colonial times, it is rather paradoxical that Puno continues to be one of the poorest regions of Peru. The fifth poorest, according to INEI.

#### “MINING CONCESSION REQUESTS

“According to INGEMMET, during 2010 there have been 9,638 mining concession requests recorded in Peru, out of which 1,656 have been submitted by companies and professionals seeking to

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<sup>69</sup> “Puno Has The Most Mining Concessions, But it is the 5<sup>th</sup> Poorest Region in Perú”, *Los Andes*, January 25, 2011, page 03 [Exhibit R-375].

work in mining in the Puno region. Compared to that [concession applications] of other regions, this figure is the highest in Peru.

(...)

#### “MINING AND POVERTY

“The districts located within the provinces of Carabaya, San Antonio de Putina, and Melgar [Quechua area]

constitute the jurisdictions with the largest mining exploitation recorded, thus generating higher mining royalties. However, unfortunately, the highest percentage of the poorest population, [in the region], including those extremely poor, are also in those districts.

“According to the 2007 – 2011 Concerted Development Plan of the Regional Government of Puno, the districts of Ollachea, Corani, Itauta, Quiaca, Potono, Orurillo, Ananea, Caracoto, Antauta, and Ocuvi, among other districts [located in the aforementioned Quechua provinces] show a high level of vulnerability to child malnutrition, despite the presence of large mining companies in those jurisdictions. (...)”<sup>70</sup>

52. In addition to the aforementioned content of the story, it must be kept in mind that mining concession applications increased 84% from the previous year, 2010.<sup>71</sup> The local population, however, in which the Aymara *comunidades campesinas* stand out, did not know about this. This population will become conscious of the meaning of the mining concession applications and their concessions in the following weeks and months, when their local authorities and leaders first understand their causes and effects, and then seek to learn more about their meaning, researching themselves the existence of these concession applications, in

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<sup>70</sup> “Puno Has The Most Mining Concessions, But it is the 5<sup>th</sup> Poorest Region in Perú”, *Los Andes*, January 25, 2011, page 03 [Exhibit R-375].

<sup>71</sup> “Puno Has The Most Mining Concessions, But it is the 5<sup>th</sup> Poorest Region in Perú”, *Los Andes*, January 25, 2011, page 03 [Exhibit R-375].

order to share that knowledge with their local population later. “How is it possible that there are so many mining concession applications in the region and yet we live in poverty?” is the recurring question among local authorities and leaders.<sup>72</sup> It is in this context that the debate concerning the EIA of the Santa Ana Project arises, which leads to greater concern among local authorities and leaders. In this regard, companies such as Bear Creek were able to submit their mining concession applications for the site that will later become the Santa Ana Mining Project without the local population of Huacullani and Kelluyo knowing about it.

53. At the beginning of 2011, after the news spread about the large number of mining concession applications and mining concessions (without prior consultation or information), and when the exploratory work and the presentation of the EIA of the Santa Ana Mining Project of the company Bear Creek became known, the Aymara local population and communities of the districts of Huacullani and Kelluyo that felt affected intensify their rejection against the aforementioned project and company. In addition, when the Aymara *comunidades campesinas* of the neighboring districts found out that their historic territories were also under new mining concessions or pending concession applications, the number of demonstrators increased. The extent of this expansion in participation in the protest by the communities and the local population occurs at the end of March or beginning of April 2011, when the population of the neighboring province of Yunguyo, still reluctant to forcefully join the protests, finds out that its sacred mountain or Apu known as Khapia was also under or above a mining concession. After this information, the protests received the support of Yunguyo, its communities, and local population. With the incorporation of the province of Yunguyo, the entire Aymara population of the southern Puno sub-region was united in rejecting and confronting the thousands of mining

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<sup>72</sup> Testimony of Lupacas advocates, March 8, 2016.

concessions and the thousands of concession applications that affected them,<sup>73</sup> but, in particular, they held the company Bear Creek and its Santa Ana Mining Project as the main and ultimate cause of this rejection and confrontation since they considered them “bad examples” that advanced and became consolidated in their territories.<sup>74</sup>

54. The second set of additional facts concerning the ultimate cause of the protests in the Puno region is provided by the prosecutorial and judicial investigation of the acts of violence that occurred at the end of May 2011, when the city of Puno is taken by thousands of community members and Aymara population in general coming from the southern area.<sup>75</sup> In the main document requesting the dismissal of the criminal investigation and the prosecutorial charging document, the initial and ultimate cause of the protests and their violent effects are identified as the Santa Ana Mining Project and the company Bear Creek.<sup>76</sup> The document distinguishes between preceding facts, concurrent facts, and subsequent facts.<sup>77</sup>

55. The facts investigated and systematized by the Prosecution include the company Bear Creek and its Santa Ana Mining Project as the original cause of the social conflict that unfolded in Puno region in 2011. The Prosecution considered it that way in the investigation of the preceding facts of the prosecutorial and court proceeding commenced because of the acts of

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<sup>73</sup> Interview with environmental rights advocates of Puno. Interview made in Lima, March 2, 2016.

<sup>74</sup> Testimony of Lupacas advocates, March 8, 2016.

<sup>75</sup> See First Peña Report, para. 91 [Exhibit REX-002].

<sup>76</sup> Document Formalizing Request for Partial Dismissal and Prosecution from the First Provincial Prosecutor’s Office in Puno, November 10, 2014, page 218 [Exhibit R-376]. The document is part of the court proceeding currently pending, with file number 00682-2011-7-JR-PE-02, before the Second Court of Preliminary Investigation of Puno and the First Corporative Criminal Provincial Office of the Prosecutor of Puno, whose complaint is annex Criminal File No. 00682-2011-7-2101-JR-PE—02, before the Second Court for Preliminary Investigation, Superior Court of Justice of Puno, reviewed on July 2015 [Exhibit R-118].

<sup>77</sup> See Criminal File No. 00682-2011-7-2101-JR-PE—02, before the Second Court for Preliminary Investigation, Superior Court of Justice of Puno, reviewed on July 2015, pages 19-28 [Exhibit R-118].

violence and damage that occurred in the city of Puno that year.<sup>78</sup> After the presentation of these preceding facts, it goes on to identify the concurrent facts or concomitant facts of the subject matter of the prosecutorial investigation, including the acts of violence of May 2011 in the city of Puno. By this date, the acts of force or violence of the protest that began in March 2011 had already fully shifted to the city of Puno, which was taken by the community members and leaders of the southern area. Unfortunately, acts of vandalism and of destruction and/or burning of public and private establishments occur in the city on that date.<sup>79</sup>

56. The concurrent facts recorded by the Prosecution lead us to confirm the disastrous situation that Puno region experienced, in particular the city of Puno in May 2011. It was the peak moment of social conflict, during which the city was regrettably surrounded by thousands of demonstrators or protesters who arrived from the south (Aymara community members initially, but also “foreign” people). After these acts of violence that concentrated in the city of Puno on May 26, 2011, the subsequent acts investigated and systematized by the Prosecution occur.<sup>80</sup> Thus the demonstrators temporarily withdraw from the city of Puno when they decide to give the Central Government a truce to carry out the second round of the 2011 election process, whose central day was June 8, 2011. On June 9, 2011, the judicial authorities issue an arrest warrant for the protest leaders, but the Aymara communities similarly reengage in the protests; the Quechua communities and local population join with acts of protest in the city of Juliaca, and, given the lack of response from the regional and central authorities, a group of Aymara

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<sup>78</sup> See Criminal File No. 00682-2011-7-2101-JR-PE—02, before the Second Court for Preliminary Investigation, Superior Court of Justice of Puno, reviewed on July 2015, pages 19-23 [Exhibit R-118].

<sup>79</sup> See Criminal File No. 00682-2011-7-2101-JR-PE—02, before the Second Court for Preliminary Investigation, Superior Court of Justice of Puno, reviewed on July 2015, pages 23-27 [Exhibit R-118].

<sup>80</sup> See Criminal File No. 00682-2011-7-2101-JR-PE—02, before the Second Court for Preliminary Investigation, Superior Court of Justice of Puno, reviewed on July 2015, pages 27-28 [Exhibit R-118].



leaders and demonstrators travel to the city of Lima. It is here where the final outcome of the conflict occurs, with the repeal of the aforementioned Supreme Decree No. 083-2007-EM.<sup>81</sup>

57. The acts preceding, concurrent, and subsequent to the social conflict or trans-communal conflict identified as the “Aymarazo” in Puno, described and concluded by the Prosecution in the court proceeding, confirm the disastrous situation that was reached, but above all they confirm the identification of the points of origin and conclusion of the conflict as the acts that involve the mining company Bear Creek and its Santa Ana Mining Project. The initial cause and the final cause of the social conflict, including its regrettable acts of violence, were found in actions that, at least from 2007 because of the enactment of Supreme Decree No. 083-2007-EM, involve the company Bear Creek.

58. Both the set of facts related to the mining concession applications and concessions, and the set of facts obtained from the conclusions of the prosecutorial investigation supplement the information presented in our first report of October 6, 2015. On the one hand, the facts related to the hundreds or thousands of mining concession applications and concessions in Puno region explain how the protests that began in Huacullani and Kelluyo against the company Bear Creek and the Santa Ana Mining Project expanded to all the Aymara communities of the region, and, on the other hand, the conclusions of the facts impartially systematized by the prosecutorial investigation leave no doubt about the facts that relate to and involve at least from 2007 until June 2011 the same company Bear Creek and the Santa Ana Mining Project.

## **F. CONCLUSION**

59. The causal link between the activities of Bear Creek and the social conflict is clear. Bear Creek did not adopt the necessary measures to guarantee good relations with all the

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<sup>81</sup> See Criminal File No. 00682-2011-7-2101-JR-PE—02, before the Second Court for Preliminary Investigation, Superior Court of Justice of Puno, reviewed on July 2015, page 28 [Exhibit R-118].

communities, acknowledging their existence and possible harm, and respecting their customs and traditions. This generated distrust in the communities, and therefore they had to protest against all the mining activities in the region, and in particular against Bear Creek because it was the only mining project in that southern area that was about to begin the exploitation. From the start of the protests, the community members demanded the cancellation of the Santa Ana Project and, with the knowledge of this request that was added together with the previous rejection (the looting and burning of the mining camp and the public hearing for the EIA) against it and its mining project, it [Bear Creek] is partially responsible for the conflict that later unfolded in the region. Such is the connection between the activities of Bear Creek and the social conflict that the protests related to the southern front did not end until the declaration of public necessity of the Santa Ana Mining Project was repealed.

60. The Aymara *comunidades campesinas* of Puno, and particularly those that experienced the confrontation and social conflict of 2011 (those that belong to the southern area, such as Puno, Ilave, Chucuito, Yunguyo), have their own way of understanding mining activities and establishing relations with the companies or with other communities, including opposing communities. They prioritize their agricultural and farming activities over any external activity such as mining. If a company arrives in the area to begin a novel activity that is apparently in the interest of the communities themselves, it must communicate with and convince all the communities. It is not enough to work with a sector or small group of communities where the new activity would supposedly take place; on the contrary, it would have to work with all the most remote communities, because the social impact is collective, given the nature of the historic relations between the members of these communities. The communities of the southern area are accustomed to [engage in] dialogue among them, to the exchange of agricultural and farming

goods and services between community members, between families and between nearby communities, such as what occurs weekly at their trade fairs or K'atos.<sup>82</sup> They put in practice institutions such as Ayni (reciprocity or mutual help) or Minka (working together for a common purpose), which help one understand that in the presence of external activities such as mining, it is important that everybody or nobody be affected or benefit.

### **III. ALLEGED AGREEMENTS FOR THE SALE OF LANDS OF THE COMMUNITIES OF HUACULLANI**

61. The company Bear Creek claims that on April 2, 2011, that is, after the start of the protests but before they spread to the provincial or regional level, it entered into a contract of sale with the community of Concepción de Ingenio for the acquisition of a part of its territory, equivalent to 208.4461 hectares.<sup>83</sup> This would facilitate, according to the company, the purchase of lands from other communities and its preparation to begin the exploitation phase of the Santa Ana Mining Project.<sup>84</sup>

62. The alleged sale transaction, however, has several problems. The sale of plots of land of *comunidades campesinas* (hereinafter “communal plot of land”) in Peru must meet a series of requirements in order for the agreement to be valid and legitimate. Below I analyze in detail the alleged contract of sale and then I show its possible legal effects in the communal context. The agreement between the company Bear Creek and the Concepción de Ingenio community has many limitations or problems that question its validity and legitimacy.

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<sup>82</sup> See First Peña Report, paras. 9-14 [Exhibit REX-002].

<sup>83</sup> See Claimant's Reply, para. 99; see also Second Witness Statement of E. Antunez de Mayolo, January 8, 2016 (“Second Witness Statement of Antunez de Mayolo”), para. 87; Minutes of the Extraordinary General Assembly of the Concepción de Ingenio *Comunidad Campesina*, April 2, 2011 [Exhibit C-0186].

<sup>84</sup> See Minutes of the Extraordinary General Assembly of the Concepción de Ingenio *Comunidad Campesina*, April 2, 2011 [Exhibit C-0186].

63. In Peru, a set of specific rules concerning *comunidades campesinas* provides requirements, and also specifics, applicable to the sale of communal plots of land. The minutes that establish this alleged sale agreement between Bear Creek and the community do not comply with these requirements.

64. First, the sale of a communal plot of land can only occur with the agreement of two-thirds of all the members of the community. Article 11 of the Law on Private Investment in the Development of Economic Activities in Lands of the National Territory and of Native Communities and *Comunidades Campesinas*, Law No. 26505, provides:

**“Article 11.** In order to dispose of, encumber, rent, or exercise any other act concerning the communal plots of land of the Mountain Range or the Forest, the Agreement of the General Assembly will be required with the affirmative vote of no less than two thirds of all the members of the Community.”<sup>85</sup>

65. From the minutes regarding the supposed sale contract of sale, it is not clearly apparent the total number of community members in attendance. It is indicated that 76 community members are present, but it is not indicated what percentage of the community that number represents in order to determine the quorum of attendees. In this regard, in addition, it must be kept in mind that when it comes to transfers of lands of the *comunidad campesina*, the agreement of at least two-thirds of its members is required, and in this regard it is essential to have access to the total number of members.

66. In addition, the minutes of the community assembly that allegedly addresses the transfer of a plot of land of the community do not state explicitly in their final part the expression of consent of the totality of community members. They do not indicate how many of the community members present voted in favor and how many voted against accepting the sale

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<sup>85</sup> Law on Private Investment for the Development of Economic Activities Within the National Territory and Native Communities Lands, Law No. 26505, July 14, 1995, Article 11 [Exhibit R-157].

proposal allegedly offered by the company Bear Creek. They do not specify whether the set of 76 community members agreed with the offer presented and what percentage of community members legally constitutes the percentage that would be needed to make the act of transfer valid. Only at the end of the minutes 57 recorded signatures are added, which do not match the community members identified as present in the assembly. What happened with the persons who did not sign? Why were the community members present who apparently totaled 76 not identified and why did not they all sign at the end of the minutes? From the minutes as they appear, we can infer that the signatures have been added after the community assembly was held, or that the majority of those present were never in agreement, or, in addition, that there was not a total of 76 members present. Consequently, there would be no consent on the part of the members of the assembly, and therefore there would be no contract.

67. Second, the Assembly in which the sale of land will be approved must be convened expressly and solely for that purpose. Article 7 of the General Law on *Comunidades Campesinas*, Law No. 24656, provides:

“**Article 7.** The lands of the *comunidades campesinas* are those indicated in the Law on Property Surveys and Titling and are unattachable and imprescriptible. They are also inalienable. As an exception, they may be sold after the agreement of at least two thirds of the qualified members of the Community, meeting in a General Assembly convened expressly and solely for that purpose. (...).”<sup>86</sup>

68. The minutes of the alleged contract of sale do not contain any explicit reference to the notice of assembly for the purpose of transferring a plot of community land. This notice of assembly constitutes not only a formal act, but a fundamental act to legitimize an act of communal transfer, in which all the members of the community appear involved, since the

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<sup>86</sup> General Law on *Comunidades Campesinas* of Perú, Law No. 24656, April 14, 1987, Article 7 [Exhibit R-107].

partition and transfer of a part of the territory of the community is a very delicate issue. In the absence of that notice of assembly, the very date that appears in the minutes of the assembly is questionable. It may have been written subsequently and later affixed to the minute book.<sup>87</sup>

69. Third, taking into account that the agreement is being entered into with an Aymara community, and the predominant language in the community is Aymara, the minutes must show that the meeting held was translated into Aymara in order for the community members to be able to clearly express their consent. The foregoing responds to the constitutional right to ethnic and cultural identity recognized in Article 2, paragraph 19 of the Constitution of Peru:

“**Article 2.** Every person has a right:

(...)

19. To his or her ethnic and cultural identity. The State recognizes and protects the ethnic and cultural plurality of the Nation.

Every Peruvian has a right to use his or her language before any authority through an interpreter. Foreigners have this same right when they are summoned by any authority.”<sup>88</sup>

70. The minutes and the alleged contract of sale that is included in the minutes are drafted in Spanish without mentioning that their content has been explained and developed in the language that corresponds to the population of the community: the Aymara language. It is public

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<sup>87</sup> Based on our knowledge of the Aymara communities in the region, minutes are drafted directly by hand. They are manuscripts that are certainly written in Spanish and not in Aymara (because the population speaks but does not write in Aymara), but it captures all the discussion that is conducted in Aymara. *See* Antonio Peña Jumpa, COMMUNAL JUSTICE IN THE ANDES, THE CALAHUYO CASE (excerpts) Annexes (1998) [Exhibit R-109]. In the case under analysis, it appears that the minutes were written externally, by means of a computer or printer, fully attached to the minute book of the community. Not even the beginning of the minutes, which corresponds to the introduction of the assembly, allegedly made on the indicated date, appears written by hand.

<sup>88</sup> Constitution of Perú, December 29, 1993, Article 2.19 [Exhibit R-001].

knowledge for the members of the company Bear Creek and for every outsider to the community that the native language of the members of that community is Aymara, and therefore the minutes must indicate that the explanation and development of the meeting was done in Aymara. Why is it not indicated that the contract has been explained in Aymara by a specialist? Why is the translator of the clauses of the contract not identified and mentioned in the minutes? Why are the minutes not written in Aymara or why is their limitation not explained? After these questions, at issue are not only the validity of the minutes and the alleged contract of sale, but a violation of a constitutional right.

71. Fourth, the minutes concerning the alleged sale of plots of land mention twice the existence of a “voluntary social support contract” that would bind the company Bear Creek with respect to the community. The text of this obligation, however, does not appear clearly in the minutes of the community.<sup>89</sup> What is the “voluntary social support contract”? Is it voluntary for the company or for the community? Why is its content not explained in a clause of the alleged contract of sale? As it appears worded in the minutes, we can assert that the aforementioned expression “voluntary social support contract” has been included to pressure the community members into signing the document. According to the statements of community members whom we interviewed during our visit to Huacullani, the company had granted to its communities, months before the date that appears in the aforementioned minutes, a sum of money equivalent to 500,000 soles as “social support.”<sup>90</sup> In one case, a community member specified to us that that

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<sup>89</sup> See Minutes of the Extraordinary General Assembly of the Concepción de Ingenio *Comunidad Campesina*, April 2, 2011, page 74 [Exhibit C-0186]. The mention of the “voluntary social support” appears before and after the alleged sale draft copy.

<sup>90</sup> Interviews with community members from Huacullani, July 20, and 29-31, 2015, and March 4, 2016.

sum was not a good benefit for all the community members because its distribution would only lead to less than 2,000 soles per family or 400 soles per member of the community.<sup>91</sup>

72. Fifth, the minutes of the *comunidad campesina* include a contract of sale form previously prepared by a person or group of persons from outside the community, related to the alleged buyers of the plot of land of the community, without a mention of those persons. The minutes do not indicate who makes the offer that the community would finally have to sign. The company Bear Creek does not indicate the agent or representative who conveys the offer to the community or with whom it would have to sign the contract. Although the introduction of the draft copy mentions the name of the company's representative, it is not recorded in the minutes of the community. Why the anonymity of the company Bear Creek in the assembly when it is common that it be recorded, even more so when that record is important given that it is interested in buying an asset of the community? As a result, the alleged contract lacks transparency.

73. Sixth, the minutes that contain the alleged contract of sale do not define the land that is the subject of the alleged acquisition. They do not describe the type of land: whether it is agricultural or grazing land, or whether it is absolutely communal. In addition, it does not describe the limits of the plot of land or its boundaries, which hinders the resolution of possible future conflicts within the community or in its relations with the alleged new owner. The minutes describe the plot of land that is allegedly transferred as the “plot of land,” indicating only an area of 208.4461 hectares. Only at the end a document is attached that makes a reference to the boundaries and adjoining plots. This contradicts the understanding of the Aymara community members, who consider that the transfer of a parcel of land from its communal territory is very delicate, and it is a major issue, and therefore its characteristics must be recorded in the contract

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<sup>91</sup> Interviews with community members from Huacullani, March 4, 2016.



itself. In these exceptional situations of transfer they seek to take the greatest precautions to prevent, in fact, new conflicts, as it occurs when they have a land dispute with another community and they decide to “sacrifice” part of their territory in order to end the conflict.<sup>92</sup>

74. Seventh, the minutes of the alleged transfer of a plot of land of the community do not mention the names of the families whose tracts of land or parts of those tracts of land are affected. In case these tracts of land from affected families do not exist, the minutes and the contract must indicate it expressly. According to the boundaries that appear recorded in the annexes to the alleged contract of sale of land, adjoining family tracts of land are identified, which may lead one to understand that there are family owners in the plot of land in question. For example, the annex of the alleged contract of sale provides: “Boundaries... The property is delimited to the North by Parcel No. 5, which is the property of Felipe Borda Jiménez ... The property is delimited to the East, with the Parcel which is the property of Sergio Gutiérrez Llanos ... The property is delimited to the South by the plot of land which is the property of the Farming Community of Ancomarca, ... The property is delimited to the West by a parcel which is the property of Aurelio Ninaja Chino...”<sup>93</sup> A failure to recognize these rights is to go against the local law of the community. Respect for family tracts of land is common in the understanding of Aymara community members, and so is the respect for communal territory in the area of communal pastures. In both cases, the explanation of the historical ownership of the plot of land existing in the interior of the same community must be indicated.

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<sup>92</sup> See Antonio Peña Jumba, *AYMARAS’ JUDICIARY POWER IN THE ANDEAN SOUTH*, 232-234 (2004) [Exhibit R-114]. Pages 232-234 describe the inter-community conflicts related to boundaries between communities, applicable to the situation described.

<sup>93</sup> See Minutes of the Extraordinary General Assembly of the Concepción de Ingenio *Comunidad Campesina*, April 2, 2011, page 11 [Exhibit C-0186].

75. Eighth, the clauses of the contract that is included in the minutes of the community assembly that allegedly transfers the plot of land of the community are complex for any citizen who is not an attorney, even more so when that citizen is not used to entering into them, such as is the case with each one of the community members. In addition to the communication problems explained above, there is the need to understand the contents of each one of the clauses of the alleged contract of sale. Did the community leaders have legal counsel at the time of the negotiation? Did the community members of the assembly have legal counsel to explain to them in their language the causes and effects of each one of the clauses that appear in the document identified as the alleged contract of sale? Since there is no attorney listed in the minutes of the community assembly, we understand that the members of the community lacked the minimum legal advice in connection with the content of the contract; furthermore, there was a lack of understanding of their rights with regard to the alleged contract, which may lead them to error and therefore to identify a ground of invalidity of the alleged contract.

76. Ninth, one can read in the minutes that the alleged contract of sale of the plot of land of the community that is presented for its approval in the assembly of the community contains a total of thirteen clauses, but how those clauses were drafted is not indicated. Beyond the lack of advice for the community leaders, a minimum of transparency and legitimacy before the community must indicate how those clauses were drafted: Were they drafted by the company Bear Creek with the leaders of the community? Were they drafted only by the company Bear Creek through its attorneys? Did the company's attorneys know about the pre-existing property right in the community? Taking into account that those clauses contain legal concepts and institutions that follow the rules of the Civil Code of the official law of the State that differ from the local law of the Aymara communities recognized in Articles 89 and 149 of the Constitution

of Peru, it can be argued that there is a lack of coherence in their application and that they amount to a constitutional violation. Articles 89 and 149 of the Constitution of Peru provide the following:

**“Article 89.** The rural and native communities have legal existence and are artificial persons.

“They are autonomous in their organization, community work, and usage and free disposal of their land, as well as in economic and administrative aspects within the framework as provided by law. The ownership of their lands is imprescriptible, except in the case of abandonment described in the preceding article.

“The State respects the cultural identity of the rural and native communities.”

**“Article 149.** Authorities of peasant and native communities, in conjunction with the peasant patrols, shall exercise jurisdictional functions at territorial level in accordance with customary law, provided they do not violate the fundamental rights of the individual. The law provides for the way of coordination of such jurisdiction with justice-of-the-peace court and other instances of the Judiciary..”

(Emphasis added)

77. Pursuant to the aforementioned constitutional provisions, Articles 89 and 149 of the Constitution of Peru, the *comunidades campesinas*, such as in the case of the Aymara community Concepción de Ingenio, are autonomous in the use and free disposition of their lands and, in cases of conflicts over their lands, exercise judicial duties within their territories pursuant to customary law. A contract of sale over a plot of land that is part of the territory of the community must necessarily take into account their indicated constitutional rights, which has been left out of the minutes that are the subject of the analysis.

78. The effect of this set of observations or details that are evident from the document submitted as minutes of the Concepción de Ingenio community in which part of its territory had been allegedly transferred, is that many questions arise about its validity. The conditions for the community members to express their duly informed intent have not been met, and on the other hand the formality for a contract such as the one under analysis to materialize in the understanding of the community members and of constitutional law has not been complied with. Thus, the community members' expression of intent is not clear because they were uninformed or with limitations in the understanding of the content of the contract apparently offered by the company Bear Creek, and we can even question the community members' expression of intent, because they did not express themselves in their native language; in addition, the number of attending community members and signing community members is not clear. Accordingly, there would be no contract of sale, and, therefore, there would be no transfer of the land allegedly bought by the company Bear Creek. This would lead to the invalidation of the assembly and the convening of a new assembly to confirm or reject the alleged agreement to transfer communal land. This assessment, in turn, would explain why the alleged transfer has not been recorded in the offices of the Public Registers of Peru.<sup>94</sup>

#### **IV. RELATIONS BETWEEN BEAR CREEK AND THE COMUNIDADES CAMPESINAS**

79. Bear Creek has argued that it has excellent relations with the communities of the Santa Ana Project and that therefore the social conflict had no connection with its activities in the area. As has been previously analyzed, the social conflict with regrettable effects was directly

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<sup>94</sup> As of the date of the drafting of this document, it was known that the alleged transfer was not recorded. This is established by the same document submitted by the company Bear Creek as an annex: it corresponds to the copy of an alleged draft copy, pending its becoming a notarial instrument and registration in the offices of the National Superintendency of Public Registers (SUNARP). See Minutes of the Extraordinary General Assembly of the Concepción de Ingenio *Comunidad Campesina*, April 2, 2011 [Exhibit C-0186].

related to the Santa Ana Project. Below we analyze the documents that Bear Creek has submitted to sustain the apparent support of the communities for the company, and we conclude that the company still today does not have enough support to return to the area.

**A. RELATIONS BETWEEN THE COMMUNITIES IN THE AREA OF INFLUENCE OF THE MINING PROJECT**

80. In its counter-memorial, counsel for the Republic of Peru submitted a document identified as “Memorial No. 0005-2011-CO-FDRN-RSP” submitted on March 10, 2011 to the Peruvian Congress by regional leaders, district leaders, and political and community authorities of the districts of Kelluyo, Huacullani, Zepita, Pizacoma, Pomata, among others. The document contains 387 signatures. In addition, the memorial submitted to the Peruvian Congress contains an annex titled “Memorial Against the Santa Ana Huacullani Mining Exploitation,” submitted in a special manner by the Alto Aracachi Kelluyo *Comunidad Campesina*, signed by a total of 57 community and political authorities of the community, with support of representatives of neighboring communities.<sup>95</sup>

81. The company Bear Creek argues that this memorial of protest has no connection with the 2011 protests, or with the Santa Ana Mining Project. The company Bear Creek claims that it simply concerns a dispute over an area called Ingenio.<sup>96</sup> To this end, the company also submits copies of two memorials that support them: first, the “Memorial Requesting the Reactivation of the Santa Ana Mining Project of Huacullani District,” dated October 27, 2013, addressed to the Ministry of Energy and Mines and signed by 40 alleged political or community

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<sup>95</sup> See Memorial submitted by the Frente de Defensa and Kelluyo’s *Comunidades Campesinas* to the President of Perú, Memorial No. 0005-2011-CO-FDRN-RSP, March 10, 2011 (“Memorial of the Frente de Defensa No. 005”) [Exhibit R-015].

<sup>96</sup> See Reply, paragraph 103; see also Letter from the Primer Teniente Gobernador of the Huacullani District to Juan José Alvares Delgado, April 4, 2011 [Exhibit C-0181]; Letter from the Primer Teniente Gobernador of Huacullani District to Mauricio Rodríguez, President of the Puno Regional Government, April 4, 2011 [Exhibit C-0182]; “The districts of Huacullani and Kelluyo urgently need territorial demarcation,” Radio Onda Azul, November 16, 2011 [Exhibit C-0235]; First Report of E. Antunez de Mayolo, May 28, 2015, para. 73.

authorities and representatives of a group of communities of Huacullani district,<sup>97</sup> and, second, the “Reiterative Memorial for Development and Inclusion” dated January 24, 2014, addressed to the ministers of the central government and the company Bear Creek, signed by 39 alleged political or community authorities, and representatives of communities of Huacullani district.<sup>98</sup> Both sets of documents—the memorials submitted by Peru and Bear Creek—show the reality of the current relations between the communities of the area of influence of the Santa Ana Mining Project. These relations between communities are tense.

82. On the one hand, there is the largest group of *comunidades campesinas* of the districts of Huacullani, Kelluyo and their neighboring districts that openly reject the Santa Ana Mining Project and the company Bear Creek. In the memorial addressed to the Peruvian Congress, one can read the rejection by the authorities and community members based on the defense of their deity Pacha Mama,<sup>99</sup> and of their natural surroundings.<sup>100</sup>

83. The political and community authorities and the representatives of neighboring communities from the Alto Aracachi Kelluyo *Comunidad Campesina*, from the Kelluyo district, state an opinion along similar lines. In addition to the rejection of the Santa Ana Mining Project and the company Bear Creek, there is also the claim concerning the rural property known as Ingenio, which they consider as part of their community, and that had been broken up and incorporated by Huacullani district to its jurisdiction.<sup>101</sup>

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<sup>97</sup> See Memorandum from Members of the Huacullani District to MINEM, October 27, 2013 [Exhibit C-0119].

<sup>98</sup> See Memorandum from Members of the Huacullani District to Prime Minister of Perú, MINEM and Bear Creek Mining, January 24, 2014 [Exhibit C-0120].

<sup>99</sup> The deity Pacha Mama refers to Mother Earth in the culture of the Aymara and Quechua communities of the Peruvian Andes.

<sup>100</sup> Memorial of the Frente de Defensa No. 005 [Exhibit R-015].

<sup>101</sup> Memorial of the Frente de Defensa No. 005 [Exhibit R-015].

84. On the other hand, there is the group of communities that was in favor of the Santa Ana Mining Project. These communities, as we have mentioned, were five; they were favored by the temporary hiring system of the company Bear Creek responsible for the mining project. Until the intensification of the social conflict, they were not afraid to openly express their support for the mining project. During the intensification of the conflict (April–June 2011), those persons were co-opted into accepting the agreement of the majority of the communities, following the content of the aforementioned memorials, as we have also mentioned.<sup>102</sup> Over the years, that coercion is decreased, although the latent conflict continued. The community members of the *comunidades campesinas* that used to be favored by the mining project were without resources, and in view of the continuous visits by officers of the company Bear Creek,<sup>103</sup> they retake their position in favor of the mining project. In this new context, they issue the “Memorial Requesting the Reactivation of the Santa Ana Mining Project of Huacullani District” (10-27-2013) and the “Reiterative Memorial for Development and Inclusion” (01-24-2014) signed by 40 and 39 community members alleged to be authorities or representatives of the communities favored by the mining project, including the former mayor of Huacullani Braulio Morales Choquecahua (whose address and telephone number appear as reference in the first memorial), respectively. Similar to the content of the first memorial, we can notice that the document contains legal references, justification, request, and proposals, which appears to indicate that it was not the community members who wrote that content. The document does not mention the company Bear Creek, but it does mention the Santa Ana Mining Project, and this

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<sup>102</sup> See First Peña Report, para. 90 [Exhibit REX-002].

<sup>103</sup> Interviews in Huacullani, July 20, 29-31, 2015. See First Peña Report, para. 90 [Exhibit REX-002].

group of communities takes an absolute position in its favor or they become participants in the same.<sup>104</sup>

85. The memorials show the opinion and perspective of the group of community members and authorities in favor of the Santa Ana Mining Project of the company Bear Creek.

The following are several characteristics of this document:

- i. The group of persons that signs the document is limited to representatives of a group of communities of Huacullani district, without including the other communities of that district or the communities of neighboring districts who are also very interested in the mining project, but who were against the same.
- ii. One notices a perspective seeking a solution to the poverty suffered by the communities by means of formal mining, identified in the Santa Ana Project of the company Bear Creek, in contrast to any environmental perspective.
- iii. It is highlighted that the Santa Ana Mining Project has its origin in 2003, when they hold “a compromise meeting with the authorities of the local government and the population,” and a request is made to the central government for the facilities for the creation of the mining project for which the company Bear Creek would be responsible, in the events from that date.
- iv. Those who are against the Santa Ana Mining Project are identified as “anti-mining,” led by politicians who deceive the population.
- v. They acknowledge that the 2011 protests were radical and prevented the continuation of the Santa Ana Mining Project; they justify that that project was cancelled by the central government or “the executive in June 2011 to stabilize control and social upheavals.”
- vi. Suggestions are made aimed at the reactivation of the Santa Ana Mining Project, exhibiting it as viable to alternative projects of agricultural development and favorable for basic services in education, health, and sanitation.

86. The second document by the same group of persons and authorities from a group of communities of Huacullani, identified as “Reiterative Memorial for Development and Inclusion” of January 24, 2014, follows the same approach of the identified characteristics. There are only two additional details: (i) It acknowledges that the Santa Ana Project can benefit the

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<sup>104</sup> See Memorandum from Members of the Huacullani District to MINEM, October 27, 2013 [Exhibit C-0119].



entire province of Chucuito, and not only Huacullani district, and (ii) it recommends the launch of Development Committees alongside the Santa Ana Mining Project.<sup>105</sup>

87. As can be noticed from the Memorials submitted to the Peruvian Congress and the central government respectively, there are two groups of communities in the area of influence of the Santa Ana Mining Project: some that are against the mining project and some that are in favor. Those who are against the Santa Ana Mining Project and the company Bear Creek constitute the largest group, which consists of the majority of communities of Huacullani district, all the communities of Kelluyo district, and an indeterminate but large group of communities of the neighboring districts of Zepita, Pizacoma, Pomata, Desaguadero, among others. There is a strong rejection of the company Bear Creek in these opposing communities because of how it has gone about in its goal of moving the Santa Ana Mining Project forward, by ignoring the opinion and interest of this largest group of communities. Those who are in favor of the Santa Ana Mining Project constitute a minority group of *comunidades campesinas* limited to the Huacullani district. Among these communities in favor of the mining project, one observes an economic interest that confirms the previous identification of the group of five communities favored by the temporary hiring system provided by the company Bear Creek.

88. An additional detail to highlight is that in the confrontation of positions between the largest group of communities that are against the Santa Ana Mining Project and the small group of communities that are in favor of the same project, there is the request of the Alto Aracachi Kelluyo *Comunidad Campesina*, which claims the lands of the rural estate INGENIO, where a large part of the mine site of the project is located. Although this request concerns

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<sup>105</sup> See Memorandum from Members of Huacullani District to Prime Minister of Perú, MINEM and Bear Creek Mining, January 24, 2014, pages 2 and 3 [Exhibits C-0120].

territorial boundaries and remains dormant,<sup>106</sup> it is in no way different from the social conflict related to the Santa Ana Mining Project and the company Bear Creek. As we can read in the community's memorial, there is a claim on the land precisely because it is being exploited by the mining company, which they strongly reject: “We, the owners of our rural estate INGENIO, will not give one centimeter of our lands to the company [Bear Creek of the mining project] Santa Ana; similarly, we will not allow its exploitation by any of the modalities of the mine, considering that mining exploitations are currently polluting our soils, our waters, our environment, our natural pastures....”<sup>107</sup>

89. As can be observed, the request of the Alto Aracachi Kelluyo *Comunidad Campesina* consists not only of the claim on the lands of the rural estate INGENIO, but, principally, of the rejection of the Santa Ana Mining Project and the mining company Bear Creek. The claim of the Alto Aracachi Kelluyo community over the land of the rural estate INGENIO is caused by the fear toward the mining exploitation and the rejection of the company that is responsible for it. Only in a complementary manner can it be considered as a problem of boundaries.

**B. CURRENT RELATIONS OF THE COMPANY BEAR CREEK WITH THE COMMUNITIES OF HUACULLANI AND KELLUYO**

90. From the reviewed documents and studies, the area of direct and indirect influence of the Santa Ana Project is not clear. Its delimitation by the mining company itself has changed. When the company Bear Creek requests the declaration of public necessity in 2006 in order to be exempted from the constitutional prohibition of operating as a foreign company

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<sup>106</sup> Interviews in Kelluyo on July 21, 2015, and March 5, 2016. See Interview with Mallku or Teniente Governor from a Kelluyo District, March 5, 2016 [Exhibit R-378]. Similarly, other interviews took place in Huacullani, July 20, 29-31, 2015, and March 4, 2016.

<sup>107</sup> See Memorial of the Frente de Defensa No. 005, page 6 [Exhibit R-015].

within the 50-kilometer border area, it identified a total of 26 communities and/or *parcialidades* as part of its area of direct influence.<sup>108</sup> In 2007, when the company begins its system for hiring community members, and in 2009, when the company returns after the acts of looting and burning of its camp, the area of direct influence is restricted to the five communities that are located over the mine site. This criterion was maintained until the crisis days of the 2011 social conflict, and, if we accept that the company continues to visit the area through its officers, that criterion remains to this day.

91. To consider only the communities whose territories are surrounding the mine site is to assume a restricted interpretation of what we understand as the area of direct influence of a mining project. It is the interpretation that the mining company Bear Creek has assumed. There is also, however, a broad interpretation of the area of direct influence, which in the case of the Santa Ana Mining Project would also include the adjacent communities that would directly suffer the effects of the activity: this interpretation considers the rest of the communities of Huacullani and all the communities of Kelluyo. Following this second interpretation, the concept of the area of indirect influence also includes the communities of adjacent districts, such as those that correspond to the provinces of Chucuito, Ilave, and Yunguyo. But, since the mining project is in a border area, it is also important to include in the area of indirect influence the Bolivian communities adjacent to the districts of Huacullani and Kelluyo.

92. The restricted interpretation of the area of direct influence by the mining company Bear Creek leads us to infer the meaning of the current relations that it maintains with the communities. The company was only interested and remains interested in the five communities with which it worked through its system of temporary hiring of community members until

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<sup>108</sup> See First Peña Report, para. 50 [Exhibit REX-002]. We have added the reference to the area of “direct” influence, because it is not clear in the request its difference with the area of “indirect” influence.

January 2011. It excludes from this scope the other communities of Huacullani district and all the communities of Kelluyo district. Moreover, it does not even take into account the communities of the adjacent districts, such as Desaguadero, Zepita, Pizacoma, Pomata, among others. Therefore, from July 2011 (when the protests of the Aymara communities began), to the present day (March 2016), the company Bear Creek has had relations only with some of those five communities from its favored location. In these relations, the company Bear Creek has even claimed, through its officers who visited Huacullani, that they will return with the mining project.<sup>109</sup>

93. On the other hand, the relations of the communities of the area of direct or indirect influence with regard to the company Bear Creek remains along the same lines. Except for the five communities favored in the past by the system of temporary hiring of community members by the company, the other communities maintain an attitude of rejection to the extent of presenting opposition with their lives if the company intends to return.<sup>110</sup> A quote of this expression of rejection is captured through an interview that we were allowed to record anonymously.<sup>111</sup> The person interviewed is a lieutenant governor of a community of Kelluyo district. The quoted sentence is the following:

**“Antonio Peña Jumpa: Mr. Lieutenant, last question: What would happen if the mining company in fact wished to return, or any other company wished to exploit that mine site that is there, or if the Santa Ana project is revived? What do you think now?”**

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<sup>109</sup> Interviews with community members of Huacullani, July 29-31, 2015, interviews of March 4, 2016. This version can also be verified with news from the media, such as those disseminated by the regional newspaper *Sin Fronteras* on March 5 and 6, 2016. “Santa Ana Mining Project Requires Dialogue,” *Sin Fronteras*, March 5, 2016 [Exhibit R-379]; “Santa Ana Mining Conflict in Rekindled,” *Sin Fronteras*, March 6, 2016 [Exhibit R-381].

<sup>110</sup> Statements of community authorities of Kelluyo, March 5, 2016.

<sup>111</sup> See Interview of Mallku or Lieutenant Governor from a Kelluyo District, March 5, 2016 [Exhibit R-378].

**“Interviewed Lieutenant Governor:** It’s like this. At the moment, when Supreme Decree [No. 0832007-EM] has been revoked [by Supreme Decree No.] 032 [-2011-EM], it has been left quite clear at the Ministry of Energy and Mines, along with the members of congress that were present representing the Puno region, and the various employees from Energy and Mines, it was agreed that it won’t come in, there is not going to be any type of mining. Neither formal nor informal mining, none. Therefore, as things stand, now if the government suddenly says that—unfortunately these days the administrations in power simply come in first, not so much for the love of the pig but for the love of the bacon. So, it is the same case with the national government in power, or the one to come [that agreement will stand]. Unfortunately, they just look to see whether my wallet has money or not, that’s all they see. They do not see the benefit to the people, acknowledging their people. They only think that they must eat today, while, on the other hand, if a president of the republic were to act like a father, a father should say “if today I have the sun, a sun, I then must share that sun equally with my children. If I am the father and take the entire sun to myself, I then leave my children here to die like vermin in this case. That is what the [current] national government is doing [under pressure by the interested company]. formally the people of Kelluyo in the Southern area of the Puno region will not allow [the entry of mining]. If, on the contrary, the next government [allows it], it would be best for them to kill us, to shoot us. In this case, I would like to ask that, sometimes we talk about nationalism, what company does the national government nationalizes? Isn’t it neo-liberal? It is a neo-liberal government of capitalists. However, I would like to ask you, and since you have come transparently to us, likewise is my people’s request. Just today I will be informing during my meeting, and will possibly be informing my people of Kelluyo this: that we are not going to allow any type or class of mining, and that’s final. Otherwise, what I’m saying is that I do not want to die suffering, I want to die a natural death. That’s all I wanted to say. Maybe, since you work... but in fact, we public officials fulfill our duty to work, but we must be transparent, things [said] must be the truth. We cannot misrepresent, let alone favoring any company or the State, but rather [express] the reality as it is, what the people say is exactly what should be. That’s all I want to say. Maybe today we have found each other..”

94. The statements of the Aymara lieutenant governor interviewed aligns with a press release that appeared in the media that circulate in the region.<sup>112</sup> The advisor of a political party likely to occupy one of the two first positions in the election process of April 10, 2016 in Peru,<sup>113</sup> Pedro Gamio, gave a favorable opinion of the company Bear Creek and its likelihood of returning to exploit the deposit of the Santa Ana Mining Project. Given these statements, the current leader of the FDRNSP, Patricio Illacutipa, gave a statement strongly rejecting that possibility. The following is part of the press release:

“Aimaras reject Todos por el Perú due to alleged support of Santa Ana

The leaders who led the Aymara uprising are planning a demonstration to reject the presidential candidate of the Todos por el Perú party, Julio Guzmán. The declaration of the party’s advisor on energy matters, Pedro Gamio, that a Guzmán presidency could reconsider the Santa Ana mining project, incensed the leaders. The mining deposit is located in the district of Huacullani, Chicuito-Juli province, south of Puno.

Patricio Illacutipa, President of the Defense Movement of the Puno Southern Zone, warned that Gamio’s statements could provoke the Aymara population. “What is the gentleman thinking? We said no, and we’re not going to tolerate the project. It has cost us days of suffering and struggle,” he said.

He announced that if they insist, the population will return to the streets, because they believe that it is in their best interest to protect the environment. (...)<sup>114</sup>

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<sup>112</sup> See “Santa Ana Mining Conflict is Rekindled,” *Sin Fronteras*, March 6, 2016 [Exhibit R-381].

<sup>113</sup> The political party mentioned is “Todos por el Perú” (All for Peru), whose candidate for the presidency was Julio Guzmán. Because of omissions in the registration process of its party list for the presidential election, the party and its candidate were left out of the electoral contest of March 9, 2016, according to a resolution of the Peruvian National Elections Committee.

<sup>114</sup> Newspaper *La República*, regional edition, Saturday March 5, 2016, page 15. “Aimaras Reject Political Party ‘Everyone for Perú’ Because of Alleged Support for Santa Ana,” *La República*, March 5, 2016, available at

95. The company Bear Creek maintains in its reply and through the testimony of Antunez de Mayolo that the communities of Huacullani continue to support the Santa Ana Mining Project and hope that the company will return to operate.<sup>115</sup> This is only partially true. Given the related facts, we can understand that there is a group of persons or community members of the five communities of Huacullani favored by the temporary hiring system of the mining project that would be interested, in fact, in the return of the company Bear Creek. On the other hand, however, there is a large majority of persons or community members of the communities of the same Huacullani district that rejects that return. The rejection is even stronger, or almost absolute, in the communities of Kelluyo district, and in the communities of the neighboring districts, such as Pizacoma, Zepita, Pomata, Desaguadero. The statements of the lieutenant governor interviewed and quoted above, in addition to the recent news about the proposals of the presidential candidates and questioned by the Aymara leaders, also quoted above, are the best example of this rejection.

96. As an additional example of the meaning of these facts, I add an anecdote that happened to me during my last field visit, which shows with absolute clarity the situation of constant tension that is experienced in the area when it comes to the Santa Ana Project.

97. On March 4 and 5, 2016, we visited again the communities of Huacullani and Kelluyo districts. In the morning of Friday March 4, we arrived first to Huacullani district and we found an empty city. Very few administrative offices were attending to the public. The majority of the population was in the field or in the Desaguadero district fair, and they would arrive in the city in the afternoon in groups. It was an opportunity to speak calmly with members

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<http://larepublica.pe/impresaeconomia/746228-aimaras-rechazan-todos-por-el-peru-por-supuesto-apoyo-santa-ana>, accessed on March, 14, 2016 [Exhibit R-382].

<sup>115</sup> See Claimant's Reply, paras. 98-105; Second Witness Statement of Antunez de Mayolo, paras. 74, 75.

of the National Police, with community members who were at the National Office for the Election Process and the primary education institution, and with a group of authorities from one of the communities located directly on the mine site, who arrived at some point in the afternoon to one of the few stores who were attending to the public in the city.

98. Once again, however, as it happened during our previous field surveys, it was difficult to address directly with them the issue of the social conflict. This assumption would be confirmed the following day, when we visited Kelluyo district and we experienced with surprise the distrust of community leaders. When we arrived in Kelluyo in the morning we looked for the mayor of the district, and we went to look for him after we found out the location of his home. On the way there, a group of community authorities was gathered, and after telling us that the mayor was not there, they agreed to speak with us. When we recognized one of them from our previous visit, we requested a recorded interview, to which he agreed anonymously, with the permission of his colleagues and relatives and as long as he also recorded and filmed the conversation.

99. After the interview, they asked us where we were going, and we answered that we would return to the municipal building and look for a local businessman who had been recommended to us in Desaguadero district. Within a few minutes a group of community members approached us on their motorcycles, and they asked us for our identity documents in order to copy them. Later, they approached us once again on their motorcycles to tell us that we were there on behalf of the mining company Bear Creek, according to the communication of one of their advisors who had resorted to verify our identity through the Internet and had found the aforementioned first report. We had to talk on the phone close to half an hour with the community members' advisor to explain to him that we had arrived as independent investigators,



although financed by the State, but independently from the Santa Ana Mining Project and the company Bear Creek. Finally, although not entirely convinced, the community members allowed us to continue with our field work, although they confirmed to us that the businessman we were looking for was not there.

100. The foregoing facts illustrate a situation of apparent calm but at the same time of distrust on the part of the community members of Huacullani and Kelluyo. It evidences a tense situation whose origin dates back to the events of the 2011 social conflict, but even before then, with the burning and looting of the mining camp in 2008. The tension is clear in the distrust of the community members of Kelluyo, but also in the apparent calm of the community members of Huacullani. In both, although in a different manner, a collective pressure and uncertainty appears in connection with the mining project. In the case of the community members of Kelluyo, it even surprised us that their tense situation leads them to pay attention to the proposals of the presidential candidates (Peruvian presidential elections of 2016), being against those proposals made public by the advisors of a candidate likely to be elected when they stated publicly that they approve of mining projects such as the Santa Ana project.<sup>116</sup>

## **V. MY EXPERT OPINION IS NOT BIASED**

101. After the first report prepared on October 6, 2015 about the Aymara *Comunidades Campesinas* of Huacullani and Kelluyo districts, as well as those of the other districts and provinces of southern Puno, the facts and data presented have been observed, and it has been claimed that its author has a “bias against foreign mining companies.”<sup>117</sup> Without questioning the content of the facts and data contained in the report, counsel for the claimant company cites as

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<sup>116</sup> See “Aimaras Reject Political Party ‘Everyone for Perú’ Because of Alleged Support for Santa Ana,” *La República*, March 5, 2016, available at <http://larepublica.pe/imprensa/economia/746228-aimaras-rechazan-todos-por-el-peru-por-supuesto-apoyo-santa-ana>, accessed on March, 14, 2016 [Exhibit R-382]; “Santa Ana Mining Conflict is Rekindled,” *Sin Fronteras*, March 6, 2016, page 9 [Exhibit R-381]. Both have been cited above.

<sup>117</sup> See Claimant's Reply, para. 69.

evidence a collection of the author's articles and essays.<sup>118</sup> Because the facts and data of the report have not been questioned, we must refer only to the cited exhibits, denying the complaint about the existence of the aforementioned bias. If we read each one of the cited articles or essays, we will observe that their content is not focused or related to mining companies in general, and much less so focused on foreign mining companies. In those articles or essays, the author expresses the existence of local laws that are not understood by the local authorities, or by the economic and social players of our country (Exhibits C-231, C-232), seeks to present the structural and systemic causes of social conflicts (Exhibit C-232), presents the different understanding of justice that can be inferred from the case of the death of a mayor in the province of Ilave (Exhibit C-233, although a part of the article has not been included), and makes an exegesis and socio-anthropological legal analysis of Article 89 of the Peruvian Constitution (Exhibit C-234). In none of the cited articles or essays, or in any other that the author has written to date, has the author focused “in a biased manner” on the analysis of foreign private or mining companies. Instead, an analysis of the social and economic policies of the different governments of our country has been undertaken critically, focusing on the responsibility of public officials responsible for those policies, as can be read in the same cited articles or essays.

102. In any event, I have been careful in remaining neutral when informing about and analyzing the facts that I have learned throughout my field work and the investigation performed. Therefore, this report, like the previous one, fairly and accurately reflects my professional analysis and opinion.

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<sup>118</sup> See annexes cited in the reply, “*Indigenous Peoples, State, and Society: Current Challenges of Multiculturalism in Peru*,” 35 *Derecho & Sociedad*,” 35 Law and Society [Exhibit C-0231]; Blog Posts of Antonio Alfonso Peña Jumpa [Exhibit C-0232]; “*The Ilave Case: Barbarity or Justice?*” LA REPÚBLICA, May 18, 2004 [Exhibit C-0233]; Antonio Peña Jumpa, “*Native Communities and Comunidades Campesinas in the Peruvian Constitution: An Exegetic Analysis of Article 89 of the Constitution*,” 40 Law and Society [Exhibit C-0234].

## **VI. CONCLUSIONS**

103. Taking into account that this report continues the content of our previous report, dated October 6, 2015, the conclusions that are presented are similar or complementary. In this regard, in part we reproduce our previous conclusions, adding the clarifications or details addressed in this report. These conclusions are presented below.

104. The company Bear Creek began its presence and work in the communities of the area of influence of the Santa Ana Mining Project before the acquisition of its mining concession. This claim is proven with two facts: the date of commencement of the system of temporary hiring of members of a group of communities of the area of influence of the mining project, which corresponds to 2007, and the date of publication of the Supreme Decree that authorized the company Bear Creek to carry out activities within 50 kilometers of the border area, which corresponds to November 29, 2007. The former precedes the latter. In addition, this early presence of the company Bear Creek coincides with the dates indicated in the management letters of a group of local authorities and members of Huacullani communities that have supported the Santa Ana Mining Project since 2003.

105. Before the looting and burning of the camp of the Santa Ana Mining Project that occurred on October 14, 2008, the dissatisfaction of the majority of the communities of the area of direct and indirect influence located in the districts of Huacullani, Kelluyo, and other neighboring districts of the provinces of Chucuito, Ilave, and Puno was already clear. Moreover, the company Bear Creek knew about the accumulation of fears, threats, isolation, and anger that coincided with the previous acts of protest and the rejection of the communities of the aforementioned districts against it and its Santa Ana Mining Project. The content of these claims is found in the statements of the very employees of the company Bear Creek, and in the decisions and documents submitted in the prosecutorial file or folder of the Prosecution related to the

investigation of the looting and burning of the mining camp, identified with Record No. 277-2008-PE and 0049-2010, of the Second Provincial Office of the Prosecutor for Civil and Criminal Matters of Chucuito-Desaguadero.

106. The Public Hearing for the Environmental Impact Assessment (EIA) of the Santa Ana Mining Project that was held on February 23, 2011 was a second opportunity that confirmed the dissatisfaction and rejection of the majority of the communities of the districts of Huacullani, Kelluyo, and other neighboring districts against the mining project and the company Bear Creek. The Aymara population that attended the Public Hearing was large, and was divided into two distinct groups: a group that supported the company Bear Creek and its mining project, and therefore, also supported its EIA, and another group, considerably larger than the first group, that rejected the company, its mining project, and, therefore, also rejected its EIA. The hearing was an opportunity for dialogue that was frustrated for the following reasons: the restriction of the event to only one day, the lack of dissemination of the EIA through media accessible to the Aymara-speaking community members, the control of the hearing by the representatives of the company Bear Creek, the absence of a translator or translators specialized in the Aymara language related to the specialized subject matter addressed, the tense context that evolved into the development of public protests against the company and the mining project at the end of the hearing, among other reasons.

107. An aspect demanded by the Aymara *comunidades campesinas* of southern Puno is dialogue. In the case of the communities of the districts of Huacullani and Kelluyo, dialogue was possible before the looting and burning of the camp of the Santa Ana Mining Project, despite the disagreement of the majority of its communities, as could be subsequently learned through the large participation of the community members in the Public Hearing for the Environmental

Impact Assessment on February 23, 2011. The massive attendance of local authorities, leaders, and community members revealed an interest on the part of the attendees to engage in dialogue, although the majority of the attendees may have been in advance against the EIA of the mining project. Given the time limitations during the Public Hearing, the hearing could have been extended or postponed to another day, seeking to respond to all the questions from the audience in their native language, incorporate the attendees, and prevent future concerns. There were many alternatives to begin or maintain the dialogue between the company and the communities. The company Bear Creek believed that with the support of the public officials of the Ministry of Energy and Mines of the government of the day it could convince and subdue the communities of the interested districts and provinces. That was a serious mistake.

108. Both the protests that evolved into the looting and burning of the camp of the Santa Ana Mining Project of the company Bear Creek (14-10-2008) and the dissatisfaction and rejection of the Environmental Impact Assessment of the same mining project and company (23-02-2011), constitute the initial causes of the social or trans-communal conflict that unfolded in Puno region from March to June 2011. The Santa Ana Mining Project and the mining company Bear Creek appear in both events as the origin, reason, or content of those causes.

109. Furthermore, the final cause of the same social or trans-communal conflict of the Puno region also had as its origin, reason, or content the company Bear Creek and its Santa Ana Mining Project. This final cause emerged through the actions that sought the cancellation of the Santa Ana Mining Project and the withdrawal of the mining company Bear Creek from Huacullani and Kelluyo districts. Multiple protests occurred without interruption between March and June 2011, including regrettable actions that harmed personal integrity and public and private assets, seeking to reach the aforementioned final cause by means of regional and national

measures. On the one hand, the effectiveness of these measures can be understood by the massive support of all the Aymara communities of southern Puno; this support became apparent when the communities learned that their territories were the subject of numerous mining concession applications, or, in other cases, had already been the subject of a mining concession. On the other hand, the facts that identify the events of the social conflict appeared recorded and systematized in the prosecutorial investigation and court proceeding that is being conducted against the leaders of the protests (file number 00682-2011-7-JR-PE-02), and whose classification into preceding, concurrent, and subsequent facts has allowed us to confirm the direction of the indicated measures toward their ultimate cause. According to these facts, the ultimate goal consisted of the repeal of Supreme Decree No. 083-2007-EM that had previously declared the public necessity of the Santa Ana Mining Project, granting its concession to the company Bear Creek. This ultimate goal was achieved with the publication of Supreme Decree No. 032-2011-EM, which repeals Supreme Decree No. 083-2007-EM. The cancellation of the Santa Ana Mining Project and the withdrawal of the company Bear Creek are confirmed only after that repeal, and then the communities ended their acts of protest.

110. Moreover, the content of the document presented by the company Bear Creek as the alleged contract of sale of a plot of 208.4461 hectares of the Concepción de Ingenio Aymara *Comunidad Campesina*, which corresponds to a part of the mine site in which the Santa Ana Mining Project is located, contradicts the local law of the Aymara communities and the plural constitutional legal system of the Peruvian State that protects the property of those communities. It has been possible to identify in the alleged contract of sale at least nine deficiencies that legally invalidate it. Bear Creek had to continue to negotiate one or more agreements with the community or with the holders or owners of the plots of land, so that they allow it to develop its

activities. Similarly, Bear Creek had to negotiate with the other communities that own the plots of land in which the mine site of the Santa Ana Project is located.

111. From the testimony, interviews, local media outlets, and documents of the communities that were reviewed, we have determined that the tense situation continues between the communities adjacent to the Santa Ana Mining Project. This tense situation, however, has two defined groups of communities, one of which is larger than the other. The small group of communities corresponds to the five communities of Huacullani favored by the system of temporary hiring of its members through the Santa Ana Mining Project, and they would be interested in the return of the company Bear Creek. The other group, which includes the majority of the communities of Huacullani district (17 out of a total of 22) and the total of the communities of Kelluyo district (25 communities), have questioned the system of temporary hiring of the company Bear Creek, as well as the company's different forms of donation or material benefits, in addition to specific complaints based on the risk of pollution, the lack of prior consultation, and the irregular manner of obtaining the concession in a border zone by the company Bear Creek. This second group of communities also includes all the communities of the neighboring districts of Pizacoma, Zepita, Pomata, and Desaguadero, among others, which also participated in the protests against the Santa Ana Mining Project and the company Bear Creek, and agree in rejecting mining activity in their communities.

All these statements, fact analyses, and commentaries are based on the field work carried out and on my professional experience; I certify that their content is true to the best of my knowledge.

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Antonio Alfonso Peña Jumba

Date: April 13, 2016