



Mr. Léo Heller
U.N. Special Rapporteur on the Human Rights
to Safe Drinking Water and Sanitation
Special Procedures Branch
UNOG-OHCHR
CH-1211 Geneva 10, Switzerland

Re: Multicultural Alliance for a Safe Environment Responses to Questionnaire
on the Right to Water and Sanitation

April 7, 2017

Dear Special Rapporteur Heller:

On behalf of the Multicultural Alliance for a Safe Environment ("MASE") please accept the following answers to your Questionnaire regarding the realization of the human right to water and sanitation. Due to capacity constraints and MASE's focus on the human right to safe drinking water, MASE will not provide answers to every question, but only those that affect the right to safe drinking water and that are within MASE's capacity to answer.

1. Please describe the role and responsibilities of your organization in the water and sanitation sector.

The Multicultural Alliance for a Safe Environment envisions respectful, peaceful communities cherishing a healthy environment. MASE is rooted in the experiences of uranium-impacted communities of the southwestern United States. We are a coalition of civil society communities and organizations working to restore and protect the natural and cultural environment through respectfully promoting intercultural engagement among communities and institutions for the benefit of all life and future generations.

Among other goals, MASE seeks to protect, preserve and restore drinking water sources in uranium impacted communities by initiating and supporting sustainable ways of working and living that promote the health and well-being among the people and the environment. MASE also engages with government and industry to re-mediate and stop harm to our people, land and water.

3. Are the contents and principles of the human rights to water and sanitation generally reflected in the regulatory frameworks? How do you assess your country's regulatory framework in this regard?

*Multicultural Alliance for a Safe Environment
PO Box 4524 Albuquerque NM 87196*

Unfortunately, in the United States, there are no laws that establish a *right* to basic access to good quality water.¹ Therefore, access to a clean, affordable and dependable drinking water source is not guaranteed in the United States. Instead, there is a complex legal and regulatory framework whereby the United States government and state governments regulate water quality and access. As with most communities in northwestern New Mexico, water quality is a primary concern for MASE and its constituent groups.

Access to water and water quality regulation in New Mexico is complicated by complex jurisdictional issues. Depending on where a community is located, water access and quality may be governed by tribal law, federal law, state law, municipal ordinances, or some combination thereof. It is not uncommon for a tribal community to have non-tribal land located within the community, further complicating the administration of regulatory frameworks. See, Iverson, Peter, *Diné: A History of the Navajos* at 94-95, University of New Mexico Press (2002)

Access to water is usually controlled by private or public water utilities. Water utilities in non-tribal communities in New Mexico are subject to regulation by the New Mexico Public Regulation Commission. Water utility regulations are found in the New Mexico Administrative Code at 17.12.1 NMAC *et. seq.* In Navajo communities, access to water is regulated by the Navajo Tribal Utility Authority ("NTUA"), which is a tribally owned and operated water utility of the Navajo Nation, and the United States Indian Health Service Division of Sanitation Facilities, which is an agency of the federal government. NTUA is governed by tribal law codified in the Navajo Nation Code. 21 N.N.C §§ 1 *et. seq.* See also, <http://www.ntua.com/aboutus.html>. Division of Sanitation Facilities is governed by federal statutes and regulations. See, <http://www.ihs.gov/dsfc/>.

Water quality is regulated by an even more complex framework. Nationally, drinking water quality is regulated by the Safe Drinking Water Act ("SDWA") 42 U.S.C. §§ 300f *et. seq.* However, the SDWA's contaminant concentration standards only apply to water utilities, so private wells are not subject to its provisions. *Id.* at § 300g. Water quality from private wells is indirectly regulated through a patchwork of regulations designed to protect groundwater and surface water. Groundwater resources under tribal lands are regulated through the SDWA's underground injection control ("UIC") provisions. *Id.* at §§ 300h *et. seq.* Groundwater resources under non-tribal lands in New Mexico are regulated by the New Mexico Water Quality Act, NMSA 1978, §§ 74-6-1 *et. seq.*, and the SDWA's Underground Injection Control ("UIC") provisions.

The federal regulations implementing the UIC program explicitly require the United States Environmental Protection Agency ("EPA") to protect future underground source water. The regulations allow the EPA to exempt certain aquifers from compliance with the UIC program. 42 C.F.R. § 144.7(a) (2016). Typically, these exemptions are granted to corporations for mineral development. However, the EPA may exempt aquifers *only if* they do not currently serve as a source of drinking water *and* "cannot

¹ Water use in most states in the western United States is governed by the prior appropriation doctrine, which is founded on the right and obligation to put water to a "beneficial use". See, e.g., *Walker v. U.S.*, 142 N.M. 45, 51-53 (N.M. 2007). However, water rights under this legal framework are property rights, in contrast to the human right of access to potable water. *Id.* at 51. Hence, unlike the human right to water, which is grounded in basic human dignity, western water rights are not inviolate and are treated like any real property. *Id.* at 53.

now and will not in the future serve as a source of drinking water.” § 146.4(a),(b).² According to the EPA, “potential sources of drinking water are protected *as stringently* as those sources currently used for drinking water.” U.S. EPA, *Introduction to the Underground Injection Control Program* (2003) (emphasis added).

Surface water on Navajo tribal lands is governed by the Navajo Nation Clean Water Act, 4 N.N.C §§ 1301 *et. seq.* and the federal Clean Water Act, 33 U.S.C. §§ 1251 *et. seq.* Surface water on non-tribal lands in New Mexico is governed by the federal Clean Water Act.

The statutory and regulatory frameworks for water quality protection in the United States poorly embody the human right to access to safe drinking water for three reasons. First, water is at best considered a property right, and therefore more easily subordinated to other property rights, for example, the right to extract minerals. Moreover, a property right is easily monetized, which further facilitates the subordination of access to drinking water to other property rights. If a resource extraction company, for example, destroys a community's drinking water source, under the U.S. framework, it need not replace or restore the drinking water supply, it need only provide monetary compensation. More often than not, monetary compensation is typically insufficient to make a community whole again because in many cases a community does not own the water it drinks.

Second, the U.S. system of federalism makes drinking water protection complex and inconsistent. Hydrological systems often span jurisdictional lines and adjacent jurisdictions may have substantially different groundwater protection requirements. So, for example, in an effort to attract revenue and jobs from polluting industries, jurisdictions may loosen regulatory protections and competition for industry invariably leads to a "race to the bottom". As a result, communities living downstream or downgradient from a jurisdiction that has relaxed its regulatory protections may be burdened by pollution it had no hand in creating and has no political recourse to address.

Finally, the regulatory and statutory framework in the U.S. does typically does not allow communities or individuals to assert their right to access to drinking water. Communities and individuals are often reliant on governmental agencies to guard their access to safe drinking water, and as the well documented case in Flint, Michigan demonstrates, such governmental assistance is not always forthcoming.

4. Please provide examples of situations where the lack of regulation, or inadequate regulation, in the water and sanitation sector could potentially lead to, or has actually led to, violations of the human rights to water and sanitation.

There are countless situations in the United States where lack of regulation or inadequate regulation have led to or could potentially lead to, violations of the human right to water. Two examples from New Mexico are illustrative.

² Aquifers cannot serve as a current or future source of drinking water for any the following reasons: (1) they are “mineral, hydrocarbon, or geothermal energy producing, (2) are situated in such a way as to make recovery of drinking water “economically or technologically impractical,” (3) are so contaminated “that it would be economically or technologically impractical to render that water fit for human consumption,” or (4) are located in an area “subject to subsidence or catastrophic collapse.” § 146.4(b)(1)-(4).

In the Diné (Navajo) village of Churchrock, a Canadian company, Laramide Resources - is proposing a uranium mine in an aquifer that has not yet been contaminated by past uranium mining. The proposed mine would use *in situ* leach or ISL technology. In its undisturbed state, uranium is immobile in an aquifer, because it is chemically bonded with soil particles within the aquifer. The water in the uranium ore bodies contains high concentrations of chemicals such as uranium, radon and radium. However, because these ore bodies are isolated and the uranium is immobile, surrounding groundwater may have very low concentrations of these chemicals. Thus, an aquifer with a mineralized ore zone may also have drinking water quality groundwater nearby, which is the case with the aquifer in Churchrock.

ISL mining involves injecting chemicals into an aquifer hosting uranium ore bodies. The chemicals react with the uranium, severing the bonds to the soil in the aquifer and mobilizing the uranium throughout the aquifer. The uranium laden water is then pumped to the surface and the uranium is removed. However, only about 75% of uranium is removed, and once the aquifer is exposed to the mining chemicals, its chemical composition is forever altered, and the remaining uranium and toxic heavy metals continue to spread throughout the aquifer for years. *See generally*, <http://www.wise-uranium.org/uisl.html>. To date, no commercial ISL mine in the United States has restored mined aquifers to their pre-mining quality. <http://pubs.usgs.gov/of/2009/1143/>. Although the United States does not argue with any of the foregoing facts, the U.S. Nuclear Regulatory Commission nevertheless licensed the uranium mine in Churchrock, condemning a future source of drinking water to irreparable contamination. *See, Morris, et. al. v. U.S. Nuclear Regulatory Commission*, 598 F.3d 677 (10th Cir., 2010) (Lucero, J., dissenting).

Should Laramide begin mining uranium in the aquifer in Churchrock, the water in that aquifer would be irrevocably contaminated. The people of Churchrock would be robbed of a valuable water supply and would be forced to either move or purchase water from other sources.

Another example is the Homestake/Barrick Gold ("Homestake") uranium mill in Milan, New Mexico. This example illustrates how ineffective regulations has resulted in an actual violation of the human right to water. The Homestake mill was a conventional uranium mill that operated in the 1950s and 60s. U.S. EPA, Superfund Site, Homestake Mining Co., <https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0600816>. The mill site has been undergoing remediation, under the supervision of federal agencies, for decades, with no improvement in environmental or public health conditions. Bluewater Valley Downstream Alliance Homestake Fact Sheet, <http://swuraniumimpacts.org/wp-content/uploads/2016/05/16-BVDA-factsheet.pdf>. In fact, radioactive and toxic waste contamination from the Homestake mill has irrevocably contaminated the Milan drinking water source, forcing residents to pay for drinking water. *Id.*; *see also*, Myers, Tom, *Conceptual Flow and Transport Model Uranium Plume Near the Homestake Millsite, Milan, New Mexico* (March 16, 2015), available at: <http://swuraniumimpacts.org/wp-content/uploads/2016/01/Myers-FINAL-hmc-cftm-report-031615.pdf>. Despite the complete failure to remediate groundwater contamination and multiple and ongoing violations of federal law, federal regulatory agencies continually fail to hold Homestake accountable for destroying a regional underground drinking water supply. *See, In re: Homestake Mining Co.*, Docket No. 040-08903, EA-16-114, Confirmatory Order Modifying License (U.S. Nuclear Regulatory Commission order negotiated with Homestake, without public input, to avoid penalties for several years of discharging uranium contaminated effluent to land and groundwater, and instead allowing Homestake to undertake an internal investigation).

7. Non-State actors have the responsibility to respect the human rights to water and sanitation and to exercise human rights due diligence in their operations. How should a regulatory framework reflect this responsibility?

10. What measures could be envisaged in a regulatory framework to promote transparency and tackle corruption in the water and sanitation sector?

MASE believes a regulatory framework that would ensure non-state actors fulfill their responsibility to respect the human right to water and exercise human rights due diligence in their operations would have two main components.

First, an effective regulatory framework must provide for accountability. Regulatory frameworks must have mechanisms by which non-state actors are held accountable for violations of the human right to water, whether due to contamination of drinking water sources or preventing access to drinking water infrastructure. Current mechanisms are overly reliant on governmental agencies holding non-state actors accountable. *See*, 42 U.S.C. § 6972 (circumstances under which citizens may initiate court proceedings under the Comprehensive Environmental Response and Liability Act limited); *Duke Power Co. v. Carolina Env'tl Study Grp.*, 438 U.S. 59 (1978), *El Paso Natural Gas v. Neztosie*, 526 U.S. 473 (1999) (limiting jurisdiction and remedies available for citizens suing based on nuclear accidents under the Atomic Energy Act and Price Anderson Act); *In re: Homestake Mining Co.*, Docket No. 040-08903, EA-16-114, Confirmatory Order Modifying License (U.S. Nuclear Regulatory Commission order negotiated with Homestake, without public input, to avoid penalties for several years of discharging uranium contaminated effluent to land and groundwater, and instead allowing Homestake to undertake an internal investigation). This leads to inconsistent enforcement based on political ideology and widespread corruption. *See, e.g.*, Think Progress, *Scott Pruitt's Record Reveals a Long History of Industry Favoritism*, <https://thinkprogress.org/scott-pruitt-epa-oklahoma-record-386f13c8cc1d>.

Further, even when citizen enforcement is available, access to state and federal court systems is very often unsatisfactory due to the imbalance in resources between community organizations and non-state actors. The Nation Magazine, *One More Way Courts Aren't Working for the Poor* (May 16, 2016), <https://www.thenation.com/article/one-more-way-the-courts-arent-working-for-the-poor/>; National Center for Access to Justice, 2016 Justice Index, <http://justiceindex.org/>; Cole, Luke, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 Ecology L.Q. 619 (1992).

A meaningful accountability framework would not only guarantee access to court for individuals and communities in every instance where non-state actors are alleged to have violated the human right to water, but would also provide a mechanism outside the traditional court system by which individuals and communities could vindicate their human rights. Such a mechanism might be a national human rights tribunal. Another mechanism might be requiring corporations incorporating under U.S. laws to specifically include in their articles of incorporation, as a condition of being granted corporate status, the requirements of the *United Nations' Guiding Principles on Business and Human Rights*.

Second, a regulatory framework reflecting human rights would be transparent. Rather than the turgid and opaque administrative processes that currently dominate protection of drinking water in the United States, a human rights centered framework would invite public participation at every step of the government decision making process rather than at the later stages as is the current norm. Further,

governments would no longer be able to withhold information from the public under attorney client privilege or deliberative privilege doctrines in the context of pollution permitting or remediation.

Additionally, the United States EPA maintains a database of all the underground sources of drinking water that have been exempted from the federal Safe Drinking Water Act's protections, in order that those aquifers can be exploited for mineral resources. However, this Aquifer Exemption Database is woefully outdated and EPA should update the database frequently to reflect changes in exemption boundaries. Such a database will help ensure that the public is aware of the precise location of exempted areas, and will help water users to avoid drilling drinking water wells in the vicinity of injection sites.

9. What mechanisms should be in place to ensure that the voice of person and communities in vulnerable situations is heard and their needs are taken into consideration in the regulation of water and sanitation services?

MASE and its constituent groups are most familiar with the regulation of underground sources of drinking water, so will restrict its recommendations to that issue. As a coalition of groups from vulnerable communities, MASE believes the following mechanisms are crucial to ensuring that vulnerable communities' voices are heard in their efforts to protect their right to drinking water:

- 1) Federal - and some state - regulatory agencies, such as the U.S. EPA, place too much reliance on electronic media, i.e., the internet and electronic mail, for communicating with communities who would benefit from underground sources of drinking water information and enforcement. In New Mexico, where most communities are rural, home internet use in low-income, rural households (less than \$35,000/year annual income) is just 57%. University of New Mexico, Bureau of Business and Economic Research, *Broadband Subscription and Internet Use in New Mexico* at 20 (June 2013), available at http://www.doit.state.nm.us/broadband/reports/NMBBP_bb_use_0613.pdf. That percentage falls to 39% in tribal communities. *Id.* In New Mexico, EPA's reliance on electronic communications further marginalizes many of the communities that would most benefit from EPA engagement.
- 2) EPA should establish or require states to establish a notice-and-comment process for aquifer exemptions that ensures notice to all interested parties and gives these parties an adequate opportunity to raise claims challenging the proposed aquifer exemption at issue. Notice should extend to the entire population living within a certain distance of the injection activities whose sources of drinking water might be impacted. This provides individuals directly affected by any potential aquifer exemption an opportunity for prior input.
- 3) All state and federal regulatory agencies should incorporate principles of environmental justice into their permitting and enforcement regulations. *See*, <http://www.ejnet.org/ej/principles.html>.
- 4) All state and federal regulatory agencies should immediately discontinue the practice of privately negotiating enforcement settlements with polluters. Regulatory enforcement actions should meaningfully include impacted communities and should be conducted in a public and transparent manner.

MASE appreciates the opportunity to express our concerns. If you have any questions or need additional information, please do not hesitate to contact MASE.

Sincerely,



Susan Gordon, Coordinator
sgordon@swuraniumimpacts.org
505-577-8438
Multicultural Alliance for a Safe Environment
www.swuraniumimpacts.org

*Multicultural Alliance for a Safe Environment
PO Box 4524 Albuquerque NM 87196*