E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

August 23, 2013

The Honorable Sally Jewell
Secretary, U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20420

Also mailed to:
U.S. Department of the Interior, Director (630)
Bureau of Land Management
Mail Stop 2134 LM
1849 C Street NW
Washington, D.C. 20240
Attention: 1004-AE26

And submitted via Regulations.Gov

RE: Comment From the Attorneys General of the States of Alabama, Alaska, Montana, Oklahoma and West Virginia on Docket ID: BLM-2013-0002-0011 Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands

Secretary Jewell,

The undersigned Attorneys General of the States of Alabama, Alaska, Montana, Oklahoma and West Virginia write to express serious concerns with, and strong objection to, the U.S. Bureau of Land Management's (BLM) recently re-proposed rule to regulate hydraulic fracturing operations on federal and Indian lands.

The states — and not the federal government — are best equipped to design, administer and enforce laws and regulations related to oil and gas development. State regulatory programs have been carefully designed to address state-specific issues and needs and are applied consistently, regularly reviewed, and continuously subjected to thoughtful administrative oversight. Importantly, the states have greater flexibility to respond to new information and modify or update their rules, as they have demonstrated in recent years.

The BLM has failed to justify the need for new federal regulations and requirements that will overlay the existing state programs in a burdensome and costly manner, beyond simply asserting that it has the authority to do so. Currently, state regulators employ highly

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trained staff that efficiently oversees operations on state, federal and fee lands within our borders and issues permits in a timely manner. This stands in stark contrast to a federal program that is notorious for frequent and prolonged delays and persistent staffing challenges. These will likely intensify once budget cuts are combined with onerous and unnecessary new federal rules and requirements.

While the newly proposed rule introduces a provision allowing the BLM to approve a "variance" when it determines that it would meet or exceed the effectiveness of the revised proposed federal rule, the "variance process" is unclear and has neither been adequately explained by the BLM nor analyzed by the states, industry or the public. We strongly urge that rather than undertake an unnecessarily complicated new approach, the BLM instead defer to the states on how best to address any health, environmental or safety issues arising from hydraulic fracturing and related operations on these lands.

Moreover, we question whether the BLM has the authority to administer procedures, reporting and engineering requirements for a range of well stimulation activities, including the regulation and management of water resources. The sole authority to regulate these activities and the protection and management of water resources resides with the states, and does not lie with the BLM.

The Supreme Court has long recognized that regulation of land and water use "is a quintessential state and local power." [1] Thus, "[if] Congress intends to alter the usual constitutional balance between the states and the federal government, it must make its intention to do so unmistakably clear in the language of the statute."[2] Importantly, Congress has not enacted any statute that gives BLM authority to pre-empt state water regulations.

On the contrary, federal statutes establishing limited federal regulation of water resources expressly preserve state primacy. For example, the Clean Water Act (CWA) reflects the Congressional policy "to recognize, preserve and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution, [and] to plan the development and use...of land and water resources[.][3] The statute further states that "[e]xcept as expressly provided in this chapter, nothing...shall...be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters...of such states."[4] Nowhere does the CWA express a desire to adjust the federal-state balance. Similarly, the Safe Drinking Water Act (SDWA) also emphasizes state primacy over drinking water regulation and enforcement.[5]

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[1] Rapanos v. U.S., 547 U.S. 715, 738 (2006).
[2] Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989). The statement in this opinion comes from parsing two quotes together from a previous Supreme Court case, Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985).
[3] 33 U.S.C.A. § 1251(b).
[4] *Id.* § 1370.
[5] 42 U.S.C.A. § 300(f) et. seq.

In fact, under the Clean Water Act, agencies like BLM are expressly required to comply with state water regulation—just as if they were private citizens.[6] Absent an express displacement of the Clean Water Act's requirement that BLM follow state water laws, BLM does not have the unilateral authority to set aside state regulations and impose its own preferred water pollution controls. Contrary to your agency's assertion, the Clean Water Act is not superseded by general language in the Federal Land Policy and Management Act (FLPMA),the Mineral Leasing Act, and the Mineral Leasing Act for Acquired Lands that directs BLM to preserve federal land. Such general language is insufficient to clearly override the more specific language of the Clean Water Act. Nor does such general language otherwise demonstrate a congressional intent to displace state water laws. BLM's proposed rules thus impermissibly interfere with state regulatory schemes and with the Clean Water Act.

Recognizing state jurisdiction over water resources, the CWA and SDWA carve out a narrow role for the federal government and vest federal regulatory authority in the U.S. Environmental Protection Agency (EPA). Thus, EPA shares, to a limited extent, state responsibility for protecting water resources. But nothing in these statutes confers regulatory authority over water resources on BLM. In a 2011 resolution, the Western States Water Council underscored this point by stating that "any weakening of the deference to state water and related laws is inconsistent with over a century of cooperative federalism and a threat to water rights and water rights administration in all western states."

BLM rightfully recognizes that it does not have the state expertise or resources to regulate water resources. In fact, BLM's Water Policy states the following:

- States have primary authority and responsibility for the allocation and management of water resources within their boundaries, except as specified by Congress on a case-by-case basis.

- In order to implement the BLM water policy of state water resources primacy, Bureau personnel shall:

    - Cooperate with state governments under the umbrella of state law to protect all water uses identified for public land management purposes.

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[6] 33 U.S.C. § 1323 ("Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges."); *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1149 (9th Cir. 2010).

- Comply with applicable state law, except as otherwise specifically mandated by Congress, to appropriate water necessary to manage public lands for the purposes intended by Congress.

Despite the BLM's recognition of state primacy in this regard, the newly proposed hydraulic fracturing rule is supposedly predicated on the need for ground and surface water protections and imposes specific regulatory requirements concerning water resources. Yet the BLM has no authority to approve or disapprove well stimulation activities to regulate operators' use of water resources, or to require operators to mitigate impacts on water resources. Because BLM has no jurisdiction to regulate water resources, BLM cannot demand information about them. Indeed, BLM should eliminate all provisions that seek information about or impose regulations on the use, transport, disposal or other activities involving waters.

Water management is only one example of the unnecessary and inappropriate federal encroachment on state regulations and practices. We therefore request that the BLM:

- Identify any health, safety or environmental issues arising from hydraulic fracturing on public lands that are not currently being addressed by state regulators before taking any further action to finalize its rule.

- Carefully review the many state comments in response to the BLM's rule. Rather than force an unnecessary "one-size-fits-all" regulatory regime on top of carefully tailored state-specific programs, we further request that BLM instead defer to our state programs, on federal lands, where these regulatory programs already exist.

Beyond the fundamental question of who is better equipped to provide the best regulations, in light of the fiscal realities we face, and in view of current and future budget constraints, the BLM should partner with the states to the greatest extent possible, to leverage the existing state programs, resources and infrastructure.

This is an extremely important matter to our states and we appreciate your serious consideration. Please contact us for any additional information or if you have any questions.

Sincerely,

Scott Pruitt

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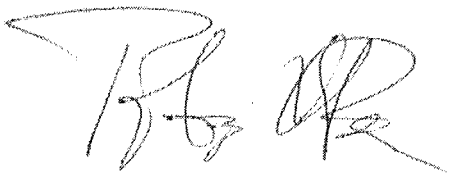

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