DATE

U.S. Department of Interior, Director (630)

Bureau of Land Management

Mail Stop 2134 LM

1849 C Street NW

Washington, DC 20240

Attn: 1004-AE26

Dear Bureau of Land Management,

The Laramie County Commissioners are submitting these comments in response to your proposed rule on hydraulic fracturing, found in the May 11 Federal Register.

We believe it makes the most sense to continue to leave the authority with states, which have successfully regulated the practice for 60 years.

We are concerned with your proposed rule despite the fact that Laramie County has minimal public land (especially in comparison with other Wyoming counties). Our county will no doubt be impacted by these proposed rules as the consequences from the proposed rule will impact the entire state of Wyoming.

State oil and gas regulations are adequately designed to directly protect water resources through all stages of production. They have authority of their water usage and they also have a better understanding of their geology.

Currently, states are collaborating with the public and working to ensure fracing continues to be conducted in a safe manner. A website, fracfocus.org, was created to address the public concern of chemical disclosure and companies voluntarily participate in the program. These steps show a commitment to safety.

Most importantly, states should continue to have authority because there is no scientific evidence that shows further regulations are needed, especially when further regulations are extremely expensive and could cause negative economic consequences.

Dunham and Associates estimates the rule could cost approximately 1.5 billion dollars each year. Federal budgets are already strained. Spending extra resources on creating federal regulations on top of existing state regulations clearly doesn't make sense. This rule will hinder job creation and economic growth on account of adding extra costs to development.

The time it takes to implement the new rule is also very concerning, especially when the federal permitting process is already cumbersome and slow. This rule could add another 100 days to process federal permits. Companies are already waiting a year or more for a permit and an extra 100 days will make the problem snowball.

However, one of the most concerning points about the rule is the infringement on state water rights. BLM does not have the authority to mitigate water use for hydraulic fracturing. This component in the proposed rule turns over 150 years of water law and BLM has no statutory authority for water use for oil and gas on federal lands. The agency is mandated to protect water rights as 'valid existing rights'.

BLM's own policies recognize that states have the authority and responsibility for the allocation and management of water resources within their boundaries – we question why the proposed rule doesn't reflect their policies.

Before more costly regulations are enforced, science needs to uncover a connection between hydraulic fracturing and water contamination. We ask your agency to reject the proposed rule.

We appreciate the opportunity to comment.

Laramie County Commissioners

BLM's Proposed Rule on Hydraulic Fracturing Infringes on State Water Laws

Executive Summary
August 16, 2012 Analysis for Western Energy Alliance

The Bureau of Land Management's (BLM) proposed rule to regulate hydraulic fracturing would interfere with the ability to appropriate and use water in the West. This unwarranted federal intrusion into state water law could affect water secured from private, public or tribal lands. This summary provides a brief overview; the attached analysis contains further details and legal citations.

We believe any requirement for federal approval and/or mitigation required on state water use is unlawful. Article VIII of Wyoming's Constitution provides, "the water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the State, are hereby declared to be the property of the State." Wyoming also explicitly protects priority of appropriation for beneficial uses and the right to appropriate waters. Wyo. Const. art. VIII, § 3.

For over 150 years, Congress has deferred to the States in matters related to the appropriation and administration of water. BLM cannot undo this with the stroke of a pen. BLM's proposed rule on hydraulic fracturing could create a federal "super" water right or impose riparian law on prior appropriation states. Neither is tenable under BLM's statutory authority and Congress' long-standing deference to state water allocation systems. BLM would establish "a consistent oversight and disclosure model" to ensure operations are "consistent with applicable laws and regulations." This would lead to a parallel federal permitting or adjudication system in clear conflict with state water laws and longstanding federal deference to them.

The rule could also interfere with allocations of water between the states through interstate compacts and equitable apportionment decrees entered by the U.S. Supreme Court. This unwarranted federal intrusion would create needless conflict and uncertainty.

The federal government defers to comprehensive state control over the appropriation of water, including water on federal lands. Even federal claims to water are subject to State laws. So long as water is used consistent with state water laws, BLM has no authority to require "mitigation" for water use in hydraulic fracturing.

BLM has no statutory authority for this roadblock to water use for oil and gas on federal lands and is mandated to protect water rights as "valid existing rights." BLM's own policies recognize that states have the authority and responsibility for the allocation and management of water resources within their boundaries.

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MEMORANDUM

TO:	Western Energy Alliance
FROM:	Kent Holsinger
DATE:	August 15, 2012
RE:	Bureau of Land Management Proposed Rule on Hydraulic Fracturing

On May 11, 2012, the Bureau of Land Management (BLM) published a proposed rule to regulate hydraulic fracturing on BLM and tribal lands (Proposed Rule). Among other things, the Proposed Rule would require mitigation for certain water sources, specify requirements for storage and potentially treatment, require disclosure of chemicals used in hydraulic fracturing and modify regulations related to well-bore integrity and flowback water. Comments are due September 10, 2012.

Whether operators use water that originates on federal, private or tribal land, such uses are governed by state water laws. Federal approvals or mitigation requirements would unlawfully circumvent the prior appropriation doctrine and deprive landowners, cities and industry in the western states of one of their most valuable economic interests--water. Moreover, the Proposed Rule could interfere with the allocation of water between the states through the interstate compacts and United States Supreme Court decrees that allocate them.

I. The Proposed Rule

BLM claims the Proposed Rule is necessary to provide information to the public and to assure fracturing is done in a way that protects the environment. BLM intends to "protect all usable waters during drilling operations...." Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27,691, 27,695 (May 11, 2012). In so doing, BLM either seeks to create a federal "super" water right or to impose riparian law on the western states. Neither is tenable under BLM's statutory authority and Congress' long-standing deference to state water allocation systems.

BLM would also require that the operator "disclose specific information about the water source to be used in the fracturing operation, including the location of the water that would be used as the base fluid." *Id.* at 27,696. Estimates of the volume of water recovered during flow back, swapping and recovery from production would also be required to "ensure that the facilities needed to process or contain the estimated volume of fluid will be available on location." *Id.* Section 3162.3-3(c)(7) "would require the operator to provide, at the request of the BLM, additional information pertaining to <u>any facet</u> of the well stimulation proposal" to "ensure that operations are consistent with applicable laws and regulation." *Id.* at 27,696 – 697 (emphasis added). Among other

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things, this information could include the water quality of water to be used as the base fluid.

Such requirements could create a parallel federal permitting or adjudication system in conflict with the state-administered priority system. This would render existing water rights and the States' authority over water allocation meaningless. Water rights and water use in the Western states would then face chaos and uncertainty wherever federal and tribal lands are concerned.

According to BLM, this information is necessary to determine the impacts associated with operations and the need for any mitigation applicable to Federal and Indian lands." *Id.* at 27,698 (emphasis added).

Absent clear and specific congressional authorization, BLM has no authority to impose conditions or mitigation requirements on state water uses. So long as water is used consistent with state water laws, BLM has absolutely no authority to require "mitigation" for alleged "impacts." Consistent with state water laws, operators should be able to use, reuse, store or otherwise dispose of produced water free from federal interference as BLM proposes.

As authority, BLM cites the Federal Land Policy and Management Act (FLPMA), "[i]n managing the public lands, the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the public lands." 43 U.S.C. 1732(b). BLM also cites 43 CFR 3161.2, "all operations be conducted in a manner which protects other natural resources and the environmental quality." But, as discussed below, FLPMA does not authorize BLM to unilaterally impose water quality standards on water use or otherwise interfere with water use on public lands.

In short, BLM has proposed a tremendous roadblock to water use related to oil and gas on federal lands. Contrary to longstanding deference to the states, BLM seems to seek veto power over whether water can be used for drilling and, if so, how it may be stored and disposed of.

II. Water is held by the States Subject to Appropriation by the Public

Throughout the West, water is held by the states for the benefit and use of the public. The doctrine of prior appropriation generally governs water rights in the 19 western states.[1] *United States v. City and County of Denver*, 656 P.2d 1, 6 (Colo. 1982)

[1] Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

(citing to *California v. United States*, 438 U.S. 645 (1978)). BLM cannot seek to impose requirements of riparian water law systems in the West.

Colorado's constitution provides that the right to appropriate unappropriated waters shall never be denied. Colo. Const. art. XVI, § 6. The doctrine of prior appropriation is adopted in Colorado's constitution and provides that the water of every natural stream in Colorado is public property, which shall be dedicated to the use of the people by diversion and application to beneficial use, subject to the rights of prior appropriators. Colo. Const. art. XVI, § 5. Nothing more than diversion and application of water to beneficial use is necessary to create a water right in Colorado. *See Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882). Similar provisions have been enacted in other western states.

For the other producing states of the West, similar provisions govern. Article VIII of Wyoming's constitution provides, "the water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the State, are hereby declared to be the property of the State." Wyoming also explicitly protects priority of appropriation for beneficial uses and the right to appropriate waters. Wyo. Const. art. VIII, § 3. In Wyoming, one has a prescriptive right to water upon registration of a claim. But legal title does not vest until the projected works are constructed and water is put to beneficial use. John W. Shields, *Elwood Mead's Establishment of the Constitutional Foundations of Wyoming's Water Law*, at 2 (2012) (citation omitted).

North Dakota provides that streams and watercourses "shall forever remain the property of the state" subject to appropriation for beneficial use. N.D. Const. art. XI, § 3 and N.D. Century Code, 61-01-01. New Mexico provides that the "unappropriated water of every natural stream...is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state." N.M. Const. art. XVI, § 2.

In Montana, "[A]ll surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people..." Mont. Const. art. IX, § 3(3). Finally, Utah states that, "[A]ll the waters in this state...are hereby declared to be the property of the public, subject to all existing rights to the use thereof." Utah Code, § 73-1-1 (1), (3).

Likewise in the western states, the authority for the administration and distribution of waters of the states rests with the state engineers. *See* Wyo. Stat. § 41-3-503; Colo. Rev. Stat. § 37-92-501; Mont. Code § 85-1-204(4); Utah Admin. Code, § 73-2-1(3)(a); N.D. Cent. Code § 61-02-14(1); and N.M. Stat. § 72-2-9.1(A). The Proposed Rule clearly interferes with the right to appropriate and distribute water in the West.

Even requirements to report information to the BLM creates the potential for a competing federal water rights system. And requirements for federal mitigation clearly interfere with notion that water is held in trust by the state for use by the public in priority.

III. Congress Defers to the States on Water Issues

For over 150 years, Congress has deferred to the States in matters related to the appropriation and administration of water. BLM cannot undo this with the stroke of a pen. Beginning with the Mining Act of 1866, 43 U.S.C. § 661 (2000), Congress recognized the local laws of the states and territories governed the use of water on federal lands:

> Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing or other purposes, have vested and accrued, and the same are recognized by local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same.

Id. In the Desert Land Act of 1877, Congress further recognized:

> [All] surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

43 U.S.C. § 321. All nonnavigable waters became part of the public domain subject to plenary control of the states. *See United States v. City and County of Den*ver, 656 P.2d 1, 8 (Colo. 1982).

In 1952, Congress established a unified method to allocate the use of water between federal and non-federal users in the McCarran Amendment. 43 U.S.C. § 666. The McCarran Amendment waives the sovereign immunity of the United States for adjudications for all rights to use water. *See Colorado River Water Conservation District v. United States (Mary Akin)*, 424 U.S. 800, 819 (1976). It is also evidence of congressional recognition of the primacy of western states' interests in regulating and administering water rights. *City and County of Denver*, 656 P.2d at 9. As the Federal Water Rights Task Force aptly summarized:

> Congress has addressed this issue repeatedly, and each time the issue has been resolved in favor of deference to the ability of the states to decide

> who has a water right, how much it is and how and when it may be exercised....
>
> Report of the Federal Water Rights Task Force Created Pursuant to Section 389(d)(3) of P.L. 104-127, p. 1 (Aug. 25, 1997).

BLM does not hold, and is not authorized to hold, a "super" federal water right beneath the public lands. While the agency could potentially apply for water rights underneath BLM lands, it lacks specific statutory authority to do so. Similar filings have occurred in Colorado—but only with express Congressional direction.[2] Because the Proposed Rule does not suggest this possibility, we have not explored these issues.

Congress intended the use of water on federal lands to be governed by the law of those states. "[E]xcept where the reserved rights[3] or navigation servitude of the United States are invoked, the State has total authority over its internal waters." *California v. United States*, 438 U.S. 645, 662 (1978). "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *Id.* at 653. These protections were expressly preserved in the enactment of FLPMA some 100 years later. *See* FLMPA Section 701(g).

In the "Colorado doctrine" states (Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming), the courts have held that the United States never acquired any interest in water: the transfer of sovereignty upon statehood transferred all authority to control the disposition and use of those waters to the states. Memorandum for Carol E. Dinkins, Assistant Attorney General, Land and Natural Resources Division, Office of Legal Counsel, U.S. Department of Justice, *Federal "Non-Reserved" Water Rights*, by Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (Jun. 16, 1982) at 13.[4]

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[2] For example, in creating the Great Sand Dunes National Park, Congress directed the Secretary of the Interior to apply for state-adjudicated water rights to protect unique hydrology and wetlands (including extraordinarily rare pulse-flows at Sand and Medano Creeks). While contested in water court, the U.S. eventually earned a decree for all of the groundwater underlying that national park

[3] BLM fails to cite to any alleged reserved water right under this Proposed Rule. In fact, the agency has limited ability to claim reserved water rights for only narrow purposes, including public water holes and springs, mineral hot springs, stock driveways, public oil shale withdrawals, wild and scenic rivers, national monuments and conservation areas, and wilderness areas. *See, e.g.*, "Public Water Reserve No. 107", 43 CFR § 2321.1-19(a) (1926, Executive Order by President Calvin Coolidge), Wilderness Act of 1964 (16 USC § 1131), Wild and Scenic Rivers Act of 1968 (16 USC § 1271).

[4] For "California doctrine" states such as North Dakota, however, the federal government had an original property right to non-navigable waters that did not pass to the states upon admission. Olson Memorandum

Through this Proposed Rule, BLM would upset the time-honored preeminence of State water law. The federal government has historically acquiesced to comprehensive state control over the appropriation of water, including water on federal lands, at least with respect to rights that could be asserted by private appropriators. *United States v. City and County of Denver*, 656 P.2d at 8; *see also California v. United States*, 438 U.S. at 656. Even federal claims to water are subject to State laws. *See United States v. Idaho*, 508 U.S. 1, 8 (1993). Just this year, the Supreme Court reiterated that the states retain the power to determine the scope of the public trust over waters within their borders--not the federal government. *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215, 1227-28, 1234-35 (2012).

IV. BLM has No Statutory Authority to Regulate State Water Rights

BLM's Proposed Rule has no legitimate foundation in federal statute or caselaw. Two major statutes authorize management of the public domain by the BLM: the Taylor Grazing Act and FLPMA. Neither reserved water rights to the BLM. *See Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management*, 86 Int. Dec. 553, 592 (June 25, 1979).

Here, there is no congressional intent to preempt state control in the instances discussed in the Proposed Rule. *See California v. United States*, *infra*, and *United States v. New Mexico*, 438 U.S. 696 (1978). BLM has no specific statutory directive authorizing this intrusion into the realm of state water laws. And neither the application of state water law, nor the use of water for industrial purposes, frustrates BLM's ability to manage the public domain lands consistent with the purposes established by Congress.

The Proposed Rule contradicts FLPMA savings provisions that protect water rights as "valid existing rights." FLPMA provides:

> (g) Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or—(1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands; (2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control; ...[and] (h) All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

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at 13. The use of water on federal land in North Dakota is subject to federal authority to determine such rights. *Id.*

43 U.S.C. § 1701 note (2000) (emphasis added). Decreed water rights, permitted water rights and appropriative rights to place water to beneficial use are valid existing rights under FLPMA.

Without clear congressional authorization, federal agencies may not use their administrative authority to, "alter the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-173 (2001). Here, BLM may not use its permitting authority to require any such provisions contained in the Proposed Rule. Congress has not delegated to the BLM the authority to require operators relinquish a part of their existing water supplies or transfer their water rights to the BLM as a condition of approvals. Nor can BLM use its permitting authority to reallocate or otherwise obtain water from non-federal water rights which have been or will be recognized in McCarran proceedings.

FLPMA land use authority cannot be used to control the use of water allocated to and owned by non-federal water users under state law, or to interfere with state water allocation and administration systems. The provisions contained in the Proposed Rule could act like a *de facto* reallocation of water. BLM may not interfere with the exercise of water rights nor may it coerce transfers of water rights through its Proposed Rule.

The Proposed Rule is also contrary to BLM's own policies on water. For example, the BLM Manual (BLM 7520) recognizes that states have the authority and responsibility for the allocation and management of water resources within their boundaries, except as specified by Congress. Moreover, in 2005, BLM entered into a Memorandum of Understanding (MOU) with the Colorado Department of Natural Resources to formalize a cooperative framework on water issues on BLM lands in Colorado. There, BLM agreed to recognize, "the authority of the State to allocate water available for appropriation and respect[s] valid water rights that are granted, exercised and managed in accordance with state law." While the terms of the MOU may have expired, BLM's Proposed Rule certainly runs counter to its purpose.

V. Implementation of the Proposed Rule could result in Takings without Just Compensation

In the West, water rights are property rights that are freely transferrable. For example, many operators contract with existing water right holders to supply water used in hydraulic fracturing. To the extent BLM interferes with or reallocates water rights, the operator or water right owner could be entitled to compensation under the Takings Clause of the Fifth Amendment to the United States' Constitution. U.S. CONST. Amend. V. The Takings Clause protects private parties from abuse of government power by requiring just compensation if the government's regulation has the effect of depriving an

individual of his, her, or its property. *See* G*ardner v. Trustees of Newburgh*, 2 Johns. Ch. 162, 167 (N.Y. Ch. 1816); *Boyle v. United States*, 200 F.3d 1369 (Fed. Cir. 2000); *Betterview Inv. V. Public Serve of Colo.*, 198 P3d 1258 (Colo. App. 2008).

While claims under the Takings Clause are factually dependant, they may be successful when regulation prevents productive use or expected economic return. *Argent v. United States,* 124 F.3d 1277 (Fed. Cir. 1997); *Van Wyk v. Public Serv. Co.*, 996 P.2d 193 (Colo. App. 1999); *Cook v. United States*, 1999 WL 36214 (Fed. Cl. 1999). Such could certainly be the case here.

A takings can occur even if the deprivation caused by the government's regulation is temporary or affects only one aspect of the property right, such as its possession or use. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). The imposition of mitigation requirements on water use could potentially qualify.

In addition, a taking may be found when a certain type of property owner has been singled-out by the government to bear a disproportionate public burden. *Armstrong v. United States*, 364 U.S. 40 (1960). Here, BLM has singled out water use related to industrial development.

VI. The Proposed Rule Interferes with Interstate Compacts and U.S. Supreme Court Decrees

Implementation of the Proposed Rule could also interfere with the allocation of water between states. The rights to interstate waters have been resolved through interstate compacts and equitable apportionment.

Article 1, section 10 of the U.S. Constitution authorized interstate compacts negotiated between the states and ratified by the state legislatures and the U.S. Congress. Much like treaties between the states, the compacts resolved water allocation issues for millions of people in the West. For example, the States of Colorado, Wyoming, Utah, New Mexico hold sacrosanct the protections in place in the Colorado River Compact of 1923 and the Upper Colorado River Compact of 1948.

States may also bring an original action the doctrine of equitable apportionment before the U.S. Supreme Court to protect their rights to interstate streams within their borders. *See* Richard A. Simms, *Equitable Apportionment and New Uses*, 29 NAT. RES. J. 549 (1989). Article III, section of the U.S. Constitution provides the authority for such unique jurisdiction. *See* James N. Corbridge Jr. and Teresa A. Rice, *Vranesh's Colorado Water Law Rev.*, at 528 (1999).

BLM has absolutely no authority to impose conditions or otherwise regulate the interstate allocation of waters by regulatory fiat. Such issues go to the heart of federalism and the U.S. Constitution.

VII. The Proposed Rule Creates Uncertainty and Confusion

BLM fails to clearly state how the Proposed Rule will modify existing procedures. However, BLM seeks to create "a consistent oversight and disclosure model." Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. at 27,692. The Proposed Rule is replete with requirements that operators submit detailed information and estimates. Such submittals are likely to trigger additional requirements or approvals from BLM under the guise of the agency's permitting authority.

BLM fails to specify how it will determine whether industry has met its requirements. Will filing a report on the contents of well stimulation fluids be sufficient or will industry have to meet certain limitations on well stimulation fluids? If so, what kinds of limitations will be in place? Will BLM sample an operator's well stimulation fluid? Will the regulations be part of an existing permitting process or separate? How will BLM assess when it will require additional conditions or even mitigation on the proposed activity? There are many outstanding questions because of the lack of detail provided in the Proposed Rule.

Thus, BLM should withdraw the Proposed Rule and publish a rule with the necessary detail for operators to sufficiently understand the impacts it will have on its operations and provide more meaningful comments.

VIII. Conclusion

BLM's Proposed Rule would interfere with the ability to appropriate and use water on public lands in the West. This amounts to an unwarranted federal intrusion into state water law that creates needless conflict and uncertainty.