

---

March 3, 2021

The Honorable Alejandro Mayorkas  
Secretary  
U.S. Department of Homeland Security  
245 Murray Lane SW  
Washington, DC 20528

Dear Secretary Mayorkas:

On behalf of the Western Governors' Association (WGA), we are writing to congratulate you on your confirmation to serve as the Secretary of Homeland Security. We look forward to working with you in your new capacity as the chief security and emergency response officer of the United States.

WGA represents the Governors of the 22 westernmost states and U.S. territories. The association is an instrument of the Governors for bipartisan policy development, information exchange and collective action on issues of critical importance to the western United States.

WGA is deeply interested in, and has adopted substantive and detailed policies regarding, activities within the jurisdiction of the Department of Homeland Security (DHS). The purpose of this communication is to introduce you to those policies and to encourage a close and productive working relationship. Western states are eager to work closely with you as authentic partners in the design and execution of programs and policies that affect our constituents and implicate state authority.

The Department has authority over several agencies and programs that have a direct relationship to states. Your responsibilities in emergency management involve a wide range of activities, from assisting states with COVID-19 response to helping in the response and aftermath of natural disasters such as wildfire, earthquakes and cyclones. DHS can be an integral partner with states in mitigating hazards to reduce the effect of future disasters. The Department also serves as an important cybersecurity resource for states, a matter of constant concern in our increasingly digital society.

The attachment to this letter presents a high-level summary of select gubernatorial priorities within your jurisdiction. We hope you will take time to review this information and remember that Western Governors are enthusiastic partners with respect to these and other issues. Moreover, we expect to be consulted throughout the decision making and rulemaking processes of the Department.

One of Western Governors' foundational policy statements is WGA Policy Resolution 2021-01, *Strengthening the State-Federal Relationship* (attached). The resolution notes that "[e]ach Executive department and agency should have a clear and accountable process to provide each state – through its Governor or their designees – with *early, meaningful, substantive, and ongoing consultation* in the development of federal policies that affect states." (emphasis added). We submit

The Honorable Alejandro Mayorkas

March 3, 2021

Page 2

that such consultation should commence immediately, both with respect to departmental policies under review and those under development.

Congratulations again on your appointment. We look forward to working with you to realign the state-federal relationship to better serve our common constituencies.

Sincerely,



Kate Brown  
Governor of Oregon  
Chair, WGA



Brad Little  
Governor of Idaho  
Vice Chair, WGA

Attachments



## Department of Homeland Security Summary of Priorities

This document outlines Western Governors’ priorities for the Department of Homeland Security. It is comprised of positions adopted by Western Governors in WGA policy resolutions.

Priority	Governors' Policy
<b>State-Federal Relationship</b>	
<p><b>States are Sovereigns</b></p> <p>Ensure that states are not treated as equivalent to stakeholders, interested parties, public or private organizations, industry, or the public by federal agencies. Rather, states should be treated as sovereign entities and engaged in a government-to-government manner.</p>	<p>WGA Policy Resolution <a href="#">2021-01</a>, Strengthening the State-Federal Relationship</p>
<p><b>Preemption</b></p> <p>Explicitly state that preemption is disfavored and require agencies to specify where preemption is warranted. In such cases, agencies must provide affected states notice and an opportunity to participate in proceedings at which the agency must demonstrate the preemption of state authority is needed to accomplish a national purpose.</p>	<p>WGA Policy Resolution <a href="#">2021-01</a>, Strengthening the State-Federal Relationship</p>
<p><b>Consultation</b></p> <p>Seek opportunities for more meaningful consultation through:</p> <ul style="list-style-type: none"> <li>• agency-specific processes;</li> <li>• Executive Branch cross-cutting regulatory efforts; and</li> <li>• administrative reorganization.</li> </ul> <p>Require federal agencies to consult with states on agency reorganization and regulatory reform.</p> <p>Consult with states on a regular basis: as a predicate to federal action; through the pre-publication stage of rulemaking; after publication and before adoption of rules and regulations; and on an ongoing basis throughout implementation.</p> <p>Define “consultation” to:</p> <ul style="list-style-type: none"> <li>• Include early, meaningful, substantive, ongoing, government-to-government communication and exchange with states through Governors or their designees.</li> <li>• Require procedures separate from and beyond the stakeholder or public process.</li> </ul> <p>Clarify that notice and comment rulemaking procedures do not satisfy agencies’ requirements to consult with states where required by law.</p>	<p>WGA Policy Resolution <a href="#">2021-01</a>, Strengthening the State-Federal Relationship</p>

Priority	Governors' Policy
<p>Require all federal departments and agencies, including independent regulatory agencies, to codify in regulation a clear, consistent, and accountable process for state consultation on policies with federalism implications. Such processes should include a remedy for states where agencies fail to do so.</p> <p>These regulations should also require:</p> <ul style="list-style-type: none"> <li>• Federal agencies to provide written notification to and an invitation to consult with Governors of all potentially affected states (or their designees) of policies with federalism implications within the area affected by the proposed federal action.</li> <li>• Federal agencies to provide procedures for written response to Governors' or their designees' input prior to a final federal decision.</li> <li>• Federal agency decision-makers to hold regular, ongoing consultation meetings with Governors or their designees regarding policies with federalism implications.</li> </ul>	
<p><b>Rulemaking</b></p> <p>Prior to promulgation of a rule with federalism implications, require federal agencies to:</p> <ul style="list-style-type: none"> <li>• ensure that new funds sufficient to pay the direct costs incurred by the state in complying with the regulation are provided by the federal government; and</li> <li>• provide OMB with a description of the extent of agency's consultation with states, a summary of their input, the agency's response to that input, and any written communications submitted by states.</li> </ul> <p>Provide an opportunity for Governors or their designees to review agencies' regulatory agendas.</p>	<p>WGA Policy Resolution <a href="#">2021-01</a>, Strengthening the State-Federal Relationship</p>
<p><b>Non-legislative Rulemaking/Guidance</b></p> <p>Require agencies to consult with affected states prior to issuing guidance documents with federalism implications – including memoranda, directives, notices, bulletins, manuals, handbooks, opinions, and letters.</p> <p>Require agencies to develop a transparent and accountable process for determining whether a proposed agency action requires notice-and-comment rulemaking procedures prescribed under Section 553 of the Administrative Procedures Act.</p> <p>Require agencies to publish all existing guidance documents at a single location on their agency's website and publish new and rescissions of guidance documents at the same location on the date they are issued.</p>	<p>WGA Policy Resolution <a href="#">2021-01</a>, Strengthening the State-Federal Relationship</p>
<p><b>Consistency and Avoidance of Conflicts</b></p> <p>Require federal agencies to make all reasonable efforts to achieve consistency and avoid conflicts between federal and state objectives, plans,</p>	<p>WGA Policy Resolution <a href="#">2021-01</a>, Strengthening the State-Federal Relationship</p>

Priority	Governors' Policy
<p>policies, and programs; and address and resolve all issues and concerns raised by states, unless precluded by federal law.</p>	
<p><b>State Data</b></p> <p>Require agencies to incorporate state and local data and expertise, subject to existing state requirements for data protection and transparency, into their decisions. This data should include scientific, technical, economic, social, and other information on the issue the agency is trying to address.</p>	<p>WGA Policy Resolution <a href="#">2021-01</a>, Strengthening the State-Federal Relationship</p> <p>WGA Policy Resolution <a href="#">2021-02</a>, Utilizing State Data in Federal Decision Making</p>
<p><b>Perceived Barriers to the State-Federal Relationship</b></p> <p>Require agencies to revise or establish their <i>ex parte</i> rules or policies in accordance with current case law, which permits these communications in informal rulemaking proceedings; and/or exempt communications with states and state officials from the definition of <i>ex parte</i> communications.</p> <p>Exempt all meetings held exclusively between federal personnel and non-federal elected officials (or their designees) acting in their official capacities or in areas of shared intergovernmental responsibilities or administration from FACA.</p> <p>Create statutory exceptions to FOIA disclosure for state data and analysis in instances where publication of state data provided to federal agencies would be violation of existing state statutes.</p> <p>Investigate and develop solutions for other barriers to state-federal communication presented by FOIA.</p>	<p>WGA Policy Resolution <a href="#">2021-01</a>, Strengthening the State-Federal Relationship</p> <p>WGA Policy Resolution <a href="#">2021-02</a>, Utilizing State Data in Federal Decision Making</p>
<p><b>Preemption</b></p> <p>Require agencies to develop step-by-step internal guidelines on compliance with the preemption provisions of Executive Order 13123.</p> <p>Require internal oversight procedure by which agency scrutinizes potential preemptions of state authority.</p> <p>Improve preemption and federalism review requirements in OIRA's "A-4 Circular" checklist.</p>	<p>WGA Policy Resolution <a href="#">2021-01</a>, Strengthening the State-Federal Relationship</p>
<p><b>Cybersecurity</b></p>	
<p><b>Energy Infrastructure</b></p> <p>Secure the United States' energy supply and systems, and safeguard against risks to cybersecurity and physical security.</p> <p>Work with the Department of Defense to meet its national security mission by ensuring safe and secure onsite and off-site electricity generation for key defense installations.</p>	<p>WGA Policy Resolution <a href="#">2019-02</a>, Cybersecurity</p> <p>WGA Policy Resolution <a href="#">2018-04</a>, Energy in the West</p> <p><a href="#">Energy Vision for the West</a></p>

Priority	Governors' Policy
<p>Continue to reduce reliance on non-North American oil imports from unstable foreign sources through individualized state-by-state solutions, such as increasing North American production, improving fuel efficiency, and developing renewable and alternative fuels.</p> <p>Ensure there is sufficient domestic energy supply, including domestic renewable electric generation, to meet existing and new market demand.</p> <p>Identify security and other vulnerabilities of energy infrastructure and create programs and standards to defend infrastructure from cyber and physical attacks, as well as natural disasters.</p> <p>Encourage effective relationships between state agencies, federal agencies, public utilities, and the private sector to prevent and prepare for risks to the region's energy supply and systems, as well as to respond to and recover from disruptions.</p> <p>Promote access to resources for state emergency planning, response, and recovery.</p> <p>Expand, upgrade, and secure transmission and pipeline infrastructure, as well as ensure that all federal pipeline safety measures are efficiently implemented.</p>	<p>WGA Policy Resolution <a href="#">2021-01</a>, Strengthening the State-Federal Relationship</p>
<p><b>Coordination and Consultation</b></p> <p>Clarify the roles and responsibilities of federal agencies in preventing, preparing for, and responding to cyberattacks, including by providing centralized authority, points of contact, and formalized communication pathways at each level within government and other organizations.</p> <p>Establish a working group with representatives from states and federal agencies to harmonize disparate agency regulations.</p>	<p>WGA Policy Resolution <a href="#">2019-02</a>, Cybersecurity</p> <p>WGA Policy Resolution <a href="#">2021-01</a>, Strengthening the State-Federal Relationship</p>
<p><b>Information Sharing</b></p> <p>Emphasize the benefits of information-sharing, while alleviating private sector concerns with this essential communication.</p> <p>Investigate liability protections, such as safe harbor provisions, for entities that report cyber intrusions.</p>	<p>WGA Policy Resolution <a href="#">2019-02</a>, Cybersecurity</p> <p>WGA Policy Resolution <a href="#">2021-02</a>, Utilizing State Data in Federal Decision Making</p>
<p><b>Election Security</b></p> <p>Work cooperatively with states in developing election security legislation and mandates.</p>	<p>WGA Policy Resolution <a href="#">2019-02</a>, Cybersecurity</p>
<p><b>Training and Workforce Development</b></p>	<p>WGA Policy Resolution <a href="#">2019-02</a>, Cybersecurity</p>

Priority	Governors' Policy
<p>Increase the cybersecurity awareness of government and private employees through training and education.</p> <p>Continue to support educational initiatives, such as NIST’s Initiative for Cybersecurity Education and National Centers of Academic Excellence in Cyber Defense.</p>	<p>WGA Policy Resolution <a href="#">2018-13</a>, Workforce Development in the Western United States</p>
<p><b>Prevention and Deterrence</b></p> <p>Encourage the use the full range of economic tools, including travel and financial sanctions, to deter cyberattacks organized or supported by nation-states.</p> <p>Take steps to mitigate global supply chain risks (e.g. installation of malicious software or hardware).</p>	<p>WGA Policy Resolution <a href="#">2019-02</a>, Cybersecurity</p>
<p><b>Cybersecurity Research</b></p> <p>Provide funding and technical assistance for cybersecurity research and development, such as research to understand the use of blockchain and encryption by perpetrators and its utility for defense against cyber threats, and address vulnerabilities of other emerging technologies, including connected vehicles and Internet of Things devices.</p>	<p>WGA Policy Resolution <a href="#">2019-02</a>, Cybersecurity</p>
<p><b>Disaster Assistance</b></p>	
<p><b>Federal Funding for Disaster Recovery</b></p> <p>Identify barriers to the effective and efficient allocation of federal funds for post-wildfire restoration efforts.</p>	<p>WGA Policy Resolution <a href="#">2018-03</a>, Federal Disaster Recovery Assistance for Communities in the West</p> <p>WGA Policy Resolution <a href="#">2020-07</a>, Rural Development</p> <p>WGA Policy Resolution <a href="#">2021-03</a>, National Forest and Rangeland Management</p>
<p><b>Federal Emergency Management Agency State Cooperation</b></p> <p>Work directly with individual states and territories to jointly identify their individual and common disaster risks and needs, and the best methods to determine the necessity and provision of federal disaster assistance.</p>	<p>WGA Policy Resolution <a href="#">2018-03</a>, Federal Disaster Recovery Assistance for Communities in the West</p> <p>WGA Policy Resolution <a href="#">2021-01</a>, Strengthening the State-Federal Relationship</p>
<p><b>Wildfire</b></p> <p>Create incentives for local governments to take voluntary actions to support the creation and expansion of fire-adapted and smoke-ready communities and resilience, including the promotion of education, fuels</p>	<p>WGA Policy Resolution <a href="#">2021-03</a>, National Forest and Rangeland Management</p>

Priority	Governors' Policy
<p>management projects and improved integration of community wildfire protection plans with land use decisions when compatible with local goals.</p>	<p>WGA Policy Resolution <a href="#">2018-08</a>, Water Resource Management in the West</p> <p>WGA Policy Resolution <a href="#">2018-03</a>, Federal Disaster Recovery Assistance for Communities in the West</p>
<b>Foreign Visitor Preclearance</b>	
<p><b>Preclearance</b></p> <p>Work to complete the negotiation process with foreign countries and add new preclearance-approved international airports as soon as possible.</p> <p>Work with western states to help identify optimal international foreign visitor preclearance airports for future consideration.</p>	<p>WGA Policy Resolution <a href="#">2019-01</a>, Foreign Visitor Preclearance</p>





## Policy Resolution 2021-01

### Strengthening the State-Federal Relationship

#### A. **BACKGROUND**

1. Western Governors are proud of their unique role in governing and serving the citizens of this great nation. As the chief elected officials of sovereign states, they bear enormous responsibility and have tremendous opportunity. Moreover, the faithful discharge of their obligations is central to the success of the Great American Experiment.
2. It was the states that confederated to form a more perfect union by creating a national government with specific responsibilities for common interests. In this union, the states retained their sovereignty and much of their authority.<sup>1</sup>
3. Under the American version of federalism, the powers of the federal government are narrow, enumerated and defined. The powers of the states, on the other hand, are vast and indefinite and encompass all powers of governance not specifically bestowed to the federal government by the U.S. Constitution. This principle is memorialized in the Tenth Amendment, which states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”
4. This reservation of power to the states respects the differences between regions and peoples, recognizes a right to self-determination at a local level, and provides for flexible, tailored solutions to policy challenges. It also requires the federal government to engage with states – our nation’s dynamic laboratories of democracy – on a government-to-government basis befitting their co-sovereign status.
5. In addition to states’ reserved sovereign authorities, Congress has recognized state authority in federal statute by: (1) directing the federal government to defer to state authority, including such authority over land and water use, education, domestic relations, criminal law, property law, local government, taxation, and fish and wildlife; and (2) delegating federal authority to states, including the regulation of water quality, air quality, and solid and hazardous waste.
6. [Executive Order 13132](#), Federalism, reinforces these constitutional, statutory, and judicial principles and directs federal agencies to have an accountable process to ensure meaningful and timely input from state officials in developing policies with federalism implications.
7. The relationship between state and federal authority is complex and multi-dimensional. There are various contexts in which these authorities manifest and intersect:

---

<sup>1</sup> The U.S. Supreme Court has confirmed that, “[d]ual sovereignty is a defining feature of our Nation’s constitutional blueprint” and “States entered the Union with their sovereignty intact.” *See, e.g., Sossamon v. Texas*, 563 U.S. 277, 283 (2011).

- a) **State Primacy** – All powers not specifically delegated to the federal government in the Constitution. In the absence of Constitutional delegation of authority to the federal government, state authority should be presumed sovereign. *Examples: groundwater, wildlife management (outside of the Endangered Species Act), natural resources management, electric transmission siting.*
  - b) **Shared State-Federal Authority** – Fact patterns in which federal authority and state primacy intersect. *Examples: wild horses and burros on federal lands, interstate water compacts.*
  - c) **Federal Authority Delegated to States** – Federal authority that Congress has delegated to states by statute. Many such statutes require federal agencies to set federal standards (and ensure those standards are met) but authorize states to implement those standards. *Examples: water and air quality, solid and hazardous waste.*
  - d) **Federal Statutory or Other Obligations to States** – Where the federal government has a statutory, historical, or moral obligation to states. *Examples: Payments in Lieu of Taxes; Secure Rural Schools Act; shared mineral royalties; agreements to clean up radioactive waste that was generated by federal nuclear weapons production.*
  - e) **Exclusive Federal Authority** – Powers enumerated in the Constitution as exclusive powers of the federal government. In areas of exclusive federal authority, state law can be preempted if Congress clearly and unambiguously articulates an intent to occupy a given field or to the extent it conflicts with state law. *Examples: national defense, production of money.*
8. In contravention of the Founders’ design, the balance of power has shifted toward the federal government and away from the states. Increasingly prescriptive regulations tie the hands of states and local governments, dampen innovation, and impair on-the-ground problem-solving. Failures of the federal government to consult with states reflect insufficient appreciation for local knowledge, preferences, and competencies. In many cases, these federal actions encroach on state legal prerogatives, neglect state expertise, and/or infringe on state authority.
  9. The federal government often requires states to execute policy initiatives without providing the funding necessary for their implementation. State governments cannot function as full partners if the federal government requires them to devote their limited resources to compliance with unfunded federal mandates.
  10. State authority and autonomy is also eroded when prescribed federal policies become effectively mandatory through the contingency of federal funding streams that states depend on to deliver critical services.
  11. Too often, federal agencies: solicit input from states after a decision is already made or a public process is started; ask states to provide feedback on a proposed action without providing details or documents regarding what the agency is proposing; or do not respond to state input or incorporate feedback from states into their decisions. This does not afford states with the respect and communication required by law, and states currently have no

recourse for an agency's failure to consult except for litigation on the merits of a federal decision.

12. Congress and Executive Order 13132 currently require federal agencies to document the effects of their actions on states in certain circumstances. In practice, federal agencies rarely prepare these prescribed federalism assessments or statements. Even when federal agencies prepare such documents, they are not ordinarily informed by input from affected states. In addition, these documentation requirements only apply at the end of the rulemaking process and cannot substitute for early and meaningful consultation with states.
13. Federal agencies have suggested to states that there are legal or other barriers to state consultation, such as: federal agency policies restricting ex parte communications; concerns about the applicability of Federal Advisory Committee Act (FACA) procedures to meetings between state and federal officials; and issues with sharing information that would otherwise be exempt from disclosure under the Freedom of Information Act (FOIA).
14. Federal agencies do not adequately incorporate state data and expertise into their decisions. This can result in duplication, inefficiency, and federal decisions that do not reflect on-the-ground conditions. Consideration and incorporation of state, tribal, and local data and analysis will result in federal actions that are better-informed, more effectively coordinated among all levels of government, and tailored to the communities they affect.
15. Many of these issues stem from a profound misunderstanding throughout the federal government regarding the role and legal status of states. Over the past several years, Western Governors have worked to improve the federal government's understanding of state sovereignty, authority, and state-federal consultation; meaningful structural change, however, has yet to occur.

## **B. GOVERNORS' POLICY STATEMENT**

1. A good faith partnership between states and the federal government will result in more efficient, economic, effective, and durable policy, benefiting the Governors' and the federal government's shared constituents and resulting in a nation that is stronger, more resilient, and more united.
2. Improving state-federal communication and coordination is a goal that transcends party lines, and it is among the Governors' highest priorities. The Governors urge Congress and the Executive Branch to make fundamental changes to realign and improve the state-federal paradigm.

### ***State Sovereignty and Authority***

3. States are co-sovereigns with the federal government pursuant to the Tenth Amendment of the U.S. Constitution and other federal law. Congress and federal agencies must recognize state sovereignty and must not conflate states with other entities or units of government. States should not be treated as stakeholders or members of the public.
4. State authority is presumed sovereign in the absence of Constitutional delegation of authority to the federal government.

- a) Federal legislative and regulatory actions should be limited to issues of national significance or scope, pursuant to federal constitutional authority. Preemption of state laws should be limited to instances of necessity.
  - b) Where Congress preempts state law (acting pursuant to federal constitutional authority), federal law should accommodate state laws, regulations, and policies before its enactment and permit states that have developed alternate standards to continue to enforce and adhere to them.
  - c) Federal agencies should construe federal law to preempt state law only when a statute contains an express preemption provision or there is some other compelling evidence that Congress intended to preempt state law.
5. Congress and federal agencies should respect the authority of states to determine the allocation of state administrative and financial responsibilities in accordance with state constitutions and statutes. It should further:
- a) Ensure that federal government monitoring is outcome-oriented;
  - b) Minimize federal reporting requirements; and
  - c) Refrain from dictating state or local government organization.
6. When a state is meeting the requirements of a delegated program, the role of a federal agency should be limited to the provision of funding, technical assistance and research support. States should have the maximum discretion to develop implementation and enforcement approaches within their jurisdiction without federal intervention. Federal agencies should recognize and credit states' proactive actions.
7. Congress and federal agencies should avoid imposing unfunded federal mandates on states. In addition:
- a) Federal assistance funds, including funds that will be passed through to local governments, should flow through states according to state laws and procedures;
  - b) States should have the flexibility to transfer a limited amount of funds from one grant program to another and to coordinate the administration of related grants;
  - c) Federal funds should provide maximum state flexibility without specific set-asides; and
  - d) Governors should have the authority to require coordination among state executive branch agencies, or between levels or units of government, as a condition of the allocation or pass-through of funds.
8. Congress and the Executive Branch should create or re-establish entities to discuss and act on federalism issues, such as the Speaker's Task Force on Intergovernmental Affairs, the U.S. Advisory Committee on Intergovernmental Relations, the Subcommittee on Intergovernmental Affairs, or a federalism office within the White House. These entities should have the ability and resources to make recommendations to improve the state-

federal relationship and include states in their membership or actively involve states in their discussions.

### ***State-Federal Consultation***

9. Federal agencies must engage in consultation with states on a government-to-government basis in accordance with states' legal status. Congress should clarify and promote the need for state-federal consultation.
10. Improving state-federal consultation will result in more effective, efficient, and long-lasting federal policy for the following reasons:
  - a) Governors have specialized knowledge of their states' environments, resources, laws, cultures, and economies that is essential to informed federal decision-making;
  - b) Federal agencies can reduce duplication through the use and incorporation of state expertise, data and documentation;
  - c) Authentic communication and information exchange will help federal agencies determine whether an issue is best addressed at the federal level; and
  - d) Through meaningful dialogues with affected states, federal agencies can also avoid unintended consequences and address or resolve state concerns.
11. Each Executive department and agency should have a clear and accountable process to provide each state – through its Governor or their designees – with early, meaningful, substantive, and ongoing consultation in the development of federal policies that affect states. The extent of the consultation process should be determined by engaging with affected states. At a minimum, this process must involve:
  - a) Conducting consultation through federal representatives who can speak or act on behalf of an agency;
  - b) Inviting states to provide input outside of a public process and before proposals are finalized;
  - c) Enabling states to engage with federal agencies on an ongoing basis to seek refinements to proposed federal actions prior to finalization;
  - d) Providing robust information and documents (including non-final, non-public, draft, and supporting documents) about potential federal actions, including proposed rules, to Governors or their designees;
  - e) Addressing or resolving, where possible, state issues, concerns, or other input unless precluded by law;
  - f) Documenting how state concerns were resolved or why they were unable to be resolved in final decisions; and

- g) Making reasonable efforts to achieve consistency and avoid conflicts between federal and state objectives, plans, policies, and programs.
12. Governors affirm their reciprocal role in advancing a clear, predictable, timely, and accountable consultation process. Governors or their designees must continue to provide clear expectations for the appropriate scope and scale of consultation and must work with federal agencies to make consultation processes as efficient as practicable. As chief executives, Governors must also ensure the views of the state are clearly and consistently conveyed throughout the consultation process by prioritizing significant issues and resolving competing viewpoints across state government.
13. In many cases, federal agencies are required – whether by statute, executive order, regulation, policy, or other mandate – to consult, cooperate, and coordinate with states before taking action. However, due to states’ unique legal status, the need for federal-state engagement is not limited to express directives and should extend to any federal actions that may have direct effects on states, on the relationship between the federal government and states, or on the distribution of power or responsibilities among the various levels of government. Federal agencies should consult with states regarding what types of agency actions typically affect states and the extent of consultation required for these types of actions.
- a) These actions include the implementation of federal statutes and the development, prioritization, and implementation of agency policies, rules, programs, reviews (e.g., Governor’s Consistency Reviews), plans (e.g., resource management plans), budget proposals and processes, strategic planning efforts (e.g., reorganization), and federal litigation or adjudication that affects states.
  - b) When a federal agency proposes to enter into any agreement or settlement that affects states, the agency should provide all affected Governors or their designees with notice of the proposal and consult with, and seek the concurrence of, Governors or their designees who respond to the notice.
14. Congress and the Executive Branch should require federal agencies to promulgate regulations in consultation with Governors, setting forth their procedures to ensure meaningful, substantive consultation with states on federal actions that affect states. This direction should also clarify that, for rulemakings affecting states:
- a) An agency’s satisfaction of rulemaking requirements under the Administrative Procedure Act (including the solicitation of public comments) does not satisfy an agency’s obligation to consult with states; and
  - b) Consultation should occur before publication of a notice of proposed rulemaking or before an advanced notice of proposed rulemaking is submitted to the Office of Management and Budget (OMB).
15. Congress and the Executive Branch should consider the following additional accountability measures:

- a) Requiring the designation of a federalism official with the responsibility for implementing state-federal consultation and publish this official's name, title, and contact information on the agency's website;
  - b) Requiring OMB to regularly submit a report to Congress and Governors on state-federal consultation and implementation of agency consultation rules;
  - c) Requiring federal agencies to provide a summary of their efforts to consult with states, including a discussion of state input and how that input was considered or addressed, in any proposed and final rules;
  - d) Creating a process where Governors can notify OMB of an agency's failure to consult or comply with their consultation procedures; and
  - e) Providing an opportunity for Governors or their designees to seek judicial review of an agency's failure to consult.
16. Congress and the Executive Branch could make federalism reviews more effective by:
- a) Working with Governors to develop specific criteria and consultation processes for initiating and performing these reviews.
  - b) Providing Governors with an opportunity to comment on federalism assessments before any covered federal action is submitted to OMB for approval.
17. Congress and federal agencies should take the following actions to clarify that *ex parte* policies, FACA, and FOIA are not barriers to consultation:
- a) Federal agencies should (and Congress should require them to) clearly identify and provide rationale for any perceived barriers to consultation;
  - b) Federal agencies should clarify that consultation with state officials does not qualify as *ex parte* communications and that *ex parte* communications are not prohibited at any point during an informal rulemaking process;
  - c) Congress should clarify that meetings held exclusively between federal personnel and state elected officials or their designees acting in their official capacities or in areas of shared responsibilities or administration (and not for the purpose of obtaining collective advice) do not qualify as requiring compliance with FACA procedures; and
  - d) Congress should clarify that FOIA's exemptions apply to federal records shared or exchanged with states (as if those records were shared, exchanged, or created solely within the federal government) and create a statutory exemption to FOIA disclosure for state records in instances where publication of state records provided to federal agencies would violate existing state law.

### ***State Data and Expertise***

18. Federal agencies should utilize state data, expertise, and science in the development of federal actions that affect states.
19. Congress and the Executive Branch should, subject to existing state requirements for data protection and transparency, require agencies to incorporate state and local data and expertise into their decisions. This data should include scientific, technical, economic, social, and other information on the issue the agency is trying to address.
20. States merit greater representation on all relevant committees and panels advising federal agencies on scientific, technological, social, and economic issues that inform federal regulatory processes.

### **C. GOVERNORS' MANAGEMENT DIRECTIVE**

1. The Governors direct WGA staff to work with congressional committees of jurisdiction, the Executive Branch, and other entities, where appropriate, to achieve the objectives of this resolution.
2. Furthermore, the Governors direct WGA staff to consult with the Staff Advisory Council regarding its efforts to realize the objectives of this resolution and to keep the Governors apprised of its progress in this regard.

*This resolution will expire in December 2023. Western Governors enact new policy resolutions and amend existing resolutions on a semiannual basis. Please consult [westgov.org/resolutions](https://westgov.org/resolutions) for the most current copy of a resolution and a list of all current WGA policy resolutions.*