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April 26, 2021

The Honorable Joe Manchin  
Chairman  
Committee on Energy and Natural Resources  
United States Senate  
304 Dirksen Senate Building  
Washington, DC 20510

The Honorable John Barrasso  
Ranking Member  
Committee on Energy and Natural Resources  
United States Senate  
304 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Manchin and Ranking Member Barrasso:

In advance of the Committee's April 27, 2021, hearing on energy development on federal lands, attached please find:

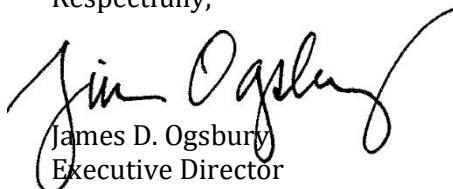
- Western Governors' Association (WGA) Policy Resolution 2018-04, Energy in the West;
- the related WGA Energy Vision for the West;
- WGA Policy Resolution 2020-02, States' Share of Royalties and Leasing Revenues from Federal Lands and Minerals; and
- WGA Policy Resolution 2021-01, Strengthening the State-Federal Relationship.

Western Governors recently communicated with President Biden regarding Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, and Department of the Interior Secretarial Order 3395. The attached letter documents Western Governors' collective request for "early, meaningful, substantive, and ongoing consultation in the development of federal policies that affect states" and emphasizes how western states are particularly affected by the Executive and Secretarial Orders due to the high percentage of federal lands in the West.

I request that you include these documents in the permanent record of the hearing, as they articulate Western Governors' policy positions and recommendations on this important issue.

Please contact me if you have any questions or require further information. In the meantime, with warm regards and best wishes, I am

Respectfully,



James D. Ogsbury  
Executive Director

Attachments



## Western Governors' Association Policy Resolution 2018-04

### *Energy in the West*

#### **A. BACKGROUND**

1. Energy policy and the development of sustainable energy resources are major priorities for every Western Governor.
2. Western Governors recognize that approaches to energy use and development vary among our states, territories, and flag islands. However, the Governors remain committed to the development of policies and utilization of state energy endowments that result in the maximum benefit for their citizens, the region, and the nation.
3. Western energy production is indispensable to meeting national energy demands. The West is the energy breadbasket of the United States:
  - a. Western states have all high-yield geothermal energy capacity in the continental United States.
  - b. Western states supply the majority of non-federal United States petroleum.
  - c. Western states are at the forefront of unconventional natural gas production.
  - d. The Pacific Northwest produces the largest output of hydropower in the nation.
  - e. Western states have the largest contiguous areas of wind power resources in the nation.
  - f. The Southwest has some of the highest-identified solar energy resource areas in the United States.
  - g. Western states produce the largest portion of coal in the United States, which is the fuel that constitutes the largest share of the national electricity generation mix.
  - h. The West has the largest contiguous areas of high-yield biomass energy resource potential in the nation.
  - i. Western states have nuclear power generation facilities and produce all domestic uranium.
4. Western states, Pacific territories, and flag islands have the resources to drive job creation and economic development through broad growth in the energy industry.

5. The Merchant Marine Act of 1920 has prevented certain noncontiguous states, territories, and flag islands from being supplied with domestically produced energy commodities.

**B. GOVERNORS' POLICY STATEMENT**

1. Western Governors recognize the following as energy policy priorities for the West:
  - a. Secure the United States' energy supply and systems, and safeguard against risks to cybersecurity and physical security.
  - b. Ensure energy is clean, affordable, and reliable by providing a balanced portfolio of renewable, non-traditional, and traditional resources.
  - c. Increase energy efficiency associated with electricity, natural gas, and other energy sources and uses to enhance energy affordability and to effectively meet environmental goals.
  - d. Advance efficient environmental review, siting, and permitting processes that facilitate energy development and the improvement and construction of necessary electric grid (transmission and distribution) and pipeline infrastructure, while ensuring environmental and natural resource protection.
  - e. Improve the United States' electric grid's reliability and resiliency.
  - f. Protect western wildlife, natural resources, and the environment, including clean air and clean water, and strive to reduce greenhouse gas emissions.
  - g. Make the West a leader in energy education, technology development, research, and innovation.
  - h. Utilize an all-of-the-above approach to energy development and use in the West, while protecting the environment, wildlife, and natural resources.
2. Western Governors support increasing the development and use of energy storage, alternative transportation fuels, and alternative vehicles.
3. Western Governors call on the federal government to lift a barrier to domestic free trade between the contiguous United States and the noncontiguous states, territories and U.S. flag islands by the Merchant Marine Act of 1920 by allowing those jurisdictions to receive energy commodities produced in the mainland but transported by foreign vessels, should those jurisdictions, and the jurisdictions whose ports are being used to ship these materials, desire it.
4. Redundant federal regulation of energy development, transport, and use is not required where sufficient state, territorial, or flag island regulations exist. Existing state authority should not be replaced or impeded by Congress or federal agencies.

**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. The Governors also direct WGA staff to consult with the Western Interstate Energy Board to recommend updates to the 10-Year Energy Vision that provide detail on the Governors' energy policy objectives outlined in this resolution.
3. 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.

Western Governors enact new policy resolutions and amend existing resolutions on a biannual basis. Please consult [www.westgov.org/policies](http://www.westgov.org/policies) for the most current copy of a resolution and a list of all current WGA policy resolutions.



## Energy Vision for the West

### Introduction

The resource-rich West supplies a majority of the country's energy resources and electric power. The United States is currently projected to become a net energy exporter within five years. The increase in natural gas developed in the West, coupled with increased investment in renewable and alternative energy sources, have positioned the region and its Governors to play a central role in the nation's economy and energy policy.

The West's vast energy resources and the Governors' role in the development of energy policy underscores the value of a regional energy policy, the *Energy Vision for the West*. This policy does not impede states or territories from approaching energy choice and industry growth based on their own resource endowments and policies. It illustrates that Western Governors have coalesced around common issues and specific goals, despite diverse geography, resources, and politics. The *Energy Vision for the West* elaborates on the Governors' objectives set forth in WGA Policy Resolution [2018-04](#), *Energy in the West*.

Western Governors support a comprehensive energy portfolio for the West to ensure that energy is clean, affordable, and reliable. They are also committed to energy policies that promote economic growth and protect the environment. This approach facilitates a strong economy and jobs across a variety of professions, skill sets, and educations.

This approach also recognizes that there are challenges and opportunities associated with every type of energy resource and use, the costs and benefits of which must be considered in policymaking. One such opportunity – and challenge – is creating an effective state-federal partnership in energy development, lands management, and environmental protection. This regional policy is a guide for realizing opportunities to advance the West as the nation's principal energy provider and a leader in energy innovation and effective policy.

### **Goal 1: Secure the United States' energy supply and systems, and safeguard against risks to cybersecurity and physical security.**

Addressing threats to the nation's energy systems and resources is a high priority of Western Governors. Coordination between states, the federal government, and the private sector on energy emergency planning and response is vital to addressing physical and cybersecurity impacts on the West's energy systems and resources. To this end, the Governors establish the following objectives:

- 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.
- 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.

- Ensure there is sufficient domestic energy supply, including domestic renewable electric generation, to meet existing and new market demand.
- 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.
- 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.
- Partner with the federal government to ensure the provision of adequate funding and access to resources for state emergency planning, response, and recovery.
- Expand, upgrade, and secure transmission and pipeline infrastructure, as well as ensure that all federal pipeline safety measures are efficiently implemented.

**Goal 2: Ensure energy is clean, affordable and reliable by providing a balanced portfolio of renewable, non-traditional and traditional resources.**

Western Governors believe that a balanced energy portfolio should consist of energy sources that are clean, affordable and reliable, that maintain system reliability, and limit rapid rate increases. These resources also require the maintenance and expansion of transmission and distribution infrastructure. To this end, the Governors establish the following objectives:

- Recognize the importance of western renewable (wind, solar, biomass, biofuels, geothermal, hydropower), nuclear, coal and natural gas resources, and the generation facilities that utilize those resources.
- Adapt utility regulation to changing markets, technologies, and resources.
- Encourage the addition of renewable, low-carbon, and clean generation, including utility-scale and distributed generation.
- Promote, advance and fund the evolution of new technologies, including carbon capture and advancements in renewable energy.
- Maintain the Rural Energy for America (REAP) program, which has benefited farmers, ranchers and rural businesses that are often underserved by other federal energy efforts.

**Goal 3: Increase energy efficiency associated with electricity, natural gas, and other energy sources and use to enhance energy affordability and to effectively meet environmental goals.**

Eliminating waste and using resources wisely are cornerstones of a sound energy strategy. State and local governments, utilities, households, and businesses are currently realizing the economic and other benefits of energy efficiency, but there are still substantial gains to be made. To this end, the Governors establish the following objectives:

- Prioritize energy efficiency associated with electricity, natural gas, and vehicle transportation.

- Enhance utility rate designs, including time-varying rates, and cost-effective utility energy efficiency programs that deliver electricity and natural gas savings to consumers.
- Support energy efficiency programs that provide incentives and rebates to lower the incremental up-front costs of energy efficiency technologies; Energy Service Company (ESCO) programs; and where successful, utility ratepayer-funded energy efficiency programs, including the use of rate decoupling.
- Encourage the retrofit of residential and commercial buildings and improve the energy efficiency of new buildings, such as through building energy codes and programs that stimulate energy efficient construction.
- Decrease energy intensity using tools such as combined heat and power and waste heat to power systems.
- Incorporate systems strategies to improve efficiency throughout the building lifecycle and to improve grid connectivity, including energy systems that enable two-way, automated utility-to-customer communications to facilitate demand response programs.
- Maintain funding and support long-term authorization for the State Energy Program (SEP), Weatherization Assistance Program (WAP), and Low-Income Home Energy Assistance Program (LIHEAP).

**Goal 4: Advance efficient environmental review, siting and permitting processes that facilitate energy development and the improvement and construction of necessary electric grid (transmission and distribution) and pipeline infrastructure, while ensuring environmental and natural resource protection.**

Responsible energy development and a robust, well maintained energy delivery system are vital to the economy and quality of life in the West. To this end, the Governors establish the following objectives:

- Encourage responsible leasing and development of energy resources and infrastructure.
- Create a clear and transparent process for regulation and permitting, coordinated among well-trained and adequately funded federal, state and local agencies.
- Streamline project-permitting reviews to minimize timelines, without compromising environmental and natural resource protection or states' roles in those processes.
- Maintain state and local decision-making authority over transmission line siting and permitting.
- Encourage regional transmission planning organizations to conduct interconnection-wide planning with the full participation of the states and with consideration of state energy policies.
- Create functional partnerships among states, federal agencies, tribal governments and local jurisdictions to solve conflicts that hinder energy infrastructure and resource development.

- Increase cooperation on interstate projects through interstate compacts and other tools.
- In the West-wide energy corridor process, ask federal agencies to guarantee: ongoing, substantive, and meaningful state consultation; consideration of state plans, processes, priorities, and policies; and integration of other streamlining efforts.

**Goal 5: Improve the United States electric grid’s reliability and resiliency.**

Changes in energy generation, distribution, and management are transforming the nation’s electric grid. But these advancements also highlight the need for grid level investment, along with associated updates for electricity regulation and policy. To this end, the Governors establish the following objectives:

- Protect state authority to determine the type and amount of new generation facilities and the programs used to procure new generation, recognizing that each state has their own priorities and portfolios.
- Protect state authority to encourage continued operation of existing generation facilities through long-term contracts, retail utility contracting, or other incentives.
- Encourage regional reliability organizations, utilities, state agencies and public utility commissions to assess the provision of essential reliability services under future scenarios that include a changing resource mix in the West.
- Support grid operator situational awareness of distributed energy resources by promoting coordination between utilities and distributed energy resource developers.
- Preserve areas of exclusive state authority regarding distributed energy resources, including storage, and improve utility distribution systems planning for distributed energy resources to enhance grid reliability and resilience.
- Improve understanding of grid resources and services and the need for new power production facilities and transmission/distribution infrastructure through data, analysis, and coordination.
- Prepare for potential disruptions to the grid from wildfires, flooding, earthquakes, tornadoes, cyberattacks and other disturbances and emergencies, as well as increase the grid’s ability to withstand and reduce the magnitude of such events.
- Enable utilities to take necessary actions to enhance grid reliability and reduce the threat of wildfires to and from electric transmission and distribution rights-of-way.

**Goal 6: Protect western wildlife, natural resources and the environment, including clean air and clean water, and strive to reduce greenhouse gas emissions.**

Western states have long assumed a stewardship role for the natural environment and have worked across state lines to protect air, land, wildlife and water. Western Governors are committed to ensuring that energy development is done in an environmentally responsible manner. To this end, the Governors establish the following objectives:



- Promote energy technologies and sources that lower emissions.
- Continue advancing air and water quality improvements and plans in each state and across state lines.
- Foster environmental cooperation that: protects the state-federal partnership; provides for sustainable environmental protection; is nimble and flexible; and ensures that state governments play a key role in regulation.
- Acknowledge that a productive economy and responsible development can support environmental protection by providing additional funding and opportunities for public-private partnership.
- Encourage technologies that reduce water consumption, prioritize water consumption for traditional activities (drinking water, agriculture, habitat conservation/restoration), and contribute to the responsible development of new energy resources.
- Achieve a balance between the responsible development of energy projects and wildlife conservation.
- Urge the federal government to identify and approve solutions for the long-term storage and permanent disposal of spent nuclear fuel and nuclear waste.
- Encourage the development and deployment of a full range of technologies that offer the potential for cost-effective reductions in greenhouse gas emissions from energy production and use, including carbon capture and storage, energy efficiency, zero emissions generation sources, and other emerging options.

**Goal 7: Make the West a leader in energy education, technology development, research, and innovation.**

Effective energy policy is facilitated by an understanding of a common set of impartial facts and scientific evidence. Furthermore, the advancement of technology will play a critical role in realizing a clean energy future. To this end, the Governors establish the following objectives:

- Leverage the vast expertise in the West's industry, academic institutions, and national laboratories to make the region an international hub for new energy technology research and development, as well as energy education.
- Encourage Congress and the Department of Energy to support and fund research, development, demonstration, and deployment of advanced energy technologies.
- Create public-private research and development partnerships among industry, academia, the national labs, and federal agencies to identify promising new technologies, including energy efficiency technologies that advance clean energy with reduced environmental impacts.
- Encourage market operators, reliability organizations, and utilities to appropriately share electric system operational data with researchers, educators, and entrepreneurs to promote

electric system innovation and technology development, while still safeguarding against risks to cybersecurity and physical security.

- Encourage training and education in energy-related fields and ensure there is an adequate workforce operating under the highest safety standards.
- Facilitate the creation of employment opportunities for displaced energy sector workers.
- Educate the public regarding: the role of energy in maintaining a high standard of living and quality of life; trade-offs and externalities associated with all types of energy development and consumption; the coexistence of a healthy environment and a thriving economy; and how federal policy on public lands impacts energy and infrastructure development.

**Goal 8: Utilize an all-of-the-above approach to energy development and use in the West, while protecting the environment, wildlife and natural resources.**

A diverse energy portfolio is essential to the provision of clean, affordable, secure, and reliable energy. Western Governors support a comprehensive energy portfolio, including: oil, gas, coal, nuclear, biomass, geothermal, hydropower, solar, wind, and conservation and energy efficiency. To this end, the Governors establish the following objectives:

- Reduce costs and risks for the environmentally sound development of all energy resources.
- Ensure competition in the market for all resources.
- Recognize the growing importance of consumer choice in driving energy policy.
- Support consumer choice of distributed energy resources to achieve affordability, environmental, and other objectives.
- Increase the development and use of alternative transportation fuels and vehicles, including the necessary infrastructure for those vehicles.
- Encourage innovation and application of energy storage, including pumped hydro storage, battery storage, and compressed air energy storage where cost-effective.
- Support the responsible and efficient development and use of traditional and renewable resources.
- Increase the amount of electricity generated from new, retrofitted, or relicensed hydroelectric facilities, including small, irrigation, and flood control hydropower projects.
- Restore financing for the geothermal exploration program financed by the Department of Energy.
- Accelerate the introduction of small modular reactors into the marketplace.



## Policy Resolution 2020-02

### States' Share of Royalties and Leasing Revenues from Federal Lands and Minerals

#### A. BACKGROUND

1. The settlement of the western United States was very different from the earlier settlement of the Eastern half of the country. As a result, land ownership in the West consists of a patchwork of federal, state, tribal and privately owned and managed lands and minerals. Over 591 million acres of federally-owned land and over 659 million acres of federally-owned mineral estate are within the boundaries of the western states. Many of these federal lands in western states have significant value.
2. The federal government sells or leases a variety of resources (minerals, gravel, oil and gas, coal, geothermal, renewable energy generating sites, timber, grazing rights, etc.) found on these federal lands to the private sector and collects substantial fees, taxes, royalties and lease payments for these rights.
3. Recognizing the principles of cooperative federalism, Congress has consistently legislated revenue sharing programs to allow states and local governments to deliver services despite the presence of tax-exempt federal lands within their borders. Congress shares revenues derived from federal lands so that states and local governments can effectively provide infrastructure and services that are contemplated by our federal system of governance.
4. Historic agreements and programs related to the compensation of state and local governments, codified in federal law, include but are not limited to:
  - Twenty Five Percent Fund Act of 1908.
  - Bankhead Jones Tenant Act.
  - Mineral Leasing Act of 1920.
  - Taylor Grazing Act.
  - Geothermal Steam Leasing Act.
  - Renewable energy leasing revenues from development on Forest Service lands, Bureau of Land Management lands, and waters off the coasts of the western states.
  - Federal Oil and Gas Royalty Management Act of 1982.
  - Abandoned Mine Lands grants to states consistent with 2006 Amendments to the Surface Mining Control and Reclamation Act.
5. As a result of federal efforts to address the federal budget deficit, state funding for these historic federal agreements and programs have previously been targets of cutbacks.
6. These agreements and programs are not proper subjects for cutbacks. For example, royalty payments owed to states are not federal expenditures. Federal land management agencies simply administer the distribution of those revenues to states. The federal government has

no discretion over this money. Payment to the states is the only authorized use for these revenues.

7. In addition, federal processes and regulations can create uncertainty regarding sales and leases of these federal resources or slow the pace of sales and leases of these federal resources, adversely affecting states' receipt of their share of these essential revenues.
8. Federal land management agencies frequently examine and revise regulations and policies governing federal management of valuable resources. For example, the Department of the Interior is currently proposing changes that could affect decisions related to temporary rental fee and royalty rate reduction applications for non-energy solid leasable minerals.
9. Despite the states' substantial interest in the revenues associated with these programs and agreements, the federal government is typically inclined to limit the states from participating in the decisions affecting these revenues. States' participation in these processes has also been limited to that of a general stakeholder, instead of on a government-to-government basis.

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

1. The federal government must honor its statutory obligations to share royalty and lease payments with states and counties in the West to compensate them for the impacts associated with federal land use and nontaxable lands within their borders.
2. Shared revenues and payments to states and counties under these programs should not be treated as federal expenditures or income. The federal government has no option except to transfer these pass-through funds to qualifying states. The federal government may not make payment of these funds to any other program or entity.
3. Governors support legislation that clarifies the unique nature of these programs and that assures states will receive full payment of statutorily guaranteed shares of receipts.
4. Governors support legislation, regulatory changes, and agency practices that provide transparency and certainty, ensure fair value for the American public, reflect changes in market conditions, and more efficiently administer the sales and leases of the resources on these federal lands.
5. Governors support efforts to eliminate the two percent administrative fee that is imposed on states' annual revenues. Given the revenue sharing nature of these funds, federal agencies and states should share these administrative costs.
6. Governors support early, meaningful, substantive, and ongoing state engagement in the development, prioritization, and implementation of federal environmental statutes, policies, rules, programs, reviews, budget proposals, budget processes and strategic planning. The U.S. Congress and appropriate federal agencies should provide expanded opportunities for such involvement. This includes when considering changes to federal resources and royalty policy, especially during regulatory processes that may affect royalty payments to states.

**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.

*Western Governors enact new policy resolutions and amend existing resolutions on a bi-annual basis. Please consult [www.westgov.org/policies](http://www.westgov.org/policies) for the most current copy of a resolution and a list of all current WGA policy resolutions.*



## 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:

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<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.*

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March 1, 2021

The Honorable Joseph R. Biden, Jr.  
President of the United States  
The White House  
1600 Pennsylvania Avenue, NW  
Washington, DC 20500

Dear President Biden:

We write to express our collective thoughts on Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, and Department of the Interior Secretarial Order 3395.

Section 208 of the Executive Order requires the Secretary of the Interior to “pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices.” It requires the Secretary to consult with the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Energy while conducting this review.

We respectfully request that Western Governors also be consulted during the Secretary’s review. Western Governors’ Association (WGA) Policy Resolution 2021-01, *Strengthening the State-Federal Relationship*, describes Western Governors’ views on the importance of fostering a good faith partnership between states and the federal government, noting that it “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.” Such a partnership, however, requires federal agencies to engage with states in “early, meaningful, substantive, and ongoing consultation in the development of federal policies that affect states,” as stated in the resolution.

We are eager to work with the Administration on policies that involve energy development and use in the West, while protecting the environment, wildlife, and natural resources, as expressed in WGA Policy Resolution 2018-04, *Energy in the West*. In the related *Energy Vision for the West*, WGA stated, “the increase in natural gas developed in the West, coupled with increased investment in renewable and alternative energy sources, have positioned the region and its Governors to play a central role in the nation’s economy and energy policy.” The resolution includes eight energy policy priorities that emphasize the importance of clean, affordable and reliable energy; environmental protection; energy security; and a balanced approach to the use of energy resources.

There is a robust energy sector in western states that is a valuable contributor to the economic vitality of many states and the energy security of our nation. Our states have taken a lead role in reducing the environmental effects of energy production activities while preserving this vital economic sector. We look forward to working with your Administration to ensure continued progress in enacting strict environmental standards, requiring accountability from energy developers, and working closely with the energy industry to develop cleaner energy solutions.

The Honorable Joseph R. Biden, Jr.

March 1, 2021

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The economic effects of energy production, including oil and gas leasing on public lands are substantial in many western states. Oil and gas and renewable energy production supports thousands of well-paying jobs and rural small businesses, many of which are already struggling from the impact of the COVID-19 pandemic on energy use. Energy production on public lands also generates federal royalties which are disbursed to various entities, including state and local governments. These payments are critical to some state and local budgets, including the funding of K-12 education and initiatives to improve conservation efforts and mitigate environmental impacts.

Climate change mitigation and adaptation strategies that rely on federal land disproportionately affect western states, given the high percentage of federal lands in western states. We do not want to see a shift of jobs and energy activity to other states or nations that may not have enacted the strong environmental standards adopted by many western states.

Western states have a rich base of experience to inform the consideration of policies affecting energy development and the environmental safeguards needed to ensure the vitality of our citizens and landscapes. We look forward to working collaboratively and constructively with you to address the challenges our nation and our states face.

Sincerely,



Kate Brown  
Governor of Oregon  
Chair, WGA



Brad Little  
Governor of Idaho  
Vice Chair, WGA

Attachments