CWAG
CONFERENCE OF WESTERN ATTORNEYS GENERAL

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August 2, 2013

Honorable Barack Obama, President
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Honorable Sally Jewell, Secretary
U.S. Department of the Interior
1849 C Street, N.W., Room 6151
Washington, DC 20240

Honorable Tom Vilsack, Secretary
U.S. Department of Agriculture
1400 Independence Ave. S.W.
Washington, DC 20250

Sylvia Mathews Burwell, Director
Office of Management & Budget
725 17th Street, NW
Washington, DC 20503

Dear President Obama and Distinguished Members of the Cabinet:

The undersigned members of the Conference of Western Attorneys General strongly object to the decision to misuse the 2011 Budget Control Act to sequester revenues owed to states under the Minerals Leasing Act (MLA). The MLA entitles states to forty-eight percent of all rentals, royalties, and other receipts collected by the federal government for mineral activity on federal lands within state boundaries. (Since 2008 the federal government has retained 2% for administrative expenses.) This revenue is statutorily guaranteed to the states in 30 U.S.C. § 191 and is vital to the economy and citizens of mineral-producing states.

Earlier this year, the Secretary of the Interior informed Western governors that mineral lease payments would be subject to sequester. (DOI Letter of February 24, 2013.) In response, the Western Governors' Association requested the Secretary of the Interior and the Director of the Office of Management and Budget (OMB) provide information justifying the position that MLA funds were legally subject to sequestration. The Department of the Interior responded to the governors by letter dated July 26, 2013. That response was wholly unacceptable.

The position taken by DOI and OMB that mineral royalties owed to the states are a "federal expenditure" and may be retained by the federal government under the sequester represents a profoundly flawed understanding of the relationship between our governments. The royalties owed under the MLA are, of course, a recognition that while the federal government presently retains title to federal lands in our states, the proceeds from the extraction of resources on those lands do not belong only to the federal government. Diminished funding hits hard the rural areas socially and economically impacted by mineral development. Beyond the financial costs to our states and our citizens, the cuts destroy the longstanding bargain between the states and the federal government to share in the revenue produced by mineral development within state boundaries.

The revenues owed to the mineral-producing states under the MLA are not a gift, a hand-out, or an entitlement but rather are the result of a compromise reached in 1920 that compensation is due to the states for mineral development within their boundaries.

At the time most of the Western states entered the Union, the federal policy toward the public lands was unequivocally to dispose of them as efficiently as possible. The federal government was presumed to be only the temporary trustee of the vast frontier lands until these holdings would transfer into private hands as the West was settled and developed. Western states entered the Union with the justified belief that these public lands would eventually become private lands. Part of the "solemn bilateral contract" of statehood was the expectation that lands within state boundaries would soon be available to benefit the residents of the state. The enormous impact that the gradual shift in policy from disposition to retention of public lands has had on Western states is acknowledged in programs like Payments in Lieu of Taxes, which compensate states for losses in property taxes due to the inability to collect taxes on federal lands within their borders.

It is within the context of continuing federal ownership of the public lands that the MLA was signed. Prior to passage, the MLA was victim to a decade-and-a-half of deadlock due to disagreement over how the nation's fuel minerals should be managed and developed. On one side, Westerners worried that federal mineral leasing would mean that western resources would be used to benefit federal interests, to the detriment of the West. Easterners knew that the development of the mineral resources was necessary to supply and fuel a growing nation. The MLA provision allocating half of the "sales, bonuses, royalties, [ ] and rentals" from mineral development to the states "within the boundaries of which the leased lands or deposits are or were located" is a large part of the compromise that ended a legislative stalemate in 1920. For nearly a century after passage of the MLA, both governments have received the benefits of that bargain.

Until now. When the federal government wrongfully cut payments to the states by 5.1% under the 2011 Budget Control Act, it violated this historic compromise. MLA payments are not subject to sequester for a number of reasons. First, remitting to states their share of mineral revenues derived within their borders should not be characterized as an expenditure or appropriation. The fact that the royalty payments make a stop in the federal treasury before being returned to the states does not convert the royalties into federal money or give the federal government any discretion to decide whether or how much money to return to the states under the MLA. Payment to the states is the only authorized use for these revenues. As the Western Governors wrote, "[t]he federal government has no option except to transfer these pass-through funds to qualifying states."

Second, classifying these state payments as an appropriation and subjecting them to sequester also fails to forward the objectives of the 2011 Budget Control Act. According to OMB, "sequestration is part of a budget enforcement mechanism that is intended to prevent enactment of mandatory spending and revenue legislation that would increase the federal deficit." Because the only payments going to the states under the MLA come directly from mineral development in those states, it is an entirely self-sustaining revenue source. Thus, it is not possible that such payments could ever exceed funding in this context.

Finally, if payments under the MLA can be deemed an appropriation or expenditure, OMB should exempt them from sequestration like many other programs important to economic recovery in this country. Sequester is often described as a blunt instrument, intended to impose cuts indiscriminately on all federal programs, both discretionary and mandatory. In reality sequester is a much more refined tool. Although OMB contemplates cuts to all federal programs, in reality the OMB has discretion to identify which programs are subject to sequester and which are exempt. The failure of the federal government to exempt MLA payments to states from sequestration is arbitrary and capricious. The federal government cannot simply seize money that belongs to the states and their people to cover its budget shortfalls. Reducing the federal budget deficit is a laudable and necessary goal; but it cannot be achieved on the backs of states and with disregard for the principles of federalism.

We have similar concerns about the notification by the Chief of the U.S. Forest Service that the federal government intends to withhold payments due the states under the Secure Rural Schools and Community Self-Determination Act. That funding is provided to the states to make up for funds they would have received if the federal government had continued to offer timber for sale on federal lands within the states. That issue was addressed in a letter to Secretary Vilsack by the Western Governors on May 14, 2013.

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We would appreciate a prompt response to our concerns.

Sincerely,

John Suthers
Colorado Attorney General

Michael Geraghty
Alaska Attorney General

Tom Horne
Arizona Attorney General

Lawrence Wasden
Idaho Attorney General

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cc: Western Governors' Association
Western Members, U.S. House of Representatives
Western Members, U.S. Senate