

REFERENCE TITLE: federal government; land acquisition; consent.

State of Arizona  
Senate  
Fifty-fourth Legislature  
Second Regular Session  
2020

# SB 1046

Introduced by  
Senator Borrelli

AN ACT

AMENDING SECTION 37-620.02, ARIZONA REVISED STATUTES; RELATING TO UNITED STATES LAND ACQUISITION.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 37-620.02, Arizona Revised Statutes, is amended  
3 to read:

4 37-620.02. State consent to acquisition of land by the United  
5 States for exclusive jurisdiction

6 Pursuant to article I, section 8, clause 17 of the Constitution of  
7 the United States, the consent of this state may NOT be given to the  
8 acquisition, ~~of~~ SALE, GIFT OR GRANT OR ANY OTHER TRANSFER OF AN OWNERSHIP  
9 INTEREST IN any ~~other~~ privately owned real property within this state THAT  
10 IS NOT IN POSSESSION OF ANY FEDERAL AGENCY AS OF THE EFFECTIVE DATE OF  
11 THIS AMENDMENT TO THIS SECTION by the United States ~~only upon~~ THAT WOULD  
12 REMOVE THE REAL PROPERTY FROM STATE, COUNTY AND MUNICIPAL PROPERTY TAX  
13 ROLLS WITHOUT THE EXPRESS, AFFIRMATIVE CONSENT OF THE LEGISLATURE AND THE  
14 GOVERNOR THROUGH the governor's signing OF a joint resolution adopted by  
15 AN AFFIRMATIVE VOTE OF A MAJORITY OF THE MEMBERS OF the legislature to  
16 that effect. The joint resolution shall recite the legal description of  
17 the land and the purposes to which ~~the~~ THIS state consents that the  
18 property may be used.

19 Sec. 2. Legislative findings

20 The Legislature finds that:

21 1. At the granting of statehood, the new State of Arizona was  
22 granted the exclusive right to all lands not assigned under treaty to the  
23 Native American tribes.

24 2. Since the granting of statehood, numerous lands have been  
25 retained by the federal government by various means by way of  
26 congressional action, thus depriving the State of Arizona of a tax base,  
27 which, in comparison to other states, is critical to funding services such  
28 as education, public safety and infrastructure.

29 3. There are three primary legal theories available to Arizona to  
30 attempt to prove the claim of tax base in existing American jurisprudence,  
31 which are, "the equal sovereignty principle," "the equal footing doctrine"  
32 and "the compact theory." All three legal theories provide credible  
33 support to the claim of a primary interest in state private property tax  
34 base.

35 4. Arizona relies on approximately sixteen percent of its land area  
36 to fund critical services of education, infrastructure, public safety and  
37 welfare programs, while other states enjoy nearly complete access to their  
38 lands to generate a survivable tax base.

39 5. The equal sovereignty principle was recently highlighted by the  
40 United States Supreme Court in Shelby County, Ala. v. Holder, 570 U.S. 529  
41 (2013), which challenged the requirement of the Voting Rights Act of 1965  
42 (P.L. 89-110, 79 Stat. 437) that certain states preclear their voting laws  
43 with the United States Department of Justice as a violation of the  
44 constitutional requirement that the states in our federal system be equal  
45 in sovereignty. The Court applied a heightened level of scrutiny to the

1 preclearance requirements because they treated Alabama as unequal in  
2 sovereignty and ruled that the preclearance provisions were  
3 unconstitutional under the equal sovereignty principle. For the reasons  
4 discussed in detail below, the Legislature finds that section 102(a)(1) of  
5 the federal land policy and management act of 1976 (P.L. 94-579; 90 Stat.  
6 2743), which reversed almost two hundred years of federal public lands  
7 policy from one of disposal to one of near-permanent retention, treats  
8 Arizona as unequal in sovereignty as compared to the states with dominion  
9 over the land within their borders. This argument, if adopted by the  
10 Court, would most likely result in a declaration that the United States  
11 cannot forever retain the public lands within Arizona's borders, not an  
12 order transferring the public lands to the State of Arizona. Therefore,  
13 should the Court be persuaded by this argument, a subsequent political  
14 solution negotiated by all stakeholders would most likely be required to  
15 resolve the issue. A possible outcome of that political process could be  
16 Arizona's ownership of those lands.

17 6. The equal footing doctrine is based on the equal sovereignty  
18 principle. It requires that states newly admitted to the Union receive  
19 all incidents of sovereignty enjoyed by the thirteen original states. The  
20 equal footing doctrine considers only sovereign and political rights of  
21 the newly admitted states, not economic or geographic differences. The  
22 original thirteen states stepped into the shoes of the Crown with regard  
23 to dominion over public lands within their borders. Similarly, Vermont,  
24 Kentucky, Tennessee, Maine, Texas and Hawaii all came into the Union with  
25 dominion over their public lands. Dominion over land has historically been  
26 viewed as a key incident of sovereignty, and denial of that dominion  
27 negatively impacts sovereignty in a variety of ways. Therefore, in order  
28 for Arizona to have been admitted as a co-equal sovereign with the states  
29 with dominion over public lands within their borders, Arizona also should  
30 have received on admission dominion over the land within its borders. A  
31 ruling by the United States Supreme Court based on the equal footing  
32 doctrine argument would logically result in the transfer of public lands  
33 to the State of Arizona.

34 7. The compact theory posits that the Arizona enabling act was an  
35 offer, and Arizona's acceptance of that offer created a solemn compact.  
36 Implicit in that compact was the duty of the United States to timely  
37 dispose of the public lands within Arizona's borders as it had done with  
38 states admitted prior to Arizona. There is historical support for the  
39 position that the United States promised to dispose of the public lands,  
40 maintained a policy requiring disposal of public lands and acted on that  
41 policy from 1784 through the date of Arizona's admission. There is  
42 historical evidence that Arizona and the United States both expected, at  
43 the time of Arizona's admission, that the public lands would be disposed  
44 of consistent with past practice. There is also historical evidence that  
45 the intent of the property clause of the Constitution of the United States

1 was to dispose of public lands, not to forever retain them. Accordingly,  
2 an argument can be made that the United States undertook an obligation to  
3 dispose of the public lands within Arizona's borders.

4 8. Since the United States has not disposed of the public lands  
5 within Arizona, the state relies on less than sixteen percent of the land  
6 it has dominion over as tax base to generate tax revenue in order to pay  
7 for critical services. Arizona cannot continue to serve the interests of  
8 its citizens if the private property tax base is taken without careful  
9 contemplation of consequences of such transfers to a government unit, the  
10 United States, which does not pay tax, nor does it compensate for the  
11 value of the land it controls through payments in lieu of taxes.

12 9. Under article I, section 8, clause 17 of the Constitution of the  
13 United States, the legislature of each state has the sole authority to  
14 give its consent of all purchases of land, "To exercise exclusive  
15 Legislation in all Cases whatsoever, over such District (not exceeding ten  
16 Miles square) as may, by Cession of particular States, and the Acceptance  
17 of Congress, become the Seat of the Government of the United States, and  
18 to exercise like Authority over all Places purchased by the Consent of the  
19 Legislature of the State in which the Same shall be, for the Erection of  
20 Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings".

21 Sec. 3. Short title

22 This act may be cited as the "Tax Base Protection Act".