

UNDERSTANDING ARIZONA'S PROPOSITIONS: 2012 SERIES

Prop 120 – State Sovereignty Act

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Proposition 120 would amend the Arizona Constitution to grant the state exclusive control over air, water, public lands, minerals, wildlife and other natural resources within the state's boundaries.¹

In 1910, the federal government granted nearly 11 million acres to the Territory of Arizona as part of the Arizona-New Mexico Enabling Act, allowing it to become a state. In accordance with this legislation, Arizona constitutionally disclaimed all rights to unallocated public lands inside its borders.² Prop 120 would repeal this provision.

Prop 120 would additionally declare that each state possesses full attributes of sovereignty on an “equal footing” with all other states, and that “state sovereignty is fundamental to the security of individual rights, free government and the inherent political power of the people.”

Specifically excluded from the ballot measure are Indian reservations, U.S. lands and federal "forts, magazines, arsenals, dock-yards, and other needful buildings" obtained for federal government purposes, as required by Article I, section 8, clause 17 of the U.S. Constitution.

Fueled by a desire for stronger states' rights, advocates say Prop 120 will liberate Arizona's natural resources from overweening federal authority and regulation, thereby

1910 Arizona Enabling Act, Section 20 (excerpt)

Clause 2: “That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes.”

Source: Arizona Enabling Act, June 20, 1910, c. 310, 36 U.S. Stat. 557, 568-579

ensuring a better-managed, more prosperous economic future.

Opponents say Prop 120 is an unconstitutional land grab for federal lands that would require Arizona to spend billions for management and liability during a time of economic austerity. Moreover, critics argue that the measure would not likely survive the federal legal challenge they believe would surely come.

Prop 120, or House Concurrent Resolution 2004, passed the Arizona Legislature along partisan lines with Democrats voting in opposition.³ The measure was sponsored by Rep. Chester Crandell, R-Heber.

Yes on Proposition 120

Anxiety over federal authority and the perceived weakening of states' rights are the driving influences behind state sovereignty (or "10th Amendment") measures such as Prop 120.⁴

Advocates argue that states have the right to reassert sovereignty over any federal law not based on an "expansive reading" of the enumerated powers granted to Congress by the U.S. Constitution.⁵ Further, many consider Congress to be in breach of its regulatory authority over the states. Still others premise their advocacy on the belief that federal courts have misinterpreted the Constitution in the federal government's favor.

In terms of public domain land, Prop 120 backers say the federal government is undermining Arizona's agricultural, forestry and mining industries through overregulation.⁶ "This threatens our businesses and our jobs," said Jonathan Paton, a District 1 Republican candidate for Congress.

Tenth Amendment, U.S. Constitution

"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."

Source: United States Constitution

Rep. Crandell, the measure's sponsor, argued that Prop 120 would allow Arizona to manage its lands without deferring to federal agencies.⁷

Echoing this sentiment, Sen. Sylvia Allen, R-Snowflake, a co-sponsor of the measure, wrote: "Western states are at a distinct disadvantage compared to the states east of Mississippi because we don't have control of all the land within our borders. The federal government controls [and mismanages] a major part of our land and interferes with mining, ranching, farming, grazing, water management, and many other aspects that are vital to our state economy, education, tourism, and our general prosperity."⁸

Like Sen. Allen, most proponents of Prop 120 are convinced the state can put public lands to more productive or profitable use than the federal government.

Advocates say the federal government made "an implicit promise" to promptly sell off public domain lands it held in 1912 to defray the national debt, but ultimately reneged.⁹ As a result, Arizona loses millions in revenue since it cannot manage these lands extractively. Moreover, some advocates question the legality of lands designated as national parks. They point out that the federal government never

purchased this property from the state nor sought consent of the Legislature as required under Article I of the U.S. Constitution.¹⁰ Proponents say Prop 120 merely seeks readdress for these perceived errors of omission or commission.

Repayment of the national debt was, in fact, one of several guiding reasons behind Congress' adoption of the General Land Ordinance of 1785 and the Northwest Ordinance of 1787. Both established the policies that would govern the disposal of public domain land, according to the Lincoln Institute of Land Policy. Of equal concern to Congress was the problem of land speculation, rapid expansion, and public education in Western lands as new states were created.

Ultimately, these laws led to the system of granting lands in the new states to support public institutions. However, there is no mention of federal assurances of land disposal, implicit or otherwise, in the Arizona Enabling Act or any other legally-binding documents that led to statehood.¹¹

As for who legally owns the national parks, history records that Mexico ceded the whole of what is today the American Southwest (including California and about 70 percent of Arizona) to the U.S. in the 1848 Treaty of Guadalupe Hidalgo. Moreover, the federal government legally acquired most of present-day southern Arizona (including Tucson) in the 1853 Gadsden Purchase. These events occurred before the Territory of Arizona was organized. The Civil War, of course, was the final arbiter of public domain claims by the federal government.

The First Public Domain

The first public domain in the union was created in 1781 when New York agreed to surrender to the Federal Government its claim to unsettled territory that extended westward to the Mississippi River.

Source: U.S. Department of the Interior

Proponents also say Prop 120 will put Arizona back on an "equal footing" with the other states that control the land within their borders. Because of this perceived inequality, Sen. Allen and others argue that Arizona was never "made a true state."¹²

Although there is no explicit reference to the equal footing doctrine in the Constitution (it was rejected at the 1787 Philadelphia Convention), Congress has historically included such a clause in its acts admitting new states to the Union. The *pro forma* language, included after the admission of Tennessee in 1796, provided that States enter the Union "on an equal footing with the original States in all respects whatever." According to constitutional scholars, the early federal government felt this assurance was sufficient to minimize the "risk of internal rebellions or changes in allegiance within the territorial settlements that would fragment the nation."¹³

Moreover, the state admission process was never strictly followed in terms of "equal footing," particularly during the years just before and during the Civil War (when the Territory of Arizona was organized in 1863). Shifting national priorities and political expediency greatly influenced Congress in the early Republic as it does today. Sixteen states, including the 13 original colonies, had entered the Union prior to 1803. Most were carved out of the colonies' land cessions through varying mechanisms. Initially, none received federal land grants upon admission since public domain lands did not exist in their territories.¹⁴ Finally, as the Yale Law Journal noted, the U.S. Supreme Court has "never explicitly

decided whether the equal footing doctrine is a constitutional limitation on the power of Congress to set terms for admission into the Union." ¹⁵

No on Proposition 120

A passage from an *Arizona Republic* editorial captures the sentiment of most opponents to Prop 120: "Arizona voters will face a lot of serious decisions on this year's ballot. They shouldn't have to waste time on an unconstitutional referendum that would seize federal land. ... Lawmakers are taking aim at two favorite targets: environmental regulations and federal land. Yet both bring benefits to Arizonans. HCR 2004 [Prop 120] is an ideological tantrum that's gone too far." ¹⁶

More cynical opponents question the motivation behind the ballot initiative. "This bid for sovereignty goes against being a state of the union," Rep. Tom Chabin, D-Flagstaff, told one news outlet. ¹⁷

The Arizona Wilderness Coalition (AWC) argues that, in effect, Prop 120 would set in motion a demand by the state that all federal lands – national parks, monuments, forests, wildlife refuges, wilderness areas, recreation areas, and historic lands – are turned over to state or private ownership. The AWC said the proposed amendment would affect about 25 million acres of the public domain and present billions of dollars of new liability for Arizona. It argues that federal agencies "employ thousands of Arizonans and spend billions of dollars managing our parks, forests, and public lands. The state doesn't have a fraction of the resources to properly manage these lands." ¹⁸

Opponents such as the Sierra Club say the assertion of state sovereignty under Prop 120 could undermine protections provided by federal environmental laws, such as the Clean Air Act, Endangered Species Act, and Clean Water Act. Critics buttress their argument by citing a recent poll in which 9 in 10 Arizona voters agreed that public lands were "an essential part" of the state's economic future and their quality of life. The poll also found that 4 in 5 Western state voters saw no conflict between building a robust economy and protecting public lands. ¹⁹

In a letter to House Agriculture & Water Committee Chairman Russ Jones, R-Yuma, the Public Lands Foundation noted that Arizona counties rely on federal Payments in Lieu of Taxes (PILT) payments to compensate for property taxes they cannot collect on public lands. In 2011, the state received about \$31.5 million in PILT payments. "The [Bureau of Land Management] lands are a major contributor to the PILT payments to Arizona," wrote PLF president Beau McClure. "It is not likely that Arizona would continue PILT payments to counties if the BLM lands were transferred to state ownership." ²⁰

Opponents of Prop 120 also view the measure as unconstitutional since it would effectively allow the state to reject any federal action or law deemed as impinging on Arizona's sovereignty. Opponents argue that this violates Article VI, Clause 2 of the U.S. Constitution – known as the "Supremacy Clause" – which establishes that laws made pursuant to the Constitution "shall be the supreme law of the land." ²¹

In its landmark ruling in *Cooper v. Aaron* (1958), the Supreme Court has explicitly rejected the idea that the states can nullify federal law. The Court held that federal law prevails over state law due to the

operation of the Supremacy Clause, and that federal law "can neither be nullified openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them through evasive schemes . . ." ²²

Given the precedent set in *Cooper v. Aaron*, it is a near certainty that the federal government would challenge Prop 120 should it pass by referendum. Prof. Ruthann Robson, who teaches constitutional law at the City University of New York School of Law, told the *New York Times*: "Article 6 says that that federal law is supreme and that if there's a conflict, federal law prevails. It's pretty difficult to imagine a way in which a state could prevail on many of these."²³

The Bottom Line

A "yes" vote would amend the Arizona Constitution to grant the state exclusive control over air, water, public lands and other natural resources within the state's boundaries. If adopted by referendum, the measure would likely to be challenged by the federal government on constitutional grounds.

Notes

¹ House Concurrent Resolution 2004: www.azleg.gov. Also, Legislative Council Analysis of HCR 2004.

² Arizona Enabling Act, June 20, 1910, c. 310, 36 U.S. Stat. 557, 568-579

³ Capitol Reports, Legislation On Line Arizona (LOLA): www.azcapitalreports.com

⁴ Kirk Johnson, "States' Rights Is Rallying Cry for Lawmakers," *New York Times*, March 16, 2010

⁵ The enumerated powers of Congress that set forth its authority are listed in Article I, section 8 of the US Constitution. The exercise of these powers is subject to explicit restrictions in the Bill of Rights and other protections in the Constitutional text. Historically, Congress and the Supreme Court have broadly interpreted these provisions, especially the Commerce Clause and the Necessary and Proper Clause, often to the chagrin of states' rights advocates. See "Exploring Constitutional Law," Univ. of Missouri-Kansas City Law School. www.law2.umkc.edu/faculty/projects/ftrials/conlaw/congpowers.htm

⁶ "Public domain" describes lands that were not under private or state ownership as the United States was expanding during the 18th and 19th centuries. Most public domain lands are held in trust for the American people by the federal government and managed by the Bureau of Land Management (BLM), the U.S. National Park Service, Bureau of Reclamation, or the Fish and Wildlife Service under the Department of the Interior; and the U.S. Forest Service under the Department of Agriculture. Other federal agencies that manage public lands include the National Oceanic and Atmospheric Administration and the U.S. Department of Defense.

⁷ Arizona League of Conservation Voters; Also see Primary Election Candidate Questionnaire, Arizona Farm Bureau

⁸ "Getting control of Arizona land," *Western Free Press*, 6/22/12

⁹ Howard Fischer, "Arizonans may get chance to vote on state sovereignty," *Yuma Sun*, 4/16/12

¹⁰ House Concurrent Memorial 2002, Reference Title: "Federal lands; Devolution to Arizona," Second Regular Session (2012); legiscan.com/gaits/text/521873

¹¹ Key documents leading to Arizona's statehood include the 1910 Arizona Enabling Act, the 1911 Joint Resolution by Congress to admit Arizona to the Union (37 Stat. 39), and the 1912 Proclamation signed by President William Taft that admitted Arizona to the Union (37 Stat. 1728).

¹² Fischer, *supra*, Note 9

¹³ The Doctrine of the Equality of States ("Equal Footing") is loosely based on Article IV, Section 3, Clause 1 of the U.S. Constitution, which states: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." See Sean O'Day, "School

Trust Lands: The Land Manager's Dilemma Between Educational Funding and Environmental Conservation, A Hobson's Choice?" 8 NYU ENVTL. L. J. 176, 174 (1999).

¹⁴ Alan V. Hager, "State School Lands: Does the Federal Trust Mandate Prevent Preservation?" 12 NAT. RESOURCES & ENV'T 39, 40 (1997). Also see BLM Report: Acquisition of the Public Domain, 1781-1867: www.blm.gov/public_land_statistics/pls11/pls1-1_11.pdf.

¹⁵ Yale Law Journal, Volume 88, No. 5, April 1979

¹⁶ Editorial: "State Senate should kill embarrassing bill," Arizona Republic, 4/18/12

¹⁷ "AZ House Passes State Sovereignty Proposal," Associated Press, 5/3/12

¹⁸ Fact Sheet: "Proposition 120: The Arizona State Legislature's Historic Land Grab," Arizona Wilderness Coalition. Per the AWC, the State Land Department has actually sold less than 10% of the lands granted to Arizona (nearly 11 million acres) at statehood. Arizona still owns over 9 million acres of State Trust Lands. But by acquiring 25 million more acres, the AWC claims that lawmakers backing Proposition 120 have "made their intent clear – they don't want to manage these lands for public benefit, they want to sell them off" in a land rush. Also see "State Trust Land at a Glance," State Land Department, www.land.state.az.us/news/ataglance.htm

¹⁹ Colorado College State of the Rockies Conservation in the West poll (2012), completed in Arizona, Colorado, Montana, New Mexico, Utah, and Wyoming by Public Opinion Strategies (a Republican firm) and Metz & Associates (a Democratic firm). See Colorado College State of the Project, www2.coloradocollege.edu/stateoftherockies/conservationinthewestsurvey_e.html

²⁰ Letter: To Rep. Russ Jones (Chairman, Agriculture and Water) from Beau McClure (President), Arizona Chapter, 2/16/12. Also see generally 2011 Tax Handbook, Arizona Joint Legislative Budget Committee Staff (8/17/11): www.azleg.gov/jlbc.htm

²¹ U.S. Constitution, Article VI, Clause 2: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

²² *Cooper v. Aaron*, 358 U.S. 1 (1958). See Hall, Kermit, "The Oxford Companion to the Supreme Court of the United States," Second Edition. Oxford University Press (2005). Also see Freyer, Tony, "Little Rock on Trial: Cooper v. Aaron and School Desegregation." Lawrence, KS, (2007).

²³ Kirk Johnson, "States' Rights Is Rallying Cry for Lawmakers," *New York Times*, March 16, 2010