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Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794

Michael C. Blumm,* Harrison C. Dunning** & Scott W. Reed***

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INTRODUCTION

In 1996 the state of Idaho, whose courts have been pioneers in the application of the public trust doctrine to water rights and state public land decisionmaking, exhibited the spirit by enacting a statute renouncing these applications of the public trust doctrine. In the waning moments of the fifty-third legislature, under pressure from powerful irrigation and timber lobbies, the Idaho legislature approved House Bill 794. This bill both eliminates public trust considerations from state land and water allocations and authorizes conveyances of submerged public lands, which, according to the statute, remain subject to the public trust.

This wholesale renunciation of public rights was justified by its proponents on the ground of eliminating the “confusion” allegedly caused by the public trust doctrine. The real reason for this attempt to virtually extirpate the public trust from Idaho law, however, was the antipathy with which the extractive industries view public appeals to the courts. Irrigators and timber companies object to the public trust doctrine because it gives the public a voice in public resource allocation by requiring decisions to reflect an accommodation between public values and private profit.

4. See infra note 24 and accompanying text.
5. The best example of the “accommodation principle” defining the public trust doctrine is the Mono Lake case, where the California Supreme Court rejected exclusive reliance on prior appropriation principles of temporal priority. Instead, the court laid the foundation for the state water board to undertake a study of the effects of diversions on trust resources and to reach an accommodation of both appropriative and trust uses of...
extractive industries fear that the public trust doctrine will lead to a loss of their influence in state resource allocation.

In states like Idaho, where extractive industries dominate state legislatures, these concerns can produce statutes, such as House Bill 794, that renounce public rights in favor of private interests. With the 1996 elections leaving Republicans and their extractive industry allies in control of seventeen of the twenty state legislative chambers in western states, House Bill 794 is not likely to remain merely a quirk of Idaho law. Further attempts to renounce the public trust doctrine may be on the western horizon.

This Article explains the evolution of House Bill 794 and its intended consequences. The Article argues that House Bill 794's effect should be considerably less significant than its drafters intended because it suffers from serious flaws. The statute impermissibly alienates public rights in violation of sovereign responsibilities, federal law, and the Idaho constitution. Since it is likely that House Bill 794 will be struck down or limited by one of the arguments advanced here, other states should not see this statute as a paradigm for eliminating public trust considerations from natural resource allocation decisions.

Part I of this Article briefly describes the public trust doctrine. Part II discusses the legislative background of House Bill 794, its attempted renunciation of the public trust doctrine, and explains why this statute represents poor natural resources policy. Part III suggests that the public rights the statute attempts to eliminate are in fact inalienable, sovereign rights. Part IV argues that a state cannot, consistent with federal law, renounce public trust rights to lands (and overlying waters) that were conveyed to the state by operation of law under the federal equal footing doctrine. Part V contends that because the public trust doctrine is implicit in the Idaho constitution's recognition of the public character of water in the state, House Bill 794 violates the state constitution. Finally, the Article concludes that western states should embrace, rather than eliminate, the public trust doctrine because it ensures that state resource allocation will be balanced, accommodating both public values and private rights.


6. For a discussion of state economic indicators concerning extractive industries, see infra notes 57-60 and accompanying text.

7. See Heather Abel, The Republicans Now Own the West, HIGH COUNTRY NEWS, Nov. 25, 1996, at 8 (noting that only New Mexico's two legislative chambers and the Nevada House are controlled by Democrats, and that "in the public land states, the Republican Party is generously supported by the resource-based industries"). This survey apparently excluded California, where Democrats control both legislative chambers.
THE PUBLIC TRUST DOCTRINE: AN INTRODUCTION

The most lucid recent judicial explanation of the public trust doctrine in American law is the California Supreme Court's Mono Lake decision in 1983, which considered the environmental harms caused by Los Angeles' water appropriations from tributaries of Mono Lake. The court held that Los Angeles' water rights could be reexamined in order to balance Los Angeles' right to appropriate water against the public's right to protect "the people's common heritage of streams, lakes, marshlands and tidelands." The court's ruling was innovative because it used traditional, deeply-rooted understandings about the public nature of navigable waters and related lands to limit equally well-established private water rights.

At the heart of the public trust doctrine lies the notion that certain natural resources are so important to community well-being that the public's interest in these resources warrants legal protection.

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10. Mono Lake, 658 P.2d at 724. Elsewhere the court notes that among the purposes of the public trust are "the scenic views of the lake and its shore, the purity of the air and the use of the lake for nesting and feeding by birds." Id. at 719. Although the court was divided over a jurisdictional point, with the dissenters concluding that the plaintiffs should seek relief from the State Water Resources Control Board before resorting to the courts, it was unanimous on the applicability of the public trust doctrine to the exercise of water rights.
11. Compare the Mono Lake court's examples of common heritage resources and public trust purposes, supra note 10 and accompanying text, with this celebrated statement in work sponsored by the Byzantine emperor Justinian I in the sixth century: "By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea." The Institutes of Justinian 2.1.1 (T. Cooper trans. & ed. 1841).

Although Roman law and English law, for example, Magna Charta, are most frequently referenced regarding the historical origins of the public trust doctrine, one prominent scholar has suggested that the tradition of the commons in medieval Europe is "the historical experience that most clearly reveals the proper sources for the legal public trust doctrine." Joseph L. Sax, Liberating the Public Trust Doctrine from Its Historical Shackles, 14 U.C. Davis L. Rev. 185, 189 (1980). Sax claimed that "[t]he central idea" of the public trust doctrine is "preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title." Id. at 188. In an earlier article, Sax argued that the public trust doctrine could serve as the basis for a general common law of environmental quality. See Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970). Since 1970, courts have done little to extend the public trust doctrine beyond the ambit of navigable waters (including, as in Mono Lake, non-navigable waters closely related to navigable ones) and related lands (tidelands, submerged lands, and, occasionally, dry sand beach areas). For citations to the extensive academic literature on the public trust doctrine, which largely supports a broader application of the concept, see James R. Rasband, The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines, 32 Land & Water L.
Courts in public trust doctrine cases often treat the significance of these "common heritage" natural resources as self-evident, in light of the vital role of navigable waters and related lands to commercial activity. But in modern times, commercial importance is only part of the underlying rationale for protecting navigable waters from excessive degradation to serve other needs; the environmental functions of navigable waters are equally important. Thus the Mono Lake court characterized the lake as "a scenic and ecological treasure of national significance . . . ."13

Recognizing the special community values of navigable waters has important consequences. In the water rights setting, one result is that, in the words of the Mono Lake court, "[b]efore state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust,"14 to attempt "so far as feasible, to avoid or minimize any harm to those interests."15 Moreover, Mono Lake demonstrates that the public trust doctrine may reach even farther: after the approval of diversions, water rights may be reexamined in an effort to reduce or eliminate adverse consequences to the public's interests.16 Where private rights in land are involved, the public trust doctrine may lead to imposing development controls pursuant to public easements on lands closely associated with navigable waters.17

Despite the public trust doctrine's potential power, courts generally have tried to accommodate it within our dominant private property rights regime. Although some courts have stated that lands under navigable waters are inalienable to private entities,18 more often

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12. In one tidelands case, the court identified preservation of lands in their natural state as a public trust purpose, "so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971). Traditional public trust purposes are navigation, commerce and fishing. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892); People v. California Fish Co., 138 P. 79, 82 (Cal. 1913). Although Justice O'Connor suggested that "the fundamental purpose of the public trust is to protect commerce," Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 488 (1988) (O'Connor, J., dissenting), the Court rejected that assertion. Id. at 476, n.5.
14. Id. at 712.
15. Id.
16. Id. at 732.
18. See, e.g., Home v. Richards, 8 Va. (4 Call) 441, 446 (1798) ("[T]he soil of navigable rivers cannot be granted").
courts have allowed alienation, subject to certain obligations toward
the public.\textsuperscript{19} Furthermore, land development in many water bodies
has occurred far beyond what a strict reading of the public trust doc-
trine might permit.\textsuperscript{20} Similarly, courts have accepted water develop-
ment that extensively impacts common heritage water resources.\textsuperscript{21} 
However, in modern public trust doctrine cases, courts typically re-
quire a balance between the uses that degrade common heritage navig-
gable waters and the uses that serve community needs, such as
navigation, fishing, and wildlife habitat.\textsuperscript{22}

\section*{II}

\textbf{THE ADOPTION AND EFFECT OF HOUSE BILL 794}

In 1996, the Idaho legislature passed House Bill 794 "to clarify
the application of the public trust doctrine in the state of Idaho and to
effectively declare the limits of this common law doctrine in accordance
with the authority recognized in each state to define the extent of the
common law."\textsuperscript{23} The legislative findings declared that the public trust
document "created confusion in the administration and management of
[state] waters and endowment lands," and claimed that other Idaho
laws sufficiently protected the public interest in state lands and wa-
ters.\textsuperscript{24} The legislative history also indicated that the bill's drafters
viewed the public trust doctrine as a recent development that

\begin{flushleft}
\textsuperscript{19} See, e.g., People v. California Fish Co., 138 P. 79 (Cal. 1913).
\textsuperscript{20} By 1966, for example, over 40\% of the San Francisco Bay, the largest estuary on
the West Coast, had been filled. \textit{San Francisco Bay Conservation and Dev. Comm'n, San Francisco Bay Plan Supplement} 11 (1966). Much of the fill has allowed development for residential, business and other purposes unrelated to navigation, commerce, fishing, and other public trust uses.
\textsuperscript{21} The Mono Lake court noted that,
\begin{quote}
The prosperity and habitability of much of this state requires [sic] the diversion of
great quantities of water from its streams for purposes unconnected to any navi-
gation, commerce, fishing, recreation or ecological use relating to the source
stream. The state must have the power to grant nonvested usufructuary rights to
appropriate water even if diversions harm public trust uses.
\end{quote}
\textit{Mono Lake}, 658 P.2d at 712.
\textsuperscript{22} On the accommodation eventually reached with regard to Los Angeles' water
\textsuperscript{24} \textit{Id.} §§ 58-1201(4) and (5).
\end{flushleft}
threatened the state’s economy. In spite of these criticisms of the public trust doctrine, the legislature cited no other laws that protect the public interest, and, as this paper argues, the legislature had no basis for its other assumptions. In fact, House Bill 794 strongly resembles nineteenth-century state laws authorizing wholesale grants of vital public resources to private interests.

A. Background of House Bill 794

Idaho House Bill 794 was the result of a conservative legislature’s concern with protecting private water rights in a court system that recognized public water rights. This conflict between Idaho’s courts and legislature is a recent one, for in the 1970s, they worked together to develop environmentally progressive laws. Throughout the 1970s, the Idaho legislature adopted several such laws: a mandatory local land use act that required planning and zoning in every city and county.

25. Senator Laird Noh, Chairman of the Resources and Environment Committee, after House Bill 794 passed by 27 to 8 vote, had the following placed in the pages of the Senate Journal:

The purpose of H794, as amended in the Senate, is to define the scope of the public trust doctrine. This doctrine governs the state of Idaho’s ownership and authority to alienate or encumber beds and banks of navigable waterways lying below the ordinary high water mark. The doctrine was described by the Idaho Supreme Court in Kootenai Environmental Alliance v. Panhandle Yacht Club, 105 Idaho 633, 671 P.2d 1085 (1983) and Idaho Forest Industries v. Hayden Lake Watershed Improvement District, 112 Idaho 512, 733 P.2d 733 (1987). It is the Legislature’s intent that nothing in this H794, as amended in the Senate shall be construed as repealing, limiting, or otherwise altering any statutory or constitutional provision, including but not limited to: Title 42, Idaho Code, concerning the appropriation, transfer and use of the waters of Idaho, Title 36, Idaho Code, concerning the appropriation of waters in trust by the state of Idaho. In addition, nothing in H794, as amended in the Senate, is intended to alter the right of public use of navigable waters for boating, swimming, fishing, hunting, and all recreational purposes recognized in Idaho Code, Section 36-1601. The Legislature reaffirms the board of land commissioners’ authority to approve, modify or reject all activities involving the use of occupancy of beds and banks of navigable waters lying below the ordinary high water mark in accordance with the public trust doctrine. Rights for the use of occupancy of beds and banks of navigable waterways lying below the ordinary high water mark remain impressed with the public trust.

26. See infra note 214 (erroneous assumption that the public trust doctrine is a recent development in Idaho); notes 150-151, 163, 189, 195-198 and accompanying text (erroneous assumption that Shively v. Bowlby authorized state abdication of the trust); Parts IV and V (erroneous assumption that the doctrine is exclusively a creation of state common law).

27. IDAHO CODE §§ 67-6501 to -6538.
minimum streamflow legislation, public interest criteria for applications for new water rights, and statutory recognition of aesthetic beauty and water quality as beneficial uses of water.

These legislative efforts were reinforced and supported by Idaho courts. For example, in the Malad Canyon case, the Idaho Supreme Court upheld a statute that appropriated minimum flows for state park purposes. The Idaho Water Users Association had attacked the statute, arguing that a valid appropriation required water to be physically diverted from the stream. The Association also argued that preserving aesthetic values and public recreational opportunities was not a beneficial use of water under the Idaho constitution. According to the Association, the constitution's mention of domestic, agriculture, mining, manufacturing, and power as beneficial uses was an exhaustive list of beneficial water uses. The court rejected these arguments, ruling that the constitution did not demand a physical diversion as part of a water right, and that the legislature could expand the permissible beneficial uses beyond those listed in the constitution.

Malad Canyon signalled the beginning of modern Idaho water law. The concurring opinion of Justice Bakes, generally regarded as the guiding law of the case, emphasized that the legal rights of the public to non-traditional uses of water could expand to accommodate changing times:

[T]he changing needs of our society are generating new uses for water which are neither domestic, agricultural, mining nor manufacturing. As an example, many privately owned public swimming pools or health facilities have applied for and received licenses to drill their own wells to supply their water needs. . . . Such uses . . . are no doubt beneficial from a societal point of view in that they contribute to the general welfare of the citizenry; and unless a valid water right could be obtained for such a use, not only would society suffer by the loss of such uses, but a great deal of capital which has been invested in reliance upon the validity of a right to such a use for water would be in jeopardy.

That same year, in Southern Idaho Fish and Game Association v. Picabo Livestock, Justice Bakes wrote an opinion for a unanimous Idaho Supreme Court upholding the public's right to access creeks for "boating, swimming, hunting and all recreational purposes."

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28. Id. § 42-1501.
29. Id. § 42-203A(5)(e).
30. Id. § 42-1501.
31. Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924 (Idaho 1974).
32. Id. at 926-29 (also upholding the authority of a state agency to appropriate water).
33. Id. at 931.
34. 528 P.2d 1255 (Idaho 1974).
35. Id. at 1297. Silver Creek is a blue ribbon trout stream in the Wood River drainage in Sun Valley. In 1975 the Nature Conservancy began acquiring riparian land in what it
Livestock involved a rancher’s efforts to fence off Silver Creek, a renowned fly-fishing stream. The Supreme Court found that Silver Creek was a navigable waterway to which the public had rights of access because the creek was used for recreational purposes. The court also determined that, under the Idaho constitution, the water in Silver Creek belonged to the public. As a result, in any Idaho stream suitable for recreation, the public possesses an easement to use the overlying water and underlying beds, including portage rights on the adjacent uplands.

Even though Picabo Livestock did not explicitly apply the public trust doctrine, it resoundingly affirmed the public’s right to use water in Idaho’s streams and lakes. The Idaho Supreme Court endorsed the modern test of navigability, “the suitability of a public water for public use,” and clearly held that the public’s right of access extended to both the water in the waterbody and the underlying lands. Picabo Livestock can be viewed as a logical antecedent to the Idaho Supreme Court’s explicit endorsement of the public trust doctrine in 1983 in Kootenai Environmental Alliance v. Panhandle Yacht Club, where the court found that “the public trust doctrine takes precedent [sic] even over vested water rights.” Malad Canyon, Picabo Livestock and Kootenai Environmental Alliance demonstrate how the Idaho Supreme Courts’ recognition of public rights in water comported with Idaho legislative efforts to make new water rights subject to public interest criteria.

This common judicial and legislative understanding of public interest in water rights began to change in the 1980s, when Idaho’s legislature and its courts started moving in different directions. Not only did the legislature enact no new conservation initiatives, it passed bills to repeal or modify environmental protection statutes. Ultimately, named the Silver Creek Preserve, and in 1995, there were more than 12,000 visitors to the preserve. The Nature Conservancy of Idaho, Idaho Field Notes (Summer/Fall 1996), at 12.

36. See Picabo Livestock, 528 P.2d at 1297-98.
37. Id. at 1297 (interpreting Idaho Const. art. XV, § 1). See infra notes 223-224 and accompanying text.
38. See Picabo Livestock, 528 P.2d at 1297-98.
39. Id. at 1298.
41. 671 P.2d at 1094 (Idaho 1983). Justice Huntley, who wrote the court’s opinion, followed the development of the public trust doctrine under the caption of “The California Approach,” and cited National Audubon Soc’y v. Superior Court (Alpine County), 658 P.2d 709 (Cal. 1983), as providing “a comprehensive statement of the current status of the public trust doctrine.” 671 P.2d at 1093. The Kootenai court ruling recognized that the trust doctrine authorized the state to revoke issuance of a dock lease in the future. Id. at 1094.
Governor Cecil Andrus vetoed most of these initiatives. With the election of a Republican governor in 1994, the veto as the environmental weapon of last resort vanished, and the Republican-dominated legislature became actively anti-environmental. In 1994, there were only eight Democrats in the thirty-five-member Senate, and just thirteen Democrats in the seventy-member House; no more than half of these consistently supported conservation measures. A handful of Republicans occasionally voiced some concern for the environment, but they were overwhelmed by colleagues supporting anti-environmental interests.

Meanwhile, Idaho courts continued to recognize public water rights. Two 1995 Idaho Supreme Court decisions affirmed the public trust doctrine, *Idaho Conservation League, Inc. v. State,* and *Selkirk-Priest Basin Association, Inc. v. State.* In 1995, *Idaho Conservation League* revisited the issue of public trust precedence over vested water rights announced in *Kootenai Environmental Alliance,* in the context of the decades-long Snake River Basin Adjudication (SRBA). In the first (unpublished) opinion in the case, Chief Justice McDevitt concluded that there had been no adoption of the application of the public trust doctrine to water rights in *Kootenai Environmental Alliance* because two Justices had concurred only in the result, and a third had written separately. On rehearing, however, the Idaho Supreme Court clarified that "proprietary rights to use water . . . are held subject to the public trust." The court went on to rule, however, that the SRBA court lacked jurisdiction over public trust claims because it was limited to determining only the relative priority of water right claimants, and had no authority to alienate state interests in water.

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42. For example, in 1988, Governor Andrus vetoed House Bill 476, which would have revoked the special protection from appropriations given to major lakes in North Idaho in the 1920s. That same year, the governor also vetoed the industry sponsored House Bill 652, which would have weakened the anti-degradation standards for water quality. **Legislative Data Center, Daily Data, Final Edition, Forty-Ninth Idaho Legislature (1988).**

43. In 1994, two of the six bills highlighted by the Idaho Conservation League in evaluating the legislative voting record were House Bill 912, which would have given bidding preference to ranchers in state leased lands, and House Bill 845, which would have allowed surface mining to override local government regulation. Governor Andrus vetoed both. The grazing bill and the surface mining bill were again passed in 1995 and became law with Governor Batt's signature. **Idaho Code §§ 58-310B, 47-1505(6).**


45. 911 P.2d 748 (Idaho 1995).

46. 899 P.2d 949 (Idaho 1995).

47. Idaho Supreme Court Docket No. 21144 5, n.2 (unpublished opinion of July 8, 1994).

48. 911 P.2d at 750.

49. *Id.* at 749-50.
At about the same time, environmental groups challenged a State Land Board timber sale on school endowment trust lands owned by the state. In *Selkirk-Priest Basin Association, Inc. v. State,*\(^5^0\) environmentalists alleged a violation of the public trust doctrine, claiming that the timber sale would produce erosion that would damage Trapper Creek.\(^5^1\) The trial court found that Trapper Creek was not a navigable water under the federal test for navigability.\(^5^2\) Therefore, the public trust doctrine was inapplicable, and the environmentalists lacked standing to challenge the Land Board's decision. The Idaho Supreme Court reversed, ruling that the proper test for navigability for public trust claims was the test announced in *Picabo Livestock.*\(^5^3\) Under *Picabo Livestock*, navigable waterways included streams capable of being navigated by small recreational boats.\(^5^4\) The *Selkirk-Priest Basin Association* court concluded that an affidavit from a professional hydrologist created a material issue of fact as to the navigability of Trapper Creek, so the environmentalists had standing to make a claim "under the public trust doctrine only as it relates to public resources below the natural high water mark of Trapper Creek."\(^5^5\)

*Idaho Conservation League* and *Selkirk-Priest Basin Association* attracted the ire of conservatives and the extractive industries. The Idaho Water Users Association was sufficiently alarmed by the court's reaffirmation of the public trust doctrine in water rights that it began lobbying the legislature to reverse *Idaho Conservation League,*\(^5^6\) even the *Idaho Conservation League* court refused to integrate the public trust doctrine into the state water adjudication process. Moreover, in the fourteen years since *Kootenai Environmental Alliance,* no water right was challenged under the public trust doctrine, and no irrigator lost a drop of water. Despite the limited effect of the public trust doctrine on private water rights, lobbyists from the Idaho Water Users Association and the Intermountain Forest Industry Association

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51.  Id. at 950.
52.  See id. at 952-53. The federal test for determining navigability for title purposes is whether a stream could be used as a commercial highway at the time of statehood in its natural and ordinary condition. See 4 WATERS AND WATER RIGHTS § 30.01(d)(3) (Robert E. Beck ed., 1996).
53.  See supra notes 34-39 and accompanying text.
54.  899 P.2d at 953 (quoting Idaho Forest Indus. v. Hayden Lake Watershed Improvement Dist., 733 P.2d 733, 739 (Idaho 1987)).
55.  Id. 955 (Idaho).
drafted and promoted House Bill 794\textsuperscript{57} to restrict the application of the public trust doctrine.

House Bill 794 was the legislature's response to judicial public trust declarations in cases like \textit{Picabo Livestock}, \textit{Idaho Conservation League}, and \textit{Selkirk-Priest Basin Association}.\textsuperscript{58} The bill resulted from the total domination of the legislature by extractive industry lobbyists. In the 1995 session, these lobbyists succeeded in passing into law bills that the governor had previously vetoed.\textsuperscript{59} Water users regarded the public trust doctrine as a latent threat, while the timber and grazing lobbies feared that the doctrine might be applied to state public lands. These interests combined to create House Bill 794, which the Idaho Conservation League aptly termed the "Public Trust Elimination" Bill.\textsuperscript{60}

The process used to enact House Bill 794 violated the fundamental principles of the public trust doctrine, as described by the \textit{Kootenai Environmental Alliance} court: "[p]ublic trust resources may only be alienated or impaired through open and visible actions, where the public is in fact informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made thereon."\textsuperscript{61} In contrast to the "open and visible" action called for by the \textit{Kootenai} court, House Bill 794 was introduced as late as possible in the session.\textsuperscript{62} \textit{Pro forma} hearings before the two committees were followed by very limited floor debate.\textsuperscript{63} Governor Batt, in

\begin{itemize}
  \item \textsuperscript{57} Idaho Code §§ 58-1201 to -1203 (1996).
  \item \textsuperscript{59} \textit{See supra} note 43.
  \item \textsuperscript{60} Idaho Conservation League, \textit{Oppose HB 794—The "Public Trust Elimination Bill" Bill} (press release), March 1996.
  \item \textsuperscript{61} 671 P.2d 1085, 1091 (Idaho 1983). In \textit{Kootenai}, environmentalists challenged the Lake Protection Act, claiming that it violated the public trust doctrine. However, the court rejected the challenge because the statute sufficiently paralleled the public trust criteria, in that the permit process was open and visible, informed the public, and allowed an opportunity for comments. \textit{Id}. Moreover, the portion of the lake occupied by the proposed docks was small in relation to the remaining lake, and the permit did not pass title to the developer, which allowed for future review under the public trust doctrine. \textit{Id}. at 1092-95. If House Bill 794 is valid, there is no public protection for recreational water uses if a subsequent legislature repeals the Lake Protection Act.
  \item \textsuperscript{62} The draft bill that became House Bill 794 was delivered by Lynn Tominaga for the Idaho Water Users to the House Appropriations Committee in late February, the last day that committee could report out new bills and after the deadline for any other committee to print bills. It was passed by both the House and Senate within two weeks. Letter from Laird Lucas, \textit{supra} note 56.
  \item \textsuperscript{63} \textit{See Letter from Laird Lucas, supra} note 56.
\end{itemize}
his letter responding to those who urged him to veto the bill, recognized the lack of openness:

There has been significant criticism over the process by which this bill was passed. I agree with this criticism. Important matters such as this should be brought forth early in the legislative session, and should have a more complete discussion. However, that was not the question before me. I was given a bill that addressed an important question, and that was passed through both houses of legislature with significant support. The process alone was not a sufficient reason for me to veto the bill.64

B. House Bill 794’s Modification of the Idaho Public Trust Doctrine

1. Restricting Public Trust Consideration to Alienation of Navigable Bedlands

House Bill 794 was intended to limit the focus of the public trust doctrine’s application. As opposed to applying the public trust to waterways capable of being navigated by small recreational boats,65 the central provision of the statute stated that Idaho’s public trust doctrine “is solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters . . . ”66 In addition, House Bill 794 prohibited applying the public trust doctrine to the management or disposition of state trust lands;67 to “[t]he appropriation or use of water, or the granting, transfer, administration or adjudication of water or water rights . . . ;”68 and to “the protection or exercise of private property rights . . . .”69

2. Reducing Public Trust Protections for Navigable Bedlands

Under House Bill 794, the public trust doctrine still ostensibly protects the beds of navigable waters, but the new law restricts the application of the public trust to those bedlands in several ways. First, it increases the number of permissible reasons to alienate public trust lands. Second, by adopting a narrower test for navigability, the law shrinks the protected class of lands. Finally, since the new navigability standard will be more difficult to apply, it renders public trust litigation more difficult and expensive.

64. Letter from Governor Philip E. Batt to Scott W. Reed (Mar. 28, 1996) (on file with the Ecology Law Quarterly).
65. See supra note 54.
66. Idaho Code § 58-1203(1).
67. Id. § 58-1203(2)(a).
68. Id. § 58-1203(2)(b).
69. Id. § 58-1203(2)(c).
House Bill 794 also broadens the permissible reasons for alienating public trust land. Traditionally, the public trust doctrine allowed alienation of navigable bedlands only if it benefitted navigation, fisheries, and water-associated commerce, or if the grantee was a public body making recreational use of the property for the benefit of the public at large. House Bill 794, however, authorizes the State Land Board to encumber or alienate title to the beds of navigable waters for “agriculture, mining, forestry or other uses,” provided the grant is “made in accordance with the statutes and constitution of the state of Idaho.” Therefore, unless the public trust doctrine is part of Idaho law or the state constitution, this provision modifies the public trust doctrine and is inconsistent with the statute’s assertion that the public trust doctrine continues to apply to “alienation or encumbrance” of the beds of navigable waters. Although this point is disputable, for purposes of this analysis, this Article assumes that the statute’s effect is to eliminate restraints on alienation of the beds of navigable waters that are not imposed by Idaho’s statutes or constitution.

These changes allow the State Land Board to alienate more easily navigable riverbeds. Even if the Land Board does not undertake large-scale sales of public land, this broader alienation power could have a significant adverse impact. For example, Idaho’s stream protection law requires a permit before any alteration can be made to streambeds or streambanks. Under House Bill 794, the State Land Board can bypass this requirement by granting riparian owners easements to streambanks or beds. Similarly, the board can circumvent

71. See, e.g., State v. Public Serv. Comm’n, 81 N.W. 2d 71 (Wis. 1957).
72. IDAHO CODE § 58-1203(3)(1996). The inclusion of agriculture, mining, and forestry as public trust uses was no accident, as these are the most powerful lobbying forces in the Idaho legislature today. Their influence is totally disproportionate to their economic clout, however. For example, in 1995 mining provided only 2,725 jobs out of a total of 476,422 in non-farm employment in Idaho, or one half of one percent. IDAHO DIV. OF Fin. MANAGEMENT, IDAHO ECONOMIC FORECAST 51, 53 (Oct. 1995). Mining was included even though the mining industry has no foreseeable need for any public trust lands; no lakebeds have ever been mined in Idaho, and placer and dredge mining of river beds no longer occurs.
73. IDAHO CODE § 58-1203(1).
75. IDAHO CODE § 42-3803.
76. IDAHO CODE § 58-1203.
public trust considerations for a proposed dam by granting the builders title to the streambed, since a dam is arguably an "other use" under the statute. 77

House Bill 794 also attempted to scale back public trust protections of navigable bedlands by adopting a narrower definition of navigability that removes streambeds from public trust protection. Before House Bill 794, the Idaho navigability test considered whether the waters were currently suitable for "public use," a term that encompassed fishing and recreation. 78 House Bill 794 limited navigability to "waters that were susceptible to being used in their ordinary condition, as highways for commerce on the date of statehood, under the federal test of navigability." 79 This would exclude from public trust protection those waterways that are accessible for recreational purposes, but too small for commercial traffic. By limiting the navigability test to waters considered navigable under the federal test, House Bill 794 sought to abolish the public interest in recreation from public resources.

The federal navigability test is also likely to make public trust litigation more inefficient and expensive. Navigability was relatively easy to ascertain under the old test of current actual public use; in Picabo Livestock 80 and Montana Coalition for Stream Access, Inc. v. Curran, 81 the recreational plaintiffs needed to show only contemporary use for floating and fishing. Determining the condition of rivers at statehood, as required by the federal test, is far more difficult. For example, in Idaho Forest Industries v. Hayden Lake Watershed Improvement District, 82 after remand to the trial court, the State of Idaho and Idaho Forest Industries each spent a week of trial presenting conflicting testimony of experts as to where the natural and ordinary high water mark was on July 3, 1890, the date of statehood. The total cost

77. Id.
78. This navigability test was adopted in Southern Idaho Fish and Game Ass'n v. Picabo Livestock, 528 P.2d 1255 (Idaho 1974). See supra notes 34-39 and accompanying text. Although the words "public trust doctrine" were not used, the Picabo Livestock decision employed the modern public trust criteria of fishing, boating, wildlife, and recreation. 528 P.2d at 1297. Other states have adopted this "modern" approach to navigability as well. See, e.g., Montana Coalition for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984) ("[T]here is a tendency in adjudicated cases from other jurisdictions to abandon the tool of defining 'navigability' and simply directing the inquiry to whether the water is susceptible to public use") 682 P.2d at 169-170 (citing ALBERT W. STONE, MONTANA WATER LAW FOR THE 1980s (1981)).
79. IDAHO CODE § 58-1202(3). The Idaho legislature has consistently resisted any imposition of federal standards or guidelines. But just as with crop subsidies, below-cost timber sales, and forest roads, political leaders have been known to blink when "federal" means favorable.
80. 528 P.2d 1255, 1297 (Idaho 1974).
82. 733 P.2d 733 (Idaho 1987).
to the parties certainly exceeded $100,000. As of this writing, six years later, the trial judge has yet to make a decision, due in part to the complexity of the issue and also to an overload of cases involving more pressing issues than which waterbodies were navigable one hundred years ago. For smaller waterbodies, such as streams, rivers or smaller lakes, where the competing parties are not as well financed, the determination of the natural and ordinary high water mark in 1890 may never be made. Tying the public trust to the condition of waterways over a century ago will have the effect of making the public trust doctrine virtually unusable in contemporary environmental litigation.

C. Renouncing the Public Trust in Idaho as a Subversion of the Public Interest

The resources protected by the public trust doctrine are extremely valuable. Idaho has, in recent years, experienced an increase in instream uses of water resources. River running in Idaho has grown from adventure sought by a few highly skilled athletes to a multimillion dollar recreational business with licensed operators on at least ten major rivers in the state. A cross-section of recreational users in Idaho would closely resemble those in other Northwest states, such as Montana, Oregon, and Washington, which have given increasing recognition to protection of public trust resources.

Indeed, Idaho is quite similar to other western states, where employment in extractive industries, like logging, mining, and agricul-

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83. Scott Reed, one of the co-authors, was an attorney for Idaho Forest Industries (IFI) in the case. This cost estimate assumes that the deputy attorneys general would be entitled to hourly fees comparable to those earned by the IFI attorneys.
84. See Bakes & Semanko, supra note 58, at 11 (quoting former Justice Bakes as stating that "House Bill 794 should reduce substantially the potential for environmental contests of state water appropriations and water rights under the public trust doctrine.").
85. The legendary Walt Blackadar, a physician in the town of Salmon, led the first rafting party to run the Middle Fork of the Salmon River. Ron Waters, Never Turn Back 31 (1994). He brought the first whitewater kayak into Idaho in 1969. Id. at 55. By 1978, the year Blackadar drowned on the Payette River, kayaking was a popular and growing sport. Id. at 241-53.
86. See Stuart R. Leidner & Ed Krumpe, Idaho Outfitters and Guides Economic Contribution to the Idaho Economy vi, viii (University of Idaho Dep't of Resource, Recreation and Tourism, Dec. 1995). The Department of Resource, Recreation and Tourism estimates the total revenue from boating on rivers estimated at $10,940,835 and that revenue from outfitted boating rose from $20,000 in 1970 to $150,000 in 1993. Id.
ture, has declined\textsuperscript{88} while employment in non-extractive uses of public lands and waters protected by the public trust doctrine\textsuperscript{89} has expanded rapidly. As an example, tourism has become a greater revenue generator in many parts of Idaho than agriculture or logging.\textsuperscript{90}

Even opponents of the public trust doctrine in Idaho recognize its importance in protecting these economically vital instream uses, as reflected in the recent controversy over the proposed Auger Falls Dam. In an ironic turn of events, while the Idaho legislature was attacking the public trust doctrine, the very conservative State Land Board—which included the newly elected Governor, Attorney General, and Superintendent of Education, all of whom were Republican—invoked the public trust doctrine to deny a developer's application to construct a hydroelectric dam at Auger Falls, one of the only remaining free-flowing stretches of the Snake River. The developer secured the necessary federal and state permits and licenses, but still required an easement from the state to use the riverbed. The board, however, decided to place recreation above development.\textsuperscript{91} In an echo of Justice Bakes' opinion in \textit{Malad Canyon},\textsuperscript{92} the Republican Commissioner of Jerome County stated that what would have been approved twenty years ago was no longer acceptable because of changing public perceptions toward the beneficial uses of water.

\textsuperscript{88} A report by thirty regional academic economists concluded that the four Northwest states are outperforming the rest of the United States in revenue, employment, and population growth. \textit{Economic Well-Being and Environmental Protection in the Pacific Northwest} (T.M. Power ed., 1995). The report termed the natural environment as the most important driving force: "The highest-value use of a forest, river or other resource will be to protect and enhance it because this will strengthen one set of forces that is creating new jobs and higher incomes." \textit{Id.} at 10. Although the timber industry in the Pacific Northwest laid off 36,000 workers during the first part of the 1980s and cut wages for those who remained employed, overall income and employment increased, particularly in Idaho, up 27.7\% between 1988 and 1994. \textit{Id.} at 3.

\textsuperscript{89} See Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1095 (Idaho 1983) (including within public trust protection recreational boating, fish, aquatic habitat, and wildlife and aesthetic beauty).

\textsuperscript{90} For example, in 1993, lumber and wood products produced only 5\% of total personal income in Idaho counties of the interior Columbia River Basin. \textit{Ray Basker, A New Home on the Range: Economic Realities in the Columbia River Basin} 44. Mining comprised just 1\%. Total farm and agricultural services constituted 7\%, down from 12\% in 1969. \textit{Id.} at 44. While income derived from resources extraction remained flat, personal income from the rest of the Idaho economy increased from \$8.85 billion to \$19.35 billion between 1969 and 1993. \textit{Id.} At the micro-level, looking at Lemhi County, where the town of Salmon is the starting point for recreation on the Salmon River, mining and timber income decreased sharply between 1980 and 1993, but the population nevertheless increased. \textit{Id.} at 20. Income from consumer, business, health, and engineering grew 29\%, while health services income increased 86\%. \textit{Id.} In less than fifteen years, the town of Salmon's economy was transformed from one based on resource extraction to one based on tourism. \textit{Id.}


\textsuperscript{92} See supra note 33 and accompanying text.
Of course, application of the public trust doctrine to state land and water use allocation does not mean that environmental considerations will invariably trump economic concerns. As the California Supreme Court observed in the Mono Lake case, the doctrine requires the state to exercise continuous supervisory control over trust resources, to take trust uses into account in planning and allocation decisions, and to preserve trust uses whenever feasible.3 But the Mono Lake court made clear that the state may authorize economic uses despite unavoidable harm to trust values, because accommodation of both economic concerns and environmental values is at the core of the public trust doctrine.4

Because the drafters of House Bill 794 were threatened by this accommodation between economics and environmental considerations, they sought to eliminate public trust considerations from land and water decisionmaking. If effective, House Bill 794 would enable state administrators to maximize commodity production while ignoring ecological concerns; the state’s waters could be completely drained for irrigation, the state’s forests clearcut without regard for watershed damage. This kind of unbalanced decisionmaking is not in Idaho’s long-term interest, and, as argued in the following parts, should be judicially invalidated.

III
THE INVALIDITY OF LEGISLATIVE ABOLITION OF SOVEREIGN RIGHTS

A critical assumption of the Idaho legislature in enacting House Bill 794 was that the public trust doctrine is a principle of state common law, subject to legislative modification or abrogation. The findings of the statute refer explicitly to “the common law doctrine known as the public trust doctrine.”5 But if the roots of the doctrine lie elsewhere—in sovereign rights, the federal Constitution, the Idaho Statehood Act, or the state’s constitution—the legislature’s attempt to limit the effect of the public trust may be ineffective. This Part examines constraints on the legislative power to abolish sovereign rights.

94. Mono Lake, 658 P.2d at 727-28; see Blumm & Schwartz, supra note 22, at 736.
95. House Bill 794 (codified at IDAHO CODE § 58-1201(4)(1996)). Although the Idaho Supreme Court has stated that the public trust doctrine is “based upon common law equitable principles,” Idaho Forest Indus. v. Hayden Lake Watershed Improvement Dist., 733 P.2d 733, 738 (Idaho 1987), it has also observed that the public trust doctrine “preserves inviolate” the public’s use of public trust lands. Id. at 737. This observation implies that the public trust doctrine is not conventional common law, for public use is hardly “inviolate” if it can be eliminated at will by the legislature.
Careful examination of leading public trust doctrine cases reveals that the public trust is the fiduciary aspect of fundamental public rights in navigable waters and the lands beneath them. To preserve public prerogatives concerning these special natural resources, the courts have developed constraints on privatization. These constraints limit legislative freedom to alienate sovereign resources to private persons or to unduly limit or abolish the public trust doctrine itself. As one court recently observed, "[t]he very purpose of the public trust doctrine is to police the legislature's disposition of public lands," and it may be added, public waters.

A. Sovereign Rights: Foundation of the Public Trust Doctrine

The historic public trust doctrine cannot be properly understood without an understanding of sovereign rights in natural resources. The 1842 U.S. Supreme Court decision of Martin v. Waddell\textsuperscript{97} provides an early authoritative explanation of these rights. Martin was an ejectment action to recover one hundred acres of the submerged bed of Raritan Bay in New Jersey, land valuable for growing oysters. The plaintiff based his claim on a chain of title going back to colonial charters, or letters patent, issued in 1664 and 1674 by Charles II, the King of England, to his brother, the Duke of York. Those letters patent granted governmental and proprietary rights to all of what later became New Jersey. The Court ruled against the plaintiff, holding that the letters patent did not convey a private right to fish in the bay.

In the course of analyzing what rights were conveyed by the letters patent at issue in Martin, the Court noted that since the Magna Charta,\textsuperscript{98} the English crown had lacked the power "to grant to a subject a portion of the soil covered by the navigable waters of the kingdom, so as to give him an immediate and exclusive right of fishery, either for shell-fish or floating fish within the limits of his grant."\textsuperscript{99} The basis for this limitation on the power of the crown was that in England, navigable waters and the lands beneath them were "held as a public trust for the benefit of the whole community . . . ."\textsuperscript{100} As trust resources, their public benefits were inalienable in principle.

While English law has limited relevance for evaluating Idaho's public trust doctrine statute, American courts have used it to interpret

\textsuperscript{97} 41 U.S. (16 Pet.) 367 (1842). Martin adopted much of its reasoning from Arnold v. Mundy, 6 N.J.L., which like Martin, involved an oyster controversy in Raritan Bay.
\textsuperscript{98} 17 John (Magna Charta) 1215. This Great Charter, which evolved from 1215 to 1225, "came to be a symbol of successful opposition to the Crown" by English barons. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 25 (5th ed. 1956).
\textsuperscript{100} Id. at 413.
sovereign rights. In Martin, Chief Justice Roger Taney used this approach to explain sovereign rights in American law. "When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use . . . ." Some of the reasons for Taney's statement were provided by his comment:

[F]or the men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shellfish from its bottom, or fasten a stake, or even bathe in its waters, without becoming a trespasser upon the rights of another.

Shortly after Martin, the Court affirmed that sovereign rights of the people to navigable waters and the lands beneath them exist in all the states; they were not an historic peculiarity found only in the states formed from the thirteen original colonies. In the 1845 case of Pollard's Lessee v. Hagan, described by one justice as "the most important controversy ever brought" before the Court, the Court held that land under navigable waters when Alabama became a state could not subsequently be granted by the United States. The Court explained that upon admission to the Union, by operation of law, Alabama obtained title to the land in question on behalf of its people. To conclude otherwise would deny Alabama the "equal footing" within the Union recognized for the thirteen colonies that formed the nation. According to the Pollard Court, the state must hold title to its submerged lands; otherwise, the Federal Government would have "a weapon that might be wielded greatly to the injury of state sovereignty . . . ."
Thus, long before Idaho became a state in 1890, the U.S. Supreme Court clearly stated that navigable waters and the lands beneath them throughout the country were subject to sovereign rights. And just two years after Idaho's admission, the Supreme Court decision of *Illinois Central Railroad Company v. Illinois* demonstrated how the fiduciary aspect of state sovereign ownership constrained the alienability of public trust resources.

**B. The Teaching of Illinois Central**

*Illinois Central* was a challenge to the Illinois legislature's uncompensated revocation of an earlier grant of a thousand acres of Chicago's outer harbor to the Illinois Central Railroad Company. The Supreme Court rebuffed the challenge on the ground that the beds of navigable waters, held "by the people in trust for their common use and of common right as an incident of their sovereignty," cannot be subject to an "irrepealable" contract. The Court emphasized that a legislature has only limited power to convey sovereign assets, and that to sustain the company's position "would place every harbour in the country at the mercy of a majority of the legislature of the State in which the harbour is situated."

Although other courts have taken the position that navigable waters and the lands beneath them are entirely inalienable to private persons, that was not the Court's view in *Illinois Central*. In fact, the Court explicitly stated that sovereign natural resources can be conveyed into private hands free of public trust obligations in two circumstances: either to further navigation-related improvements, or

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108. 146 U.S. 387 (1892).
109. *Id.* at 459-60.
110. *Id.* at 460.
111. *Id.* at 455.
112. See, e.g., *Home v. Richards*, 8 Va. (4 Call) 441, 446 (1798); *Arnold v. Mundy*, 6 N.J.L. 1, 78 (1821).
113. Instead, the Court there objected to wholesale alienation: "[A]bdication of the general control of the State over lands under navigable waters of an entire harbor or bay... is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public.") *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452-53 (1892). The Court stated that a grant "of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power." *Id.* at 453. Whether the grant in *Illinois Central* was void or revokable was not entirely clear, as the Illinois legislature revoked the grant four years after authorizing it. Justice Field equivocated on the issue. *Id.* at 453, 460. The Illinois Supreme Court later interpreted *Illinois Central* to have concluded that the grant was void. *People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773, 779 (Ill. 1976).
where there is no substantial impairment of the public interest in the remaining lands and waters.\textsuperscript{114} But neither of those criteria justified the wholesale disposition of the sovereign natural resources at issue in \textit{Illinois Central}. Conveying Chicago’s entire outer harbor to a railroad company was an abdication of sovereign rights, and the Court concluded that the legislature could revoke the grant without compensation.

By the time the Court decided \textit{Illinois Central}, the state legislature already had revoked its ill-advised grant of sovereign natural resources, so when the Court supported that revocation, there was no clash of objectives between the legislative and judicial branches of government. The important substantive question was whether the railroad company had acquired property rights in the outer harbor lands that would require compensation if extinguished.\textsuperscript{115} In most other sovereign natural resource alienation cases, however, there has been no legislative or administrative revocation. In these situations, courts must decide whether to declare a legislative grant invalid or, less drastically, to determine that the grantee holds title subject to public trust obligations.

\textit{Illinois Central} indicated that invalidity may be appropriate in extreme cases; for example, the Court noted that a state grant “of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power . . . .”\textsuperscript{116} In more recent litigation in Illinois, both state and federal courts have declared legislative grants of sovereign lands invalid, and they have done so in circumstances far less dramatic than the thousand-acre harbor grant of \textit{Illinois Central}. For instance, a state court invalidated a grant of nearly 200 acres for expansion of a steel mill,\textsuperscript{117} while a federal court subsequently invalidated a grant of only 18.5 acres for expansion of a private university.\textsuperscript{118} And in Arizona, an intermediate appellate court invalidated a legislative “quitclaim” purporting to relinquish public rights to many of the state’s streambeds.\textsuperscript{119}

\textit{Illinois Central} remains our best guide to the reason for this special treatment of sovereign resources. The Court there noted that

\begin{itemize}
  \item \textsuperscript{114} 146 U.S. at 452.
  \item \textsuperscript{115} The Lake Front Act required the railroad company to pay $800,000 to the City of Chicago, grantee under an early version of the bill. \textit{Id.} at 407. Interestingly, when the railroad tendered the first installment of $200,000, the city council refused to accept it. The city comptroller kept the money in an individual account and returned it to the company in 1873. \textit{Id.} at 408.
  \item \textsuperscript{116} \textit{Id.} at 453.
  \item \textsuperscript{117} \textit{People ex rel. Scott v. Chicago Park Dist.}, 360 N.E.2d 773 (Ill. 1976).
  \item \textsuperscript{119} \textit{Arizona Ctr. for Law in the Public Interest v. Hassell}, 837 P.2d 158 (Ariz. Ct. App. 1991). For a discussion of this decision, see \textit{infra} text accompanying notes 139-142.
\end{itemize}
Chicago's harbor "is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce . . . ."120 Similarly, many navigable Idaho waters are of great value to its people for recreation and environmental quality. Sovereign resources are of such importance that a protective, public regime of sovereign rights can be regarded as a fundamental task of government, comparable to the exercise of the police power. For the judiciary to impose some limits on legislative alienation of essential public assets is simply to ensure that the government does not thoughtlessly deprive itself of power appropriate to fulfill its responsibility to the people. In reality, protection of sovereign rights by courts consists more of constitutional ordering than of the day-to-day task of developing the common law. As the Court noted in Illinois Central, abdication of public control over sovereign natural resources "is not consistent with the exercise of that trust which requires the government of the State to preserve [navigable] waters for the use of the public."121

C. Idaho House Bill 794: An Impermissible Abdication of Sovereign Rights

Since Martin v. Waddell122 and Pollard's Lessee v. Hagan,123 the concept of sovereign rights to navigable waters and the lands beneath them has been firmly embedded in American law.124 It is less than clear, however, what law controls the management of these sovereign resources. There is a credible argument, developed below in Part IV, that federal law continues to constrain what states may do with regard to sovereign assets. Moreover, even if it does not, the state law bear-

121. Id. at 453.
122. 41 U.S. (16 Pet.) 367 (1842).
123. 44 U.S. (3 How.) 212 (1845).
124. See generally Waters and Water Rights, supra note 52, §30.01. See also Priewe v. Wisconsin State Land & Improvement Co., 79 N.W. 780 (Wis. 1899), in which the Wisconsin Supreme Court affirmed a lower court decision voiding an act of the legislature that attempted to convey a lake bed to private ownership, and requiring restoration of the previous lake levels. The court wrote:

The legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school land or the state capital to a private purpose . . . . [T]his doctrine has been so firmly rooted in our jurisprudence as to be safe from any assault that can be made upon it. The navigable waters of the state belong to the state, and the lands under them, in all situations so far as necessary to preserve inviolate the common right to enjoy those incidents which were not the subject of private ownership at common law.

Id. at 781-82.
ing on the legislative disposition of trust assets typically incorporates the teaching of *Illinois Central*.125

Although *Illinois Central* was written in a way suggesting universal application of its principles,126 the Court later characterized its teaching as “necessarily a statement of Illinois law . . . .”127 Other state courts have treated *Illinois Central* as persuasive rather than binding authority. Yet they have accorded the decision enormous deference as they have shaped their own state law on sovereign rights and the public trust doctrine. Thus, state courts in Alaska, New Jersey, and Washington have called *Illinois Central* “the leading case”;128 a California court termed it “the seminal case;”129 and an Oregon court characterized it as the “bellwether” case.130

Idaho courts have also deferred to the teachings of *Illinois Central*. In *Kootenai Environmental Alliance*, one of Idaho’s leading public trust doctrine decisions, the Idaho Supreme Court cited *Illinois Central* as “the seminal case on the public trust decision and [it] remains the primary authority today.”131 The court interpreted *Illinois Central* as establishing the principle that “a state, as administrator of the trust in navigable waters on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties.”132 The court applied the above principle in *Kootenai*, concluding that no violation of the public trust doctrine occurred.133 Thus, *Illinois Central* is

126. See infra note 173 and accompanying text.
133. *Kootenai* was a challenge to a lease of a portion of Lake Coeur d’Alene for use by a private yacht club. The court held the lease not to be a violation of the public trust
the law in Idaho, adopted by the Idaho courts if not by direct federal mandate. As a consequence, the Idaho legislature is not free to abdicate the public trust responsibilities of the state.

The critical question regarding House Bill 794 can now be considered: is that statute an abdication of Idaho's role as trustee in favor of private parties? Unlike the statutes at issue in *Illinois Central* and other public trust doctrine cases concerning the alienability of sovereign resources, House Bill 794 makes no direct grant of rights to private parties. Instead, the statute indirectly benefits some private parties by prohibiting the application of the public trust doctrine to water rights or private property rights, and by broadening the permissible grounds for alienating navigable bedlands.

The judicial decision most on point comes from the Arizona Supreme Court, which disallowed a legislative abdication of sovereign rights in navigable bedlands, even though no direct grant was made to any private party. When Arizona was admitted to the Union in 1912, the state automatically acquired title to the beds of all navigable watercourses within its boundaries by virtue of the equal footing doctrine. Until 1985, Arizona asserted its sovereign rights to submerged land only with regard to the Colorado River. But in 1985, state officials in Arizona began to assert sovereign claims to the beds of rivers other than the Colorado; for example, to beds of the Verde River in Yavapai County. In reaction to those assertions, in 1987 the Arizona legislature enacted H.B. 2017, a "quitclaim" of any state title "based on navigability, in any lands . . . located in the bed of any watercourse in this state," with the exception of the Colorado, Gila, Salt and Verde rivers. For the last three of the excepted rivers, state claims were relinquished as to lands outside of the riverbeds as they existed on January 1, 1987.

doctrine. *Id.* at 1096. The court noted, however, that the grant remained subject to the public trust doctrine. *Id.*

134. Although the best known, the grant in *Illinois Central* was by no means the only nineteenth century grant of large quantities of submerged land to private parties. For example, in 1874, Oregon granted to a railroad company "all the tide and marshlands" in Benton County. Corvallis & E.R. Co. v. Benson, 121 P. 418, 419 (Or. 1912). And in California it was argued the legislature conveyed 8,000 acres of land submerged by San Francisco Bay to a private company, although the court construed the grant to include only "the strip of land bounded by the lines of ordinary high and low tide, and extending along the estuary and bay front of the town . . . ." Oakland v. Oakland Water Front Co., 50 P. 277, 285 (Cal. 1897).


136. *See id.*


In 1991, the Arizona Court of Appeals invalidated the quitclaim statute. In an opinion that combined public trust considerations with an analysis of the gift clause of the Arizona constitution, the court found the quitclaim statute deficient because it failed to provide a mechanism for:

- Articulated assessment of (1) the validity of the equal footing claims that it relinquishes;
- (2) the continuing value of land subject to such claims for purposes consistent with the public trust;
- (3) equitable and reasonable consideration for claims that may be relinquished without impairing the public trust; and
- (4) conditions that may be necessary to any transfer to assure that public trust interests remain protected.

In other words, the Arizona legislature abdicated its public trust responsibility by simply abandoning public rights in a wholesale fashion. The legislature failed to examine with specificity precisely which public prerogatives were being relinquished; thus, it did not fulfill “the state’s special obligation to maintain the trust for the use and enjoyment of present and future generations.”

Idaho’s public trust doctrine statute is remarkably similar to Arizona’s quitclaim statute in one significant respect. Like the Arizona statute, Idaho House Bill 794 provides no mechanism to determine the public benefits relinquished by abolishing the public trust doctrine’s application to navigable waters. Since Martin v. Waddell, American courts have uniformly held that sovereign rights exist for navigable waters as well as for the lands beneath them. In contrast, the Idaho legislation attempts in wholesale fashion to extinguish sovereign rights required for land in the rivers’ floodways. Ariz. Rev. Stat. Ann. § 37-1103 (repealed 1992). Some of those riverbed lands were alleged to be worth more than $61,000 per acre. Brief for Appellant at 4, Arizona Ctr. for Law in the Public Interest v. Hassell, 837 P.2d 158 (Ariz. Ct. App. 1991).


143. 41 U.S. (16 Pet.) 367 (1842).
ereign rights in navigable waters, preserving them only for the beds of navigable water courses.

The abolition of sovereign rights in the Idaho statute is also far too broad to fit within the two exceptions for termination of public trust obligations recognized by Illinois Central: (1) to further navigation-related improvements, or (2) where there is no substantial impairment of the public interest in the remaining lands and waters. The abolition of sovereign rights in the Idaho statute is also far too broad to fit within the two exceptions for termination of public trust obligations recognized by Illinois Central: (1) to further navigation-related improvements, or (2) where there is no substantial impairment of the public interest in the remaining lands and waters.144

Those exceptions were framed with legislative grants of particular land parcels in mind, rather than legislative modifications of legal doctrine. But clearly their thrust is to provide for some legislative flexibility, while guarding against serious damage to the public interest from wholesale abandonment of the state's fiduciary obligation regarding navigable waters and the lands beneath them. The grant to a private company of Chicago's outer harbor in Illinois Central threatened such damage; the 1996 Idaho legislature's comprehensive abolition of vitally important applications of the public trust doctrine threatens similar damage.

House Bill 794 impermissibly renounces the state's sovereign responsibilities. The legislation is inconsistent with a long line of case law both old and recent.145 Idaho courts should therefore reaffirm that the legislature has no authority to abdicate trust responsibilities and rule House Bill 794 ineffective.

IV

THE FEDERAL NATURE OF THE PUBLIC TRUST DOCTRINE

The legislative findings of House Bill 794 declare that, "[u]pon admission," the beds of navigable waters became state property under "the equal footing doctrine." According to the legislature, which erroneously claimed to be quoting from the U.S. Supreme Court's decision in Shively v. Bowlby, the state possesses the right to dispose of the beds of navigable waters "in such manner as [it] may deem proper... subject only to the paramount right of navigation and commerce;" the state may determine "to what extent it will preserve its rights of ownership in them, or to confer them on others."150 Relying

145. See Martin v. Waddell, 41 U.S. 367 (1842); Arnold v. Mundy, 6 N.J.L. 1, 10 (1821).
147. See supra note 132 and accompanying text.
149. 152 U.S. 1, 154, 161 (1892)
150. Id. (quoting 152 U.S. 1, 52 (1892)). The actual date of Shively v. Bowlby was 1894; the quote in the text is from the decision below, Bowlby v. Shively, 30 P. 154, 161 (Or. 1892).
on this language from the Oregon Supreme Court, and ignoring the U.S. Supreme Court's language in *Shively* that recognized only a limited power of the state to alienate trust lands, the Idaho legislature felt free to disclaim any application of public trust principles in the management of state endowment lands, state water rights, and lands above the beds of navigable waters.

But can the Idaho legislature renounce the applicability of the public trust doctrine in this manner? The answer may turn on the origins of the public trust doctrine in Idaho. The legislative assumption that its origins lie in statehood seems unassailable. But it does not follow that the state is free to restrict the doctrine's application. In fact, as discussed below, the federal nature of the statehood grant limits the state's ability to do exactly that.

A. Origins: The Constitution's Statehood Clause

Idaho, like all other subsequently admitted states, entered the Union on an "equal footing" with the original states. Often misunderstood, the equal footing doctrine was originally only a rule of political equality; for example, a right to equal representation in the U.S. Senate, and proportional representation in the U.S. House and in the electoral college. However, as previously noted, the Supreme Court extended the doctrine to include certain proprietary rights in its 1845 decision in *Pollard's Lessee v. Hagen*. *Pollard's Lessee* held that the Federal Government had no authority to convey

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151. The *Shively* court noted that submerged lands "are of great value to the public for purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and control of them are vested in the sovereign, for the benefit of the whole people." 152 U.S. at 57 (emphasis added).

152. *Idaho Code* § 58-1203(2)(a)-(c).

153. The Idaho Statehood Act declared that the state was "admitted into the Union on an equal footing with the original states in all respects whatever." Ch. 656, §1, 26 Stat. 215 (1891).

154. Opponents of federal public lands have periodically claimed that the equal footing doctrine extends beyond submerged lands to include federal uplands, but their efforts have been unavailing. See, e.g., United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996) (finding that equal footing applies only to submerged lands), *appeal filed*; Nevada ex rel. Nevada State Bd. of Agric. v. United States, 512 F. Supp. 166 (D. Nev. 1981), *aff'd*, 699 F.2d 486 (9th Cir. 1983) (finding that equal footing applies only to submerged lands). See also Arizona v. California, 373 U.S. 546, 596-97 (1963) (refusing to expand the equal footing doctrine beyond the beds of navigable waters); United States v. Gardner, 107 F.3d 1314 (9th Cir. 1997) (holding that equal footing doctrine did not operate to give state title to public fast dry lands within its boundaries).

155. See *Coyle v. Smith*, 221 U.S. 559, 566-67, 573 (1911) (holding that the federal constitution provides for a union of states "equal in power" and that equal footing means equality "of sovereignty and jurisdiction"). See also John Hanna, *Equal Footing in the Admission of States*, 3 Baylor L. Rev. 519 (1951) (tracing the history of the equal footing doctrine and concluding that it was not intended to convey property).

156. See supra notes 103-106 and accompanying text.
lands below the high water mark of a navigable river following statehood; thus, upon admission to the Union, Alabama obtained title to the Mobile River’s navigable waterbeds. According to the Court, concluding otherwise would deny Alabama “equal footing with the original states.”

The *Pollard* result was quite extraordinary. New states and the Federal Government typically engaged in lengthy and complex negotiations over tracts of public lands that would be expressly conveyed to the states in their individual acts of admission. Lands not expressly granted to the states were retained by the Federal Government, and in the statehood acts the states usually disclaimed any attempt to interfere with federal land management. The statehood acts, however, said nothing about the beds of navigable waters. These bedlands were not granted to the states in the conventional sense, but instead passed from the Federal Government to the states implicitly and automatically. As Professor Albert Stone stated years ago, the result was that, after statehood, “the federal government continued to hold nearly all of the remaining land as public domain, [while] the newly admitted states acquire[d] only thin ribbons of land comprising the bed and banks of navigable waters.” This doctrine was of the utmost importance when it was first articulated in *Pollard*. In an era that did not clearly separate regulatory power from proprietary rights, public ownership of navigable waters was the key to promoting, controlling, and avoiding monopolies in the most important instrumentality of commerce in mid-nineteenth century America.

The implicit equal footing transfer of navigable bedlands is a federal doctrine, applicable to all new states. Several decisions of the

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157. 44 U.S. (3 How.) 212, 220 (1845). Three years earlier, in *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), the Court first held that upon entering the Union states obtained ownership of submerged tidelands, but *Martin* involved New Jersey, one of the original states.

158. *Pollard’s Lessee*, 44 U.S. at 229.


160. The Idaho Statehood Act, for example, states that “the state of Idaho shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this ct.” Ch. 656 § 12, 26 Stat. 215 (1891).


163. From *Pollard’s Lessee* to *Phillips Petroleum*, the Court has consistently embraced “equal footing” as to sovereign rights. *Phillips* treated *Shively v. Bowlby*, 152 U.S. 1 (1894), as “the ‘seminal case in American public trust jurisprudence’” 484 U.S. 469, 473 (1988)(quoting from the reply brief for petitioners). *Shively*, an action to quiet title to lands below the high water mark in Astoria, Oregon, accords with the other precedents as to the fundamental importance of sovereign rights. The *Shively* court termed *Martin v.*
Supreme Court suggest that the equal footing doctrine results from the statehood clause of the Constitution.\(^{164}\) The clearest recent expression of this principle came from the Court in its 1977 decision of *Oregon Land Board v. Corvallis Sand & Gravel*, where the Court stated that "the State’s title to land underlying navigable waters is conferred not by the Congress but by the Constitution itself."\(^{165}\) However, the words "equal footing" appear nowhere in the statehood clause.\(^{166}\) Instead, they have been expressed in every state’s act of admission since the admission of Tennessee in 1796.\(^{167}\) Apparently, these federal statutes are merely making explicit what is implicit in the statehood clause.

### B. Equal Footing and the Public Trust Doctrine

In its 1988 decision of *Phillips Petroleum v. Mississippi*, the Supreme Court equated the lands that states acquired at statehood pursuant to the equal footing doctrine with the lands protected by the public trust doctrine.\(^{168}\) In *Phillips*, the Court ruled that lands under nonnavigable waters but subject to tidal influence were owned by the state and subject to public trust obligations because title to such lands passed from the Federal Government to the states under the equal footing doctrine.\(^{169}\) The Court was quite conscious of the federal nature of its holding, citing the benefits of "uniformity and certainty and . . . eas[e] of application" in a federal approach.\(^{170}\) This decision seemed to confirm the federal nature of the public trust doctrine, at least with respect to those bedlands transferred by equal footing. This interpretation of *Phillips* would be consistent with a fair reading of the Court’s 1892 decision in *Illinois Central Railroad v. Illinois*.\(^{171}\)

In concluding that the state’s grant of Chicago’s outer harbor to a private party violated the public trust doctrine, the *Illinois Central

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\(^{165}\) 429 U.S. 363, 374 (1977). See also the Postscript to this Article.

\(^{166}\) U.S. CONST. art. IV, § 3, cl. 1 ("New states may be admitted by Congress into this Union . . . .").

\(^{167}\) *See Coyle*, 221 U.S. at 566-67.

\(^{168}\) 484 U.S. at 475-76.

\(^{169}\) *Id.* at 476 ("[W]e reaffirm our longstanding precedents which hold that the States, upon entry to the union, received ownership of all lands under waters subject to the ebb and flow of the tide.").

\(^{170}\) *Id.* at 481 (citing Cobb v. Davenport, 32 N.J.L. 369, 379 (1867)).

\(^{171}\) 146 U.S. 387 (1892).
Court relied on no state law or precedents. Indeed, Justice Field's opinion seemed to assume that the limits imposed by the trust doctrine were federal in nature. He suggested that without the limits imposed by the trust, "every harbor in the country [would be placed] at the mercy of the Legislature of the State in which the harbor is situated." Many state courts have assumed that *Illinois Central* articulates principles that are broader than Illinois law and have relied extensively upon the case. It is true that three decades after *Illinois Central*, in *Appleby v. City of New York*, the Court referred to the case as one "necessarily" involving Illinois law, and *Illinois Central* did rely on state law to determine ownership of shorelands between the lake and Michigan Avenue. But the Court's discussion of the issue of the alienability of submerged lands in the Chicago harbor drew heavily from other state cases and federal law, and *Illinois Central* was phrased in general principles, with no specific references to Illinois state law. Instead, the Court relied on federal cases involving New Jersey, Alabama, and Virginia submerged lands and quoted at length from a decision of the New York Court of Appeals. Thus, the *Appleby* Court's characterization of *Illinois Central* as involving Illinois law, insofar as it involved the alienability of submerged lands, was erroneous.

Given that the equal footing doctrine is a federal constitutional concept, that the Court in *Phillips* assumed that equal footing lands were also public trust lands, and that the *Illinois Central* articulation of the public trust was not based on state law, the public trust doctrine seems clearly to be a federal requirement, at least as applied to navigable bedlands. States are not free to rescind requirements of federal law absent federal consent.

The federal establishment of the public trust doctrine may seem inconsistent with a statement of the Supreme Court in *Phillips* that transferring ownership of public trust tidelands from the states to private parties "is a question of state law." In reality, the federal origins of the doctrine are entirely compatible with a prominent, even predominant, role for the states in articulating the purposes, scope, and duties imposed by the public trust. Some states have extended

172. Id. at 455.
173. See cases cited supra notes 128-132; *Waters and Water Rights*, supra note 52, § 30.02(b)(1) at 41, n.140.
175. 146 U.S. at 462-64.
176. Id. at 452-56.
177. Id. at 456-58.
178. See supra Part IV.A.
the scope of the doctrine beyond navigable bedlands;\textsuperscript{181} some have broadened its purposes to include ecological protection;\textsuperscript{182} some have sanctioned disposition of trust lands to private parties.\textsuperscript{183} This is not inconsistent with the federal nature of the public trust, as long as the public trust is understood as a minimum upon which states may expand, but may not reduce.\textsuperscript{184} Under this interpretation, the implied transfer of title of navigable bedlands to the states under the equal footing doctrine also came with an implied restriction: that the lands be managed in accordance with the states’ public trust obligations. State law may govern subsequent alienation of state trust lands,\textsuperscript{185} but state grantees receive these lands subject to the states’ federally imposed public trust obligations.\textsuperscript{186}

C. State Public Trust Obligations

The public trust doctrine imposes a fiduciary obligation on states to ensure that the public can access and benefit from navigable waters.\textsuperscript{187} States have a great deal of discretion in determining how to fulfill these obligations and may permit alienation of trust resources to private parties, subject to certain obligations to the public.\textsuperscript{188} Grants of trust resources are revokable, and private grantees must ensure that the public’s access to trust resources is not destroyed.\textsuperscript{189} In the words of the \textit{Illinois Central} Court, the doctrine “is founded on the necessity of preserving to the public the use of navigable waters from private interruption and encroachment.”\textsuperscript{190} Thus, the purpose of public own-


\textsuperscript{182} See, e.g., Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (finding that trust purposes include ecological and recreational uses as well as traditional purposes of commerce, fishing, and navigation); Orion v. Washington, 747 P.2d 1062, 1073 (Wash. 1987), cert. denied, 486 U.S. 1022 (1988) (noting that trust purposes have been held to include navigation, fishing, and water-related recreation); Menzer v. Village of Elhart Lake, 186 N.W.2d 290, 296 (Wis. 1971) (finding that trust purposes include all public uses of water).

\textsuperscript{183} See cases cited in \textit{WATERS AND WATER RIGHTS}, supra note 52, § 30.02(d).

\textsuperscript{184} This argument builds on the analysis of Professor Charles Wilkinson. See Wilkinson, supra note 159, at 460-64, especially n.164.

\textsuperscript{185} \textit{Phillips}, 484 U.S. at 483.

\textsuperscript{186} See infra Part IV.C.

\textsuperscript{187} See \textit{WATERS AND WATER RIGHTS}, supra note 52, § 30.02(d).

\textsuperscript{188} Id. § 30.02(d). In \textit{Illinois Central}, for example, the Court approved a grant to the railroad of submerged lands that had been filled for railroad facilities because the grant did not substantially impair the public’s interest in the waters of Lake Michigan. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435 (1892).

\textsuperscript{189} \textit{WATERS AND WATER RIGHTS}, supra note 52, § 30.02(d)(1) and (2). In \textit{Bowlby v. Shively} the Oregon Supreme Court allowed alienation of state tidelands “subject . . . to the paramount right of navigation and commerce.” 30 P. 154, 160 (Or.), aff’d., 152 U.S. 1 (1894).

\textsuperscript{190} Illinois Central, 146 U.S. at 436, quoted in Justice O’Connor’s dissent in \textit{Phillips}, 484 U.S. at 488.
ership of navigable bedlands is to protect the public's use of navigable waters for public trust purposes: navigation, commerce, and fishing.  

Although states have broad discretion to implement the fiduciary obligations imposed by the public trust, Illinois Central makes it clear that states are not free to extinguish the trust, except in two limited circumstances. First, a state may terminate the trust obligation while furthering particular trust values, such as navigation. Second, a state may extinguish the trust where a development does not substantially impair public uses, such as the fills approved in Illinois Central. Shively v. Bowlby, on which the Idaho legislature relied, reaffirmed this principle two years after Illinois Central, explaining that disposition of trust lands should occur only "without substantial impairment of the interests of the public" because "the public authorities ought to have the entire control of the great passageways of commerce and navigation, to be exercised for public advantage and convenience."

Thus, while primarily a state doctrine, there are federally imposed limits on state discretion over navigable bedlands that the states acquired pursuant to the equal footing doctrine. States must ensure that the public's interest in these lands is not substantially impaired, although states may choose to foster some trust values over others. According to Shively and Phillips, these limits are designed to ensure that the states are "charged with . . . trust [for] the benefit of the nation." The next section describes how the Idaho legislature exceeded these limits.

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191. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 413 (1842) ("shores, and rivers, and bays, and arms of the sea, and the land under them . . . [are] held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery . . . ."); Phillips Petroleum, 484 U.S. at 476 (explicitly recognizing fishing as a public trust purpose). The Phillips majority rejected Justice O'Connor's contention that the public trust doctrine's fundamental purpose is the protection of navigation. Id. at n.5. The Court also noted that "[o]n several occasions the Court has recognized that lands beneath tidal waters may be reclaimed for urban expansion." Id. at 476 (citations omitted). This sentence does not mean that urban expansion is a public trust purpose; rather, it seems to be merely a recognition that the doctrine allows extinguishment of trust obligations over specific lands where there is no "substantial impairment" of trust uses. See infra notes 194-197 and accompanying text.

192. See Waters and Water Rights, supra note 52, § 30.02(d)(3).


194. Id. See supra note 187 and accompanying text.

195. See supra note 150 and accompanying text.


197. Id. at 43 (quoting Barney v. Keokuk, 94 U.S. 324, 338 (1876)).

198. Id. at 57; Phillips, 484 U.S. 469, 473 (1988).
D. The Limits on the Idaho Legislature's Ability to Revoke the Public Trust Doctrine

Since the public trust is grounded in the federal constitutional equal footing doctrine, the effect of House Bill 794 is quite limited. The legislature can restrict the doctrine to navigable waters and their beds, precluding the courts from applying it to natural resources not implicated by equal footing. Thus, the provision in House Bill 794 that denies public trust protection to the management or disposition of school endowment lands is unobjectionable, since those lands were express statehood grants, not federal grants under the equal footing doctrine. Even so, the federal public trust is violated where activities on endowment lands, such as a timber harvest, substantially impair the public's right to navigate or fish in "equal footing" navigable waters. Therefore, the federal public trust doctrine prevents the legislature from overturning Selkirk-Priest Basin Association, because the Idaho Supreme Court concluded that logging of endowment lands that damaged public trust resources in a navigable waterway could be a public trust violation.

The equal footing doctrine also limits the extent to which House Bill 794 can exempt private property rights and state water rights from public trust limitations. House Bill 794 defines private property rights as applying to those uplands "above the beds of navigable waters." Just as the federal public trust limits House Bill 794's effect on endowment lands, it also limits activities on private lands that substantially diminish public navigation or fishing rights in "equal footing" navigable waters. Similarly, if granting a water right substantially impairs the public's right to navigate or fish in a navigable water, it violates the state's public trust obligations. But since the federal public trust applies only to waterways that the state acquired pursuant to the equal footing doctrine, many smaller streams would not benefit from public trust protection.

In cases involving private property rights, water rights, and activities on endowment lands, the effectiveness of the legislature's attempt

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204. Id. § 58-1203(2)(b).
205. Id. § 58-1202(4). The legislation adopted the federal test for determining navigability, H.B. 794 (codified at Idaho Code § 58-1202(3)), presumably limiting navigable waters to those usable as commercial highways at the time of statehood. See Waters and Water Rights, supra note 52, § 30.01(d)(3).
to renounce the public trust doctrine will turn on the specific factual context at issue. In these situations, plaintiffs will probably bear the burden of proving that a particular activity substantially impairs trust resources. The Idaho Supreme Court has indicated, however, that substantial impairments can result from (1) cumulative impacts of proposed and existing activities; (2) adverse effects on “the primary purpose for which the trust resource is suited, i.e., commerce, navigation, fishing or recreation”; or (3) “the degree to which broad public cases are set aside for more limited or private ones.”

Another area that House Bill 794 freed from public trust constraints seems plainly inconsistent with the state’s federal public trust obligations: authorizing encumbrances on or alienating title to navigable bedlands for navigation, commerce, recreation, agriculture, mining, forestry, or other uses consistent with Idaho’s constitution and statute. Encumbrances or alienation of navigable waterbeds for navigation, commerce, and recreation may be consistent with the public trust rule allowing states to terminate public interests in order to develop a particular trust purpose, such as a harbor. But “agriculture, mining, forestry, or other uses” are clearly not public trust purposes, and encumbrances or alienation for these reasons are subject to the “no substantial impairment” rule. As in the water rights situation, the constitutionality of this provision depends on the facts, although constitutional problems seem more likely here.

Because House Bill 794 is limited by the federal nature of the public trust doctrine, the Idaho legislature unconstitutionally overreached when it restricted the state’s fiduciary duties with respect to lands and related navigable waters acquired under the equal footing doctrine. In the past, the Idaho Supreme Court has rejected precisely this type of legislative overreaching in attempts to establish a legislative state water plan, and special judicial procedures for the Snake River Basin Adjudication. The court should be no less sensitive to

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206. Kootenai Envtl. Alliance, 671 P.2d at 1092-93. See also Selkirk-Priest Basin Ass’n., 899 P.2d at 954 (on cumulative impacts). The Idaho Supreme Court’s recognition of recreation as a public trust purpose is certainly a permissible expansion of the scope of the trust, see supra note 182 and accompanying text, but recreation is not part of the federal core of the public trust doctrine.

207. See supra note 193 and accompanying text.

208. See supra notes 194-197 and accompanying text.


210. In In re Snake River Basin Adjudication, 912 P.2d 614, 625-27 (Idaho 1996), the Idaho Supreme Court struck down as unconstitutional amendments attempting to establish additional procedures governing the Snake River Basin Adjudication; these procedures would have designated the Director of the Idaho Department of Water Resources as an
legislative overreaching in the context of federal constitutionally established public trust lands.

V

THE PUBLIC TRUST DOCTRINE AND THE IDAHO CONSTITUTION

Like constitutions in other western states, Idaho's constitution declares water use to be "a public use." Although no Idaho court has interpreted this public use clause to incorporate the public trust doctrine, such an interpretation is consistent with past interpretations of the clause, and several court decisions in other western states, which have construed similar provisions to constitutionalize the public trust doctrine.

A. Interpreting the Idaho Constitution to Incorporate the Public Trust Doctrine

Although Idaho courts have not yet recognized the public trust doctrine as implicit in the Idaho constitution, they have a long history of construing private water rights to be more limited, and subject to community needs, than private land rights; they refer to these public water rights as public trust rights.

Article XV, section 1 of the Idaho constitution declares appropriation of water for sale, rental, or

independent expert, directed the court to adopt provisions of the Director's report to which no objections were made, and required the court to conduct a settlement conference prior to trial.


212. IDAHO CONST. art. XV, § 1 (all water "now appropriated, or that hereafter may be appropriated for sale, rental, or distribution ... is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law").

213. See, e.g., Owsichek v. Alaska Guide Licensing & Control Bd., 763 P.2d 488, 494 (Alaska 1988) (interpreting the state constitution's "common use" clause, which declares that fish, wildlife, and waters in their natural state are reserved to the people for common use, to codify the public trust doctrine); Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 171 (Mont. 1984) (holding that under the public trust doctrine and the Montana Constitution the public has an easement over any surface waters capable of recreational use without regard to streambed ownership or navigability for nonrecreational purposes); United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457, 462 (N.D. 1976) (determining state constitutional and statutory provisions declaring streams to be public to embody the public trust doctrine).

214. The public trust doctrine has deep roots in Idaho. See Washington County Irrigation Dist. v. Talboy, 43 P.2d 943, 945 (Idaho 1935) (noting that water stored and appropriated in reservoirs remains "impressed with the public trust ... "); Twin Falls Land & Water Co. v. Twin Falls Canal Co., 7 F.Supp. 238, 245 (D. Idaho 1933), ("[W]ater is the lifeblood of the arid portion of the western states. So essential is it to existence that it is administered as a public trust."); aff'd, 79 F.2d 431 (9th Cir. 1935), cert. denied, 296 U.S. 654 (1936) Callahan v. Price, 146 P. 732, 735 (Idaho 1915) (finding that the Salmon River is a state "public highway" subject to "the rights of the public").
distribution to be a "public use," subject to state regulation.\textsuperscript{215} One of the drafters of this provision explained that this public use clause "was taken from the California Constitution. They found it necessary to declare water appropriated for public use a public trust, and that the legislature should have the right to prescribe suitable laws concerning it."\textsuperscript{216} The effect of this provision was to give constitutional protection to water consumers dependent on for-profit water suppliers in an era before the enactment of public utility laws.\textsuperscript{217} As the Idaho Conservation League noted in a brief to the Idaho Supreme Court, Imposing public utility-type regulation on what otherwise would be private economic activity emphasizes the importance of water as the essential, publicly-controlled resource to which trust obligations attach. The framers adopting Article XV, § 1 thus recognized that, because water resources are so important, and are vested with a trust character, special extension of state regulation was vital.\textsuperscript{218}

Case law has reinforced the fiduciary responsibility imposed on the state by the public use clause of Article XV, section 1. In 1912, the Idaho Supreme Court noted that under the Idaho constitution, "the state holds the title to all public waters in common for the benefit of all its people."\textsuperscript{219} In 1935, the court stated that "the ownership of public waters by the state constitutes a trust to be administered so as to accomplish the greatest benefit to the people of the state . . . ."\textsuperscript{220} Although waters impounded in a reservoir became the property of the owners of the reservoir and those with appropriative rights, the impounded water was "impressed with a public trust to apply it to beneficial use."\textsuperscript{221} And in 1974, in the \textit{Picabo Livestock} case,\textsuperscript{222} the court interpreted Article XV, section 1 to create "an easement in the state

\begin{footnotes}
\item[215] The full text is:
\begin{quote}
The use of all waters now appropriated, or any that hereinafter be appropriated for sale, rental, or distribution; also of all water originally appropriated for private use, but which after each appropriation has heretofore been, or may hereinafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law.
\end{quote}
\end{footnotes}
on behalf of the public for a right of way through the natural channels
of [streams] for such waters upon and over the lands submerged by
them.\textsuperscript{223} The fiduciary responsibility imposed by section 1 is not
overridden by section 3’s language stating that the “right to divert and
appropriate . . . shall never be denied . . . “\textsuperscript{224} The Idaho Supreme
Court repeatedly has interpreted section 3 as merely clarifying that
prior appropriation law, rather than riparian rights law, governs water
in Idaho.\textsuperscript{225} Thus, these cases demonstrate that the public use clause
clearly embraces fiduciary concepts.

Sections 4, 5, and 6 of Article XV of the Idaho constitution also
impose trust responsibilities on water use. These provisions impose
restrictions on the “sale, rental, or distribution” of water for the ben-
efit of consumers of water who hold no water rights and impose a trust
obligation on water rights holders to protect those who receive water
pursuant to “sale, rental or distribution” agreements.\textsuperscript{226} These provi-
sions stipulate that irrigators cannot be deprived of annual use of
water for domestic and agricultural purposes without consent,\textsuperscript{227} and
impose limits on the prior appropriation doctrine’s effect on irrigators
during shortages.\textsuperscript{228} In addition, they provide the basis for regulating
rates charged for water “for any useful . . . purpose.”\textsuperscript{229} These provi-
sions provided security to those irrigators who had no water rights and
who were dependent on private ditch carriers, which were either
poorly financed or managed.\textsuperscript{230}

In 1896, the Idaho Supreme Court interpreted sections 4, 5, and 6
of Article XV of the Idaho constitution to mean that “companies or
individuals” appropriating water for “sale, rental or distribution” for
“beneficial purpose[s]” do so for a “public use, and the sale or rental

\textsuperscript{223} Southern Idaho Fish and Game Ass’n v. Picabo Livestock, 528 P.2d 1255, 1297
(Idaho 1974). If the public trust doctrine is tantamount to a public easement, then House
Bill 794’s renunciation of the public trust amounts to a conveyance of public property. The
Arizona Court of Appeals recognized a similar renunciation by the Arizona legislature as
an unconstitutional gift in violation of the gift clause of the Arizona constitution. See supra
notes 137-142 and accompanying text. An Idaho court could interpret House Bill 794 as
unconstitutional under Article I of the Idaho constitution, which affirms that the rights
reserved to the people are not limited to those specified in the constitution.

\textsuperscript{224} \textit{Idaho Const.} art. XV, § 3.

\textsuperscript{225} Parker v. Wallentine, 650 P.2d 648, 654-55 n.10 (Idaho 1982); State Dep’t of Parks
v. Idaho Dep’t of Water Admin., 530 P.2d 924, 933 (Idaho 1974) (Bakes, J. concurring);
Spear v. Stephenson, 102 P.2d 365 (Idaho 1909). See also Grant, supra note 209, at 497-98.

\textsuperscript{226} \textit{Idaho Const.} art. XV, §§ 4-6.

\textsuperscript{227} Id. § 4.

\textsuperscript{228} Id. § 5.

\textsuperscript{229} Id. § 6.

\textsuperscript{230} Jeffrey C. Fereday, \textit{Ownership of Water Rights In Irrigation Water Delivery Organ-
Pizations: An Outline of the Major Issues}, \textit{Water Organizations In A Changing West} 6
(Univ. of Colo. Natural Resources Law Ctr., June 14-16, 1993) (citing \textit{Samuel Weil, Water
Rights in the Western States} §§ 1244-46 (3d ed. 1911)).
of it for pay is a franchise." Thus, deliveries by a commercial carrier ditch to a consumer gave rise to public dedication, because the right to use such water, after having "once been sold, rented, or distributed to any person who has settled upon or improved land for agricultural purposes," becomes a perpetual right subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the conditions of the use. The court later applied the same principles to a municipal water supply company, noting that even though the consumer of a municipal water right has no water right, he has "a right to the use of it." A noted Idaho water lawyer interpreted this case to mean that the water consumer had "a right of service, enforceable against the supplier so long as the consumer pays the bill . . . [even though] . . . this entitlement . . . is not part of the consumer's property holdings." In short, Article XV, sections 4, 5, and 6 of the Idaho constitution impose trust-like duties on water right holders for the benefit of those with no water rights.

These decisions recognize a "public use" right against water rights holders, giving the beneficiaries a right to reasonable use upon tender of a reasonable rate without discrimination. This right allows the beneficiaries to enforce continued deliveries against water rights holders. The fiduciary responsibility means that water rights holders may not refuse nondiscriminatory delivery of water to irrigators paying reasonable rates. This restraint on a water rights holder's ability to freely alienate is quite similar to the public trust doctrine's restriction on a water rights holders' ability to substantially diminish trust resources. While the recognized beneficiaries of the fiduciary obligation imposed by the Idaho constitution thus far have been primarily agricultural and municipal water consumers, the public's use of the waters of the state is hardly limited to agricultural and municipal consumption. Interpreting the public trust doctrine to be implicit in the public use clauses of the state constitution would enlarge the beneficiaries to include all water users and better reflect the changing uses of water in the Idaho economy.

Based on both the fiduciary duties imposed by Article XV, sections 4, 5, and 6, and the clear public trust implications in the public

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232. Id. at 780-81, interpreting IDAHO CONST. art. XV, § 4.
235. Id. at 6 (relying on WEIL, supra note 230, § 1247; and Munn v. Illinois, 94 U.S. 113 (1876)).
236. Id. at 8.
237. See supra notes 231-233 and accompanying text.
238. See supra note 86 and accompanying text.
239. See supra notes 88, 90 and accompanying text.
use language of section 1,240 as well as the Idaho courts' recognition of public rights in privately-owned water,241 Idaho courts should conclude that the public trust doctrine is a part of the Idaho constitution. In some respects, the effect of such a holding would be similar to finding that the public trust was federally imposed by the equal footing doctrine: while House Bill 794 would be able to eliminate the public trust doctrine's application to state endowment lands and private uplands, it could not insulate activities on those lands that substantially diminish trust uses in waters protected by the public trust.242 In other respects, recognizing the public trust doctrine as implicit in the Idaho constitution would have an even broader effect because the constitution's public use provisions apply to all state waters, not merely navigable waters.243 Thus, House Bill 794 could not eliminate the public trust doctrine's application to state water rights administration.244 Finally, House Bill 794's authorization of encumbrances on or alienation of navigable bedlands for agriculture, mining, forestry, or other uses that substantially impair trust uses would be unconstitutional. Thus, under such an interpretation of the Idaho constitution, many provisions of House Bill 794 would be unconstitutional.

B. Other Western State Constitutions Incorporating the Public Trust Doctrine

Although Idaho's courts have yet to hold that the Idaho constitution incorporates the public trust doctrine, courts in several other western states have recognized the public trust doctrine under their constitutions. Perhaps the most prominent decision is Montana Coalition for Stream Access v. Curran.245 In Montana Coalition, the Montana Supreme Court interpreted a state constitutional provision declaring all water in the state "the property of the state for the use of its people"246 to reflect the public trust doctrine. The court quoted at length from Illinois Central in emphasizing that the state had no authority to abdicate trust property "like navigable waters and the soils under them . . . ."247 Like the Idaho Supreme Court in Picabo Live-

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240. See supra notes 215-224 and accompanying text.
241. See supra note 214.
242. See supra notes 192-197 and accompanying text.
243. Compare IDAHO CONST. art. XV, §§ 1, 4-6 with supra note 204 and accompanying text.
244. Cf. supra text following note 205.
245. 682 P.2d 163 (Mont. 1984).
246. MONT. CONST. art. IX, § 3. The complete text of the provision is: "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." Id.
the Montana Supreme Court held that the public had a right of access to both traditionally navigable waters, in which the state holds title, and waters for public recreational use, irrespective of who owns title to the streambed. The court concluded:

If the waters are owned by the State and held in trust for the people of the State, no private party may bar the use of those waters by the people. The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters.

The "public use" clause of the Montana constitution would prohibit abdicating the public's rights of access to navigable and nonnavigable waters, as attempted by Idaho House Bill 794.

The Alaska Supreme Court also found the public trust doctrine implied in that state's constitution. In Owsichek v. State, the court struck down a state board's grant of an exclusive hunting guide license as a violation of the state constitution's "common use" clause. This clause declares that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved for the people for common use." Even more explicitly than the Montana Supreme Court, the Alaska Supreme Court based its constitutional interpretation on the public trust doctrine. The court noted that the purpose of the common use clause "was anti-monopoly. This purpose was achieved by constitutionalizing common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife, and waters." Relying in part on Illinois Central, which it termed "the lodestar of American public trust law," the court concluded that the common use clause prohibited "any monopolistic grants or special privileges" such as the exclusive guide licenses.

248. See supra notes 34-39 and accompanying text.
249. 682 P.2d at 170.
250. Id.
251. See supra Part II.
253. ALASKA CONST. art. VIII, § 3.
254. Owsichek, 763 P.2d at 493. See also id. at 494 (noting that the purpose of common use clause is "to constitutionalize historic common law principles governing the sovereign's authority over management of fish, wildlife, and water resources").
255. Id. at 496. The court contrasted the exclusive guide areas (EGAs) with state leases and concession contracts, in the following terms:

In contrast, EGAs are not subject to competitive bidding, provide no remuneration to the state, are of unlimited duration, and are not subject to any other contractual terms or restrictions. Rather . . . they are granted essentially on the basis of seniority, with no rental or usage fee, for an unlimited duration, and are administered in such a way that guides may transfer them for profit as if they owned them. In these respects the EGAs resemble the types of royal grants the common use clause expressly intended to prohibit.

Id. at 497-98. The parallels between the EGAs at issue in Owsichek and state water rights in Idaho are striking.
North Dakota also recognizes public trust principles under its constitution, as seen in *United Plainsmen Ass'n v. North Dakota State Water Conservation Commission*. Quoting *Illinois Central*, the North Dakota Supreme Court imposed a public trust duty on the state under a state constitutional provision that reserved the water in flowing streams and natural watercourses to the public. According to the court, the public trust doctrine “confirms the state’s role as trustee of public waters. It permits alienation and allocation only after an analysis of present supply and future need.” Therefore, the court ruled that the state had to make a determination of the proposed water diversions’ effects on present and future water supplies before issuing water permits.

Courts in many western states have also imposed fiduciary responsibilities based on public dedication clauses similar to those in the Idaho constitution. For example, California has a public dedication provision in its constitution regarding the sale, rental, or distribution of water. In interpreting this provision, one court concluded that although a carrier ditch company’s customer had no water right, it only possessed a “right of service;” that is, “the right to that service so long as the public utility controls the instrumentality rendering that service.”

In Colorado, which does not have an explicit constitutional provision regarding water for “sale, rental, or distribution,” but which does have a constitutional declaration that all waters in the state are “the property of the public” and “dedicated to the use of the people of the state,” courts have imposed similar duties on carrier ditches. For example, in *Wheeler v. Northern Colo. Irrigating Co.*, the Colorado Supreme Court interpreted the Colorado constitution to impose “a public duty or trust” on a commercial ditch company, which the court referred to as a “quasi public servant or agent.”

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256. 247 N.W.2d 457 (N.D. 1976).
257. *Id.* at 461 (interpreting N. D. Const. art. XVII, § 210 (“[T]he State holds the navigable waters, as well as the lands beneath them, in trust for the public . . . .”)).
258. *United Plainsmen*, 247 N.W.2d at 463.
259. *Id.* at 462.
260. Cal. Const. art. X, § 5 (“The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner prescribed by law.”).
constitution required a ditch company to supply water to anyone whose lands could be supplied by the canal and who paid the established rate. The court forbade the ditch company from imposing additional costs or "unreasonable regulations and demands . . . ." In Jacobucci v. District Court, the court noted that "[m]utual ditch companies in Colorado have been recognized as quasi-public carriers." These cases demonstrate that courts in several western states with constitutional provisions declaring water to be public property have interpreted those declarations to embrace the public trust doctrine. Moreover, state courts faced with public dedication provisions like those in the Idaho constitution have interpreted those provisions like Idaho courts: they impose fiduciary obligations on water right holders. It is only a small step for Idaho courts to conclude that the Idaho constitution, like the Montana, Alaska, and North Dakota constitutions, recognizes public trust principles.

CONCLUSION

As argued throughout this Article, Idaho House Bill 794 is an impermissible conveyance of public rights that violates sovereign responsibilities, the federal equal footing doctrine, and the Idaho constitution. Due to these violations, House Bill 794's elimination of public trust considerations from land and water use decisions are largely ineffective.

House Bill 794 is also poor public policy because, as noted in Mono Lake, the public trust doctrine simply ensures a balance between environmental considerations and economic concerns. This accommodation is fundamental to the West's ongoing transition from an economy based on resource extraction to a modern service-based economy of the twenty-first century.

By eliminating the accommodation of interests required by the public trust doctrine, the drafters of House Bill 794 seek to turn the clock back to a bygone era. However understandable their fears may be, their nostalgia will produce unbalanced decisionmaking that will be expensive and environmentally degrading in the long run. Fortunately for the residents of Idaho, House Bill 794 violates the state's sovereign duties, federal law, and the Idaho constitution.

264. 28 P. 966 (Colo. 1892).
265. Id. at 968.
266. 541 P.2d 667, 671 (Colo. 1975).
267. See supra note 94 and accompanying text.
268. See, e.g., Reopening the Western Frontier (Ed Marston ed., 1989).
After this Article was in press, the U.S. Supreme Court decided, in *Idaho v. Coeur d'Alene Tribe*, 1997 WL 3380603 (U.S.), that the Eleventh Amendment barred a federal suit by the tribe against Idaho state officials where the suit sought to prevent those officials from interfering with the tribe's alleged ownership of the submerged lands beneath Lake Coeur d'Alene. Among the reasons the Court gave for upholding the state's sovereign immunity was "[n]ot only would the relief block attempts by [state] officials to exercise jurisdiction over a substantial portion of land but also would divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust the State is bound to respect." *Id.* at 12-13. The Court referred to the submerged lands at issue as "sovereign lands" and noted that "State ownership of them has been considered an essential element of sovereignty." *Id.* at 15, quoting *Utah Div. of State lands v. United States*, 482 U.S. 193, 195 (1987). Repeating that "a State's title to these sovereign lands arises from the equal footing doctrine" and is "conferred not by Congress but by the Constitution itself," *id.* at 13, quoting *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 374 (1977), the Court quoted from Justinian, Bracton, and the Magna Charta, and concluded that American Law adopted the English principle "that submerged lands are held for a public purpose." *Id.*, citing *Arnold v. Mundy*, 6 N.J.L. 1 (1821). Although the Court unfortunately repeated the error made in *Appleby v. City of New York*, 275 U.S. 364, 396 (1926), which mistakenly considered *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892) to be a statement of Illinois law, (see our discussion *supra* notes 167-176 and accompanying text), we submit that if a state's "weighty public interests in submerged lands" are sufficient to bar a federal suit concerning the ownership of those lands (*Idaho* at 13), a state may not renounce its sovereign responsibilities, as the Idaho state legislature attempted to do in House Bill 794.