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BOISE CASCADE CORP. V. STATE OF OREGON:
SIGNALING THE END OF SOVEREIGN IMMUNITY AS A
SHIELD FOR ENVIRONMENTAL REGULATION

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Sovereign immunity has been a part of American jurisprudence since before the Constitution was enacted. The doctrine traveled across the Atlantic Ocean with the early English settlers. Deriving its origin from the English common law system and the fiction that “the King can do no wrong,” sovereign immunity has caused heated debate among legal scholars and politicians since the state ratifying conventions.¹ It has created dissension among jurists, congressmen, state governments, and citizens for over two hundred years. The doctrine can be loved or hated, but not ignored. The United States Supreme Court, the United States Congress, and individual state legislatures have refused to completely eradicate this obscure principle. Though the doctrine has taken a beating since the states ratified the Constitution, it has made a valiant comeback over the last two decades.

*Boise Cascade Corp. v. State of Oregon*² illuminates the importance and effect of sovereign immunity on the ability of states to regulate environmental matters. *Boise* involves an environmental regulation that prevents landowners from logging on their land. As society becomes more environmentally conscious, the soundness of this doctrine takes on heightened importance because of the unavoidable confrontations between individual due process rights and attempts to protect the environment. To balance these interests, it is necessary to understand the underlying goals and rationales of sovereign immunity.

Among its numerous purposes, the foremost function of sovereign immunity is to protect the sovereign states and federal government from litigation by their citizens.³ The general principle is that a citizen of a state may not bring a claim for monetary damages against that state without the state’s consent.⁴ The rationale for this

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¹See, e.g., John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1902-14 (1983).

²991 P.2d 563 (Or. App. 1999) [hereinafter *Boise*].

³See Erwin Chemerinsky, *Symposium: Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001).

⁴See 32A AM. JUR. 2D *Fed. Courts* §1146 (2002).

immunity is that such litigation would disrupt the effective function of our governments and would essentially be an indignity to the sovereign states.⁵

The Supreme Court has held that sovereign immunity protects a state from litigation in its own courts unless the state waives or Congress directly abrogates the state's immunity.⁶ Moreover, Congress can only abrogate states' immunity through Section V of the Fourteenth Amendment.⁷ This leads to problems similar to those in *Boise*, in that where a state regulation constitutes a Fifth Amendment taking of a citizen's property, the citizen has no remedy. Ostensibly, sovereign immunity prevents the individual from obtaining a judicial forum in which to recover his constitutional right to just compensation.⁸ The decision in *Boise* helps alleviate the burden sovereign immunity places on individuals. The *Boise* court concluded that the self-executing nature of the Constitution requires that a forum be made available in the event of a state violation of the Fifth Amendment.⁹ Thus, according to that decision, a state may be sued in its own courts without a waiver or abrogation of immunity.

The decision in *Boise* could have significant influence over how states regulate wildlife and the environment. Subjecting the states to takings litigation under the Fifth Amendment will force their governing bodies to consider the possible financial ramifications associated with the imposition of environmental regulations on its citizens and their private property. This will reduce the regulatory options available to states, thus limiting their ability to undertake protective measures for the benefit of the environment.

I. THE DOCTRINE OF SOVEREIGN IMMUNITY

Sovereign immunity stands for the proposition that a state cannot be subjected to litigation in its own courts unless the state has given its consent.¹⁰ In effect, the doctrine operates in state courts by providing the state with an absolute defense.¹¹ Furthermore, the United States Supreme Court has interpreted the Eleventh Amendment of the Constitution to provide that a state may not be sued in federal court by a citizen of that state.¹² In other words,

⁵*See, e.g.*, THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961).

⁶*See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999).

⁷*Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59 (1996).

⁸*Chemerinsky, supra* note 3, at 1202.

⁹*Boise*, 991 P.2d 563, 569 (Or. App. 1999).

¹⁰*See State Park Bd. v. Tate*, 295 S.W.2d 167 (Mo. 1986).

¹¹*See id.*

¹²*Hans v. Louisiana*, 134 U.S. 1 (1890).

federal courts do not have subject matter jurisdiction to hear claims against a state in the absence of a waiver or abrogation of immunity.¹³

In effect, sovereign immunity shields states from liability for any claims brought by citizens of that state, another state, or a foreign country.¹⁴ The basic theory is that such immunity is necessary for the efficient and continued function of state governments.¹⁵ States will have immunity in the absence of either waiver of immunity by the state or a constitutionally authorized abrogation of immunity by Congress.¹⁶ Most states require waiver of immunity through legislative enactment,¹⁷ although some permit waiver through judicial action.¹⁸ The more complex issue concerns whether and to what extent Congress has the power to abrogate a state's immunity.

A. History

Sovereign immunity is based upon the English common law tenet that "the King can do no wrong."¹⁹ The doctrine has been a part of English law since the reign of Edward I in the thirteenth century.²⁰ In America, there was considerable debate at state conventions to ratify the Constitution over whether states would retain this common law principle.²¹ Nonetheless, the Constitution fails to specifically mention sovereign immunity. Many proponents of sovereign immunity argue that the omission merely indicates that it was implicit that states would retain the immunity of a sovereign.²²

In *Blatchford v. Native Village of Noatak*,²³ Justice Scalia wrote, "[t]he States entered the federal system with their sovereignty intact."²⁴ Yet, in *Chisholm v. Georgia* the U.S. Supreme Court held that a state may be sued in federal court by a citizen of another state.²⁵ It was the decision in *Chisholm* that led to the ratification of the Eleventh Amendment to the U.S. Constitution:

¹³But see 71 AM. JUR. 2D *States, Territories, and Dependencies* § 100 (2002) (citing *Dep't of Employment v. United States*, 385 U.S. 355 (1966) ("even without its consent, a state may be sued in a federal forum by the United States and a federal instrumentality.")).

¹⁴See, e.g., 32A AM. JUR. 2D *Federal Courts* § 1118 (2002).

¹⁵See, e.g., 72 AM. JUR. 2D *States, Territories, and Dependencies* § 99 (2001).

¹⁶See *id.*

¹⁷See *Lipwich v. Frankel*, 691 A.2d 1099 (Conn. App. Ct. 1997).

¹⁸See *Norris v. Borough of Leonia*, 734 A.2d 762 (N.J. 1999).

¹⁹See *Chemerinsky*, *supra* note 3, at 1201.

²⁰*United States v. Lee*, 106 U.S. 196, 205 (1882).

²¹See, e.g., *Gibbons*, *supra* note 1, at 1902-1914 (discussing the debate).

²²See, e.g., *Alden v. Maine*, 527 U.S. 706, 706 (1999).

²³501 U.S. 775 (1991).

²⁴*Id.* at 779.

²⁵2 U.S. (1 Dall.) 419 (1793), *overruled by* *Hans v. Louisiana*, 134 U.S. 1 (1890).

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.²⁶

The express language of the Eleventh Amendment only precludes diversity actions against states from finding a home in federal courts.²⁷ The Supreme Court, however, interpreted this Amendment to also exclude from federal jurisdiction a suit brought by a citizen against his own state.²⁸ In *Alden v. Maine*, Justice Kennedy, writing for the majority, said, “[T]he sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment...[it] is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution.”²⁹

B. Purposes of Sovereign Immunity

There are several reasons expounded for the existence of sovereign immunity. Among them is the need to protect state treasuries and to preserve “the autonomy of the coordinate branches of the government.”³⁰

Sovereign immunity is intended to protect government treasuries from suits for monetary damages.³¹ This purpose is made obvious by the *Ex Parte Young*³² doctrine, which allows citizens to sue government officers for prospective remedies. This facilitates the ability of a citizen to sue a state officer to prevent further enforcement of an action that causes injury.³³ This exception to sovereign immunity is intended to alleviate some of the burdens a government may place upon its citizens.³⁴ However, if government action has tortiously injured a citizen in the past, mere equitable relief does not redress that citizen’s injury.³⁵ The availability of equitable relief, combined with the denial of retrospective monetary damages,

²⁶U.S. CONST. amend. XI.

²⁷*See id.*

²⁸*See Alden v. Maine*, 527 U.S. 706 (1999).

²⁹*Id.* at 713.

³⁰57 AM JUR. 2D *Municipal, County, School, & State Tort Liability* § 2 (2001).

³¹*See id.*

³²209 U.S. 123 (1908).

³³*Id.*

³⁴*Id.*

³⁵*See, e.g., United States v. Stanley*, 483 U.S. 669 (1987) (holding federal government and its officers not liable to serviceman injured by administration of LSD in an illegal medical experiment conducted by the Army).

is a manifestation of the intent to protect government treasuries from costly tort awards.

Proponents of sovereign immunity also contend that its protection is necessary to ensure the autonomy of the coordinate branches of government.³⁶ It is argued that judicial interference in legislative decision-making creates a chilling effect on legislatures' discretion in policy formation.³⁷ The idea is that governments and their officers should be free from fear of liability in attempting to protect their state's interests, including their environmental concerns.³⁸ One criticism of this rationale is that it ignores the fundamental tenets upon which the states ratified the Constitution: that individual rights be preserved and not subjected to the tyranny of over-zealous government actions. Essentially, governments should be held accountable, as citizens are, for wrongs unlawfully caused to others.³⁹

These are among the reasons the Supreme Court has retained the doctrine of sovereign immunity as a viable element of American jurisprudence. Nevertheless, support for the doctrine appears to be waning.⁴⁰ The rationale for sovereign immunity diminishes in light of the repercussions it repetitiously leaves on individual rights, namely the right to due process. The cases discussed below illustrate the current status of the doctrine in America.

C. Recent Supreme Court Decisions On Sovereign Immunity

1. *Seminole Tribe of Florida v. Florida*⁴¹

At the time of the decision in *Seminole Tribe*, Congress had been attempting to use its Article I power to statutorily abrogate states' sovereign immunity. In its decision, the Court limited the ability of Congress to authorize suits against state governments in federal courts.⁴² The Court held that the Eleventh Amendment is a constitutional limit on federal subject matter jurisdiction and that Congress could only override this limitation through Section V of the

³⁶See, e.g., *Hanson v. Metro. Transit Comm'n*, 553 N.W.2d 406, 412 (Minn. 1996) ("immunity exists to prevent the courts from conducting an after-the-fact review that second-guesses certain policymaking activities that are legislative in nature.").

³⁷57 AM. JUR. 2D *Municipal, County, School, & State Tort Liability* § 2 (2001).

³⁸See *id.*

³⁹See Chemerinsky, *supra* note 2.

⁴⁰See *Lyon & Sons, Inc. v. N.C. State Bd. of Educ.*, 76 S.E.2d 553 (N.C. 1984) ("the current trend of legislative policy and judicial thought has been declared to be toward abandonment of the doctrine.").

⁴¹517 U.S. 44 (1996).

⁴²*Id.*

Fourteenth Amendment.⁴³ This essentially means that sovereign immunity is a Constitutional right guaranteed to states.

2. *Alden v. Maine*⁴⁴

In *Alden*, the plaintiffs, who were probation officers, filed suit in federal court against their employer, the State of Maine, for violation of overtime provisions of the Fair Labor Standards Act (FLSA).⁴⁵ Basing its decision on *Seminole Tribe*, the district court dismissed the action on sovereign immunity grounds.⁴⁶ Plaintiffs subsequently filed the suit in state court.⁴⁷ Although FLSA contains a provision authorizing actions against a state in a state court proceeding,⁴⁸ the state court dismissed the suit on the basis of sovereign immunity.⁴⁹ The U.S. Supreme Court affirmed the dismissals and held that neither the Supremacy Clause of the U.S. Constitution nor the enumerated powers in Article I grant Congress the authority to abrogate a state's sovereign immunity.⁵⁰ The Court held that, "The powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."⁵¹ Justice Kennedy stated that, "[S]overeign immunity derives not from the Eleventh Amendment, but from the structure of the original federal Constitution itself."⁵² The rationale the majority used was that the founders intended sovereign immunity to remain an integral part of the government's operations when the Constitution was ratified.⁵³ Therefore, the states did not intend to give such power to Congress through the Supremacy Clause or the enumerated powers.⁵⁴

II. *BOISE CASCADE CORPORATION V. STATE OF OREGON*⁵⁵

A. Facts

In 1988, Boise Cascade Corporation purchased some commercial timberlands in Oregon.⁵⁶ In that same year, "the Oregon

⁴³*Id.*

⁴⁴527 U.S. 706 (1999).

⁴⁵*Id.*

⁴⁶*Id.* at 712.

⁴⁷*Id.*

⁴⁸Fair Labor Standards Act, 29 U.S.C. §§ 203(x), 216(b) (2002).

⁴⁹*Alden*, 527 U.S. at 712.

⁵⁰*Id.*

⁵¹*Id.* at 712.

⁵²*Id.* at 728.

⁵³*Id.* at 713.

⁵⁴*Id.*

⁵⁵991 P.2d 563 (Or. App. 1999).

Department of Fish and Wildlife designated the northern spotted owl as a threatened species.”⁵⁷ In 1990, the State Forester enacted an administrative regulation preventing timber harvesting within a 70-acre area of known spotted owl nesting sites.⁵⁸ In 1991, Boise sold all of the timberland except for a 64-acre parcel surrounding a northern spotted owl nest, which the buyer refused to purchase because of the regulation.⁵⁹ Boise then requested permission to harvest the land from the Board of Forestry,⁶⁰ but was refused because of the owl nests.⁶¹ Thus, Boise possessed land that they could neither sell nor harvest because of the restrictions imposed upon it pursuant to the regulation.

Boise instituted an action for inverse condemnation in Oregon state court.⁶² The corporation argued that the Board’s refusal to permit harvesting on the land amounted to a taking under the Fifth Amendment.⁶³ The trial court dismissed the complaint for failure to state a claim.⁶⁴ The Oregon Supreme Court reversed in part, deciding that Boise had stated a claim for a taking of the land surrounding the owl nest.⁶⁵ On remand, the trial court ruled that a regulatory taking had occurred and a jury awarded Boise \$2,279,223 for the restriction on logging.⁶⁶ On appeal, the Oregon Supreme Court reversed the award of damages and remanded.⁶⁷ The Oregon Supreme Court eventually dismissed the claim as not being ripe because Boise had failed to seek an incidental take permit.⁶⁸ However, the court first decided that the Oregon state court did have subject matter jurisdiction to hear the claim and that neither the Eleventh Amendment nor sovereign immunity protected the State.⁶⁹

B. Majority Opinion

The Oregon Supreme Court held that, “[B]ecause of the ‘self-executing’ nature of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, a state may be sued in state

⁵⁶*Id.* at 564.

⁵⁷*Id.* at 564.

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Hereinafter* “The Board”.

⁶¹*Boise*, 991 P.2d at 565.

⁶²*Id.*

⁶³*Id.*

⁶⁴*Id.*

⁶⁵*Id.* (citing *Boise Cascade Corp. v. Bd. of Forestry*, 935 P.2d 411 (Or. 1997)).

⁶⁶*Boise*, 991 P.2d at 565.

⁶⁷*Id.* at 574.

⁶⁸*Id.*

⁶⁹*See id.* at 568-69.

court for takings in violation of the federal constitution.”⁷⁰ Pursuant to this holding, a state may be sued in its own courts without a waiver of immunity or a direct abrogation by Congress because the Fifth Amendment requires that a person receive just compensation for a taking. The *Boise* court recognized that their decision was debatable⁷¹ and that there was at least one case in direct contravention with its holding.⁷²

The Oregon Supreme Court framed the issue in *Boise* as whether a state may be subjected to private litigation in its own courts in the absence of a waiver or Congressional abrogation of immunity.⁷³ The court began its analysis by looking at the United States Supreme Court’s decision in *Alden*.⁷⁴ The court was particularly swayed by statements in *Alden* that sovereign immunity would not be a barrier to judicial review of all state action.⁷⁵ In *Alden*, the United States Supreme Court reasoned that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its [section five] enforcement power.⁷⁶

Hence, by enacting the Fourteenth Amendment, states surrendered a portion of their sovereign immunity. The reasoning behind this principle is that States have agreed that “no person shall... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.”⁷⁷ This intimates that a forum must be provided for judicial review of state action that violates the Fifth Amendment of the Constitution. This would ensure that a citizen has a means to seek redress from a state whose actions amount to a taking of his or her property without just compensation. In essence, this view allows the judiciary to ensure that states act in compliance with the Fifth Amendment of the U.S. Constitution.

The Oregon court further reasoned that dictum in *Alden* “suggest[ed] that states may be required to provide promised remedies in state court proceedings by force of the Due Process Clause alone.”⁷⁸ In *Alden*, the Court stated, “[D]ue process requires

⁷⁰*Id.* at 569.

⁷¹*Id.* at 568 (“we recognize that our conclusion on this point is not beyond dispute.”).

⁷²*Boise*, 991 P.2d at 563 (citing *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992)).

⁷³*Boise*, 991 P.2d at 565.

⁷⁴*Id.* at 566 (citing *Alden v. Maine*, 527 U.S. 706 (1999)).

⁷⁵*Boise*, 991 P.2d at 563.

⁷⁶*Alden*, 527 U.S. at 756 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

⁷⁷U.S. CONST. amend. V.

⁷⁸*Boise*, 991 P.2d at 567.

the State to provide the remedy it has promised,”⁷⁹ “[t]he obligation arises from the Constitution itself.”⁸⁰ The *Boise* Court reasoned that Oregon, by ratifying the Fourteenth Amendment, guaranteed its citizens a remedy for a violation of the Fifth Amendment, i.e. a taking of private property without just compensation.⁸¹ This indicates that the Constitution requires a forum be made available for such violations. Furthermore, because of the self-executing nature of the Constitution, no waiver or abrogation of immunity is needed to seek a Fifth Amendment remedy against a state court.

The *Boise* Court also considered the Supreme Court’s holding in *First Lutheran Church v. Los Angeles County*⁸² as further evidence to support its view.⁸³ In *First Lutheran*, the plaintiff sued a county after it enacted an ordinance that temporarily banned construction within a flood zone.⁸⁴ The Court in *First Lutheran* stated that “a landowner is entitled to bring an action in inverse condemnation as a result of ‘the self-executing character of the constitutional provision with respect to compensation.’”⁸⁵

The *Boise* court, relying on the decision in *First Lutheran* and dicta in *Alden*, determined that the Supreme Court “in its recent Eleventh Amendment decisions, did not intend to abandon the notion that at least some constitutional claims are actionable against a state, even without a waiver or congressional abrogation of sovereign immunity[.]”⁸⁶ Therefore, a state may be sued in its own courts for an unconstitutional taking of private property.

III. EFFECT OF DECISION IN *BOISE*

A. Effect on Sovereign Immunity

The basic effect of the Oregon Appellate Court’s decision in *Boise* is that states will be susceptible to more litigation and they will not be permitted to hide behind the shield of sovereign immunity. As the amount of litigation increases, the costs to states, in terms of the time and money necessary to defend themselves, will increase.⁸⁷

⁷⁹*Alden*, 527 U.S. at 740 (citing *Hudson v. Palmer*, 468 U.S. 517, 539 (1984) (O’Connor, J., concurring)).

⁸⁰*Alden*, 527 U.S. at 740.

⁸¹*Boise*, 991 P.2d at 568 (citing *United States v. Clarke*, 445 U.S. 253 (1980); *Jacobs v. United States*, 290 U.S. 13 (1933); *Kirby Forest Indus. Inc. v. United States*, 467 U.S. 1 (1984)).

⁸²482 U.S. 304 (1987) [hereinafter *First Lutheran*].

⁸³*Boise*, 991 P.2d at 567-68.

⁸⁴*First Lutheran*, 482 U.S. at 307-08.

⁸⁵*Id.* at 315 (citing *United States v. Clarke*, 445 U.S. 253, 257 (1980) (quoting 6 P. Nichols, *Eminent Domain* § 25.41 (3d rev. ed. 1972))).

⁸⁶*Boise*, 991 P.2d at 568.

⁸⁷*See* *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868) (“The public service would be

Without the protection of immunity, it is inevitable that states will also face substantially more liability as a result of increased litigation. These increased costs will certainly place additional burdens on state treasuries. The *Boise* view will also subject more legislative and administrative decisions to judicial scrutiny. This places the legislative branches in the precarious position of being second-guessed by courts, which are less able to consider all of the factors relevant to the situation. This will force states and their officers to take these variables into consideration when making decisions. Obviously, this will make the tasks of legislatures and agencies more difficult; it is an additional factor they must insert into an already difficult decision making process.

Nevertheless, this may be a small price to pay to ensure that individuals' due process rights are not ignored. It is hardly a novel idea that state action should remain consonant with the federal Constitution.⁸⁸ That is the premise underlying the text of the Supremacy Clause: "This Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme Law of the Land."⁸⁹ Sovereign immunity acts to defeat this basic premise and allow states, at least in some areas, to act in disaccord with the Constitution.⁹⁰ Without the view taken in *Boise*, there is nothing to ensure that a citizen receives just compensation when his or her property is subjected to a taking by a state.

It is true that many states have already waived their immunity in certain areas. However, in states like Kentucky, which requires a specific waiver by its General Assembly for the state and its officers to be susceptible to litigation,⁹¹ there is no guarantee that the state will subject itself to due process claims. In fact, there is little incentive for states to do so. This is especially true for takings claims. Presumably a state causes a taking of private property for public purposes. In such circumstances, there is a reasonable justification for the state's actions if the benefit to the state as a whole outweighs the burden placed on a few individuals. There is less incentive for a state to subject itself to litigation when its actions are justified in this manner. Moreover, a state is less likely to waive its immunity when liability will be an inevitable result. In attempting to

hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen...").

⁸⁸See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁸⁹U.S. CONST. art. VI, § 1, cl. 2.

⁹⁰*Chemerinsky*, *supra* note 3, at 1214 (arguing that sovereign immunity violates the constitutional principle of government accountability because it allows States to avoid judicial review of Constitutional compliance).

⁹¹See, e.g., *Withers v. Univ. of Ky.*, 939 S.W.2d 340, 344 (1997) ("The granting of waiver is a matter exclusively legislative.").

balance these concerns, the *Boise* court finds a satisfactory medium between sovereign immunity and individual due process rights.

B. Effect on States' Ability to Regulate Environment and Wildlife

Regulations intended to protect the environment often involve private property, and, therefore, may raise the question of whether a Fifth Amendment taking has occurred, as was the case in *Boise*. Total sovereign immunity would allow states to enact regulations to preserve the environment in any manner they see fit because they would face no liability. Yet, that is not the status of the doctrine today. If the *Boise* court's view is followed in other jurisdictions, states and their officers will face more potential liability. Furthermore, their decisions will be subjected to judicial scrutiny more often. Both of these factors could have a profound impact on states' actions to protect the environment.

In *Boise*, it is presumable that the regulation protecting the Northern Spotted Owl was enacted with the idea that the state would be shielded from any potential liability by its sovereign immunity. After *Boise*, the State Forester will have to factor such liability into his decision-making process. Thus, the Forester will have to decide if preventing harvesting within 70-acres of a spotted owl nest is the best method of protecting the animal, while also considering the potential liability to the state for the taking of private land that may result.

Although it is generally difficult for an individual to show that a Fifth Amendment taking has occurred, under qualifying circumstances courts are willing to find a taking.⁹² In fact, the trial court in *Boise* determined that a temporary taking had occurred, and the Oregon Supreme Court affirmed that decision.⁹³ The case was remanded only because it was not yet ripe.⁹⁴ It merely requires considering that the jury awarded the plaintiff in *Boise* \$2,279,223 in damages⁹⁵ to understand the impact sovereign immunity has on legislative and administrative actions. Obviously, in this case, over two million dollars would have placed a significant burden on the state treasury, and this was only one such claim. Even if the state possessed insurance against such liability, the result would be increased premiums. Hence, while citizens may establish relatively few Fifth Amendment takings, it would not take many to affect a

⁹²See generally *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (discussing two possible theories under which a plaintiff may show a Fifth Amendment taking).

⁹³*Boise*, 991 P.2d 563, 565 (Or. App. 1999).

⁹⁴*Id.* at 574.

⁹⁵*Id.* at 565.

state's fiscal operations, and thus, affect the ability of states to enact environmentally protective legislation.

IV. CONCLUSION

Alexander Hamilton eloquently expressed the fundamental principle behind the rationales for sovereign immunity: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."⁹⁶ However, this principle is in direct conflict with Justice Marshall's opinion in *Marbury v. Madison*⁹⁷ that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."⁹⁸ Thus, the paradox presents itself: How do you provide states with the immunity from litigation that is necessary to their efficient and continued function as sovereigns, while simultaneously providing just compensation to individuals who have suffered a taking at the hands of the State? The *Boise* court attempts to find a middle ground between the two conflicting interests.

The importance of the decision in *Boise* is that there was neither a waiver of immunity by Oregon nor a direct abrogation of immunity by Congress. Yet, the Oregon Appellate Court found that the state is subject to litigation despite its customary immunity, because the Constitution specifically provides that a remedy must be made available for government takings of private property. This is an expansive view of sovereign immunity, especially in light of the recent Supreme Court decisions, which have tended to strengthen states' sovereign immunity. However, the *Boise* court successfully finds a way to retain sovereign immunity in most areas, and, yet, ensure that citizens' due process rights are not violated in the process.

The loophole in sovereign immunity that the *Boise* court establishes through the Fifth and Fourteenth Amendments will have a significant impact on legislative and administrative regulations regarding environmental issues. State environmental and wildlife regulations generally affect private property in some form.⁹⁹ Thus, they will inevitably lead to takings claims against states when the states are not protected by sovereign immunity. Such claims could potentially subject states to significant financial burdens. This will

⁹⁶THE FEDERALIST No. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁹⁷5 U.S. (1 Cranch) 137 (1803).

⁹⁸*Id.* at 163.

⁹⁹See generally Jonathan Brinckman, *Oregon Supreme Court Allows Logging Restriction Suit*, at http://sweet-home.or.us/forest/owl/09_CourtFor.html (last visited Apr. 16, 2002) ("States customarily enforce provisions of the federal Endangered Species Act on private lands.").

make the states' and their agencies' task of regulating the environment more difficult. They will be required to take the potential liability of their actions into consideration when forming a plan of action.

It is already difficult to determine how best to protect the environment because of the numerous factors that must be analyzed. One such factor is the negative impact of environmental regulations on local economies, and consequently, employment for citizens. Sweet Home, Oregon, is an example of a locality that has been hit especially hard by the Northern Spotted Owl regulations. Sweet Home is a small community heavily dependent on the logging industry. In the 1980's, the area produced nearly 86 million board feet of timber annually.¹⁰⁰ In 1992, when the Northern Spotted Owl controversy first raged, only 100,000 board feet were produced.¹⁰¹ The loss of timber available for logging has forced the closing of local mills and the loss of hundreds of jobs in this one area.¹⁰² The damage to local economies is only one serious factor regulatory agencies and state legislatures must consider in undertaking environmentally protective measures. Other factors include what method will be effective to accomplish the purpose, the states' ability to enforce the regulation, the costs in terms of time and money of enforcement, and potential impacts on individuals. The possibility of litigation and crippling liability will only add to this already onerous burden.

After *Boise*, the process will be further complicated, and the ability of states to protect endangered animals like the Northern Spotted Owl will be reduced. As Kurt Smitch, Assistant Regional Director for the United States Fish and Wildlife Service, has said, "If courts come down on the side that anytime you've got to protect a species, you've got to pay for it, that will be very tough on the species."¹⁰³ The *Boise* decision will "force the state to weaken its rules protecting the spotted owl and other plants and animals protected by the federal Endangered Species Act."¹⁰⁴

¹⁰⁰*Sweet Home Hard Hit by Federal, State Logging Restrictions*, at http://www.sweet-home.or.us/forest/owl/index.html#Social_Impact, (n.d.).

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³*Id.*

¹⁰⁴*Id.*

