IN THE SUPREME COURT OF TEXAS

NO. 07-0945

TEXAS PARKS AND WILDLIFE DEPARTMENT, PETITIONER,

v.

THE SAWYER TRUST, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

JUSTICE HECHT, concurring in part and dissenting in part.

By today's decision, the Court abolishes the State's immunity from suit to determine title to real property. All the plaintiff must do is name some state official as the defendant. The suit proceeds as against a private defendant. Of course, naming a state official instead of the State is a complete fiction. For all practical purposes, the suit is against the State. If the plaintiff's claim is superior to the State's, as advocated by the state official, the plaintiff wins, and the State is bound by the judgment.

In the Court's view, repeated in the concurring opinion, the State has *never* been immune from suit over real property, having announced that ruling fifty years ago in *State v. Lain*.[1] It is difficult to take this view seriously. For one thing, if it were true, then we should have granted this petition for review when it was first filed and reversed and remanded in a two-page per curiam

[1] 349 S.W.2d 579, 582-583 (Tex. 1961).

opinion, as we ordinarily would whenever the court of appeals has ruled directly contrary to an opinion of this Court. Instead, we requested full briefing, denied the petition, granted rehearing, requested more briefing, heard argument, and struggled with the issues. That's a lot of work to apply law that has been settled for fifty years ago.

Moreover, the courts of appeals have been divided in their view of *Lain*, with one reading that decision narrowly,[2] and three construing it more broadly.[3] *Lain* unquestionably allows suit against a government official when suit against the government itself would be barred. Less clear is whether, to prevail in a suit against a government official, the plaintiff must prove only that the official is in error in asserting a claim to property on behalf of the government, which is all the plaintiff would be required to prove against a private defendant, or whether the plaintiff must prove more: either that the official abused his discretion in asserting his claim, or that he had no discretion to assert the claim, or that he had no power to act at all. Only because the Court holds today that a plaintiff's burden of proof against a public official is no different than in a suit against a private individual, and the government is bound by a judgment against its officer, does it follow that the government has no immunity from suit.

It is difficult to square the Court's broad reading of *Lain* with its much narrower holding

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[2] *State v. Riemer*, 94 S.W.3d 103, 110 (Tex. App.–Amarillo 2002, no pet.); *see also Cornelius v. Armstrong*, 695 S.W.2d 48, 49 (Tex. App.–Tyler 1985, writ ref'd n.r.e.).

[3] *Fleming v. Patterson*, 310 S.W.3d 65, 70 (Tex. App.–Corpus Christi-Edinburg 2010, no pet.); *State v. BP Am. Prod. Co.*, 290 S.W.3d 345, 356-357 (Tex. App.–Austin 2009, pet. denied); *Porretto v. Patterson*, 251 S.W.3d 701, 711 (Tex. App.–Hous. [1st Dist.] 2007, no pet.); *Texas Parks and Wildlife Dep't v. Callaway*, 971 S.W.2d 145, 152 (Tex. App.–Austin 1998, no pet.); *Bell v. State Dep't of Highways and Pub. Transp.*, 945 S.W.2d 292, 295 n.1 (Tex. App.–Hous. [1st Dist.] 1997, pet. denied).

recently in *City of El Paso v. Heinrich*.[4] There we allowed suit against a city pension fund's trustees in their official capacity for acting *ultra vires* in denying the plaintiff's claim for benefits even though the city, the fund, and the board were all immune from suit.[5] But "[t]o fall within this *ultra vires* exception," we held, "a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act."[6] 2Because of this restriction, an *ultra vires* suit is an "exception" to the government's immunity from suit; it does not destroy immunity from suit.

Today — *and for the first time* — the Court allows a plaintiff to sue a government official for title to property, and recover in practical effect against the government itself, proving no more than would be required in a suit against a private defendant. The only remaining immunity from suit is in name only: the government cannot be sued, but its actors can. Why this should be — or as the Court believes, should always have been — the rule for title suits but not for suits for pension benefits, like *Heinrich*, for example, is not clear. Why the government's immunity from suit in tort and contract should be absolute, subject only to statutory waiver, its immunity from suit for the unauthorized actions of its agents should be subject to the narrow *Heinrich* exception, and its immunity from suit over title to real property should be nonexistent is a puzzle to which the Court is strangely oblivious.

I agree with the Court that respondent's declaratory judgment claim fails. In my view, the

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[4] 284 S.W.3d 366 (Tex. 2009).

[5] *Id.* at 370-372.

[6] *Id.* at 372.

law affords a practical solution for settling title disputes with the government that preserves immunity while providing a resolution of serious issues. When the government is met with a claim of ownership contrary to its own that it considers serious, it can sue for a resolution, thus waiving immunity. It would be required to sue to protect its own interests. When the government considers its own possible claim not worth asserting, the individual claimant has the property. But when the government claims immunity from suit over title, refuses to sue for a resolution of the dispute, and imposes criminal penalties on the individual claimant for treating the property as his own, the government has removed itself from the proper scope of immunity. In that situation, I would permit the individual claimant to sue for a taking, for which the government has no immunity.

At bottom, I would allow the government to preserve its immunity from suit but would preclude it from making that immunity absolute. Because the Court chooses to abolish immunity altogether, I respectfully dissent.

I

The parties agree that if the Salt Fork of the Red River is "navigable", a term that by statute refers to "a stream which retains an average width of 30 feet from the mouth up",[7] the State owns the bed on the Sawyer Trust ranch; if not, the Trust owns it.[8]

> The bed of a stream is that portion of its soil which is alternatively covered and left bare as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during an entire year, without

[7] TEX. NAT. RES. CODE § 21.001(3).

[8] *See State v. Bradford*, 50 S.W.2d 1065, 1069 (Tex. 1932) ("The rule long has been established in this state that the state is the owner of the soil underlying the navigable waters, such as navigable streams, as defined by statute . . . ."). The Department also contends that the Salt Fork on the Trust's property is governed by the "Small Bill", TEX. REV. CIV. STAT. ANN. art. 5414a-1, which grants title to the beds of certain "water courses or navigable streams.

> reference to the extra freshets of the winter or spring or the extreme drouths of the summer or autumn. . . . [The bed] include[s] all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time . . . .[9]

Determining whether the Salt Fork is "navigable" is not an easy matter. It rises in the Texas Panhandle near Amarillo and flows southeastward some fifty miles to Greenbelt Lake, just north of Clarendon, then extends another hundred miles or so across Texas and Oklahoma to its mouth in the Prairie Dog Town Fork of the Red River.[10] The Salt Fork crosses the Trust's property just below the Greenbelt Lake dam. No water flows there, except in floods. Even before the dam was built in 1966, there was never enough water in the Salt Fork on the Trust property for regular use.[11]

In 2006, the Trust contracted for the mining of sand and gravel from the dry streambed. But removal of such materials from the bed of a navigable stream requires a $1,200 permit[12] issued by

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[9] *Brainard v. State*, 12 S.W.3d 6, 16 (Tex. 1999) (citations omitted).

[10] Texas State Historical Ass'n, *Salt Fork of the Red River*, THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/rns05 (last visited Aug. 21, 2011); Texas State Historical Ass'n, *Greenbelt Lake*, THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/rog09 (last visited Aug. 21, 2011); Texas State Historical Ass'n, *Donley County*, THE HANDBOOK OF TEXAS ONLINE, http://www.tshaonline.org/handbook/online/articles/hcd10 (last visited Aug. 21, 2011); 30 TEX. ADMIN. CODE § 307.10(3), App. C.

[11] This evidence offered by the Trust has not been challenged and thus must be taken as true for purposes of resolving the jurisdictional issues before us. *See Tex. Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004) ("[I]f the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law.").

[12] TEX. PARKS & WILDLIFE CODE § 86.002(a) ("No person may disturb or take marl, sand, gravel, shell, or mudshell under the management and protection of the commission or operate in or disturb any oyster bed or fishing water for any purpose other than that necessary or incidental to navigation or dredging under state or federal authority without first having acquired from the commission a permit authorizing the activity."); 31 TEX. ADMIN. CODE § 69.104 (stating that with exceptions, "the disturbance of sedimentary materials under the management and protection of the commission must be authorized under the terms and conditions of either an individual or a general permit"); *id.* § 69.114(a) (stating that "applications for permits to take or disturb sedimentary material shall be accompanied by the following nonrefundable application fees: (1) $1,200 for applications to take sedimentary material for purposes of sale").

the Texas Parks and Wildlife Department, which may be subject to various conditions.[13] The permittee must also post a bond[14] and pay royalties.[15] The Trust's contractor inquired of the State whether it claimed that the Salt Fork is navigable. When the State would not take a position one way or the other, the Trust sued the Department for a declaration that the Salt Fork is non-navigable. The Department asserted immunity,[16] still refusing to take a position on navigability, but after a hearing before the district court, it agreed to arrange for the Director of Surveying of the Texas General Land Office to visit the Trust property. He found that all water channels on the property were dry but that at one point the riverbed was 330 feet wide. Based on his brief observations at the site and his review of a few unspecified field notes from the original surveys, he concluded that the Salt Fork is navigable.[17] The trial court refused to dismiss the case, and the court of appeals

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[13] *Id.* § 69.111(a) ("The director [of the Department] may make such reasonable requirements of the permittee as required to effectuate the intent of Chapter 86 of the Parks and Wildlife Code.")

[14] *Id.* § 69.111(b) ("The director shall require the permittee to make a good and sufficient bond payable to the department, and conditioned upon the prompt payment of charges for sedimentary materials and any damage done to property under the ownership or trusteeship of the state.").

[15] *Id.* § 69.121(a).

[16] *See* TEX. PARKS & WILDLIFE CODE § 11.011 ("The Parks and Wildlife Department is established as an agency of the state. It is under the policy direction of the Parks and Wildlife Commission.").

[17] I quote the report of the Director of Surveying in full:

> Report of Inspection
> Salt Fork of the Red River
> Donley County, Texas
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> A visit was made to the Salt Fork of the Red River in Donley County on August 22, 2006, for the purpose of determining if the stream was statutorily navigable. The inspection was made at a point approximately 4.7 miles north of Clarendon and less than one mile downstream from the dam creating Greenbelt Lake. Bob Sweeney, an attorney for the Parks & Wildlife Department, and I met with the landowner, a Mr. Sawyer, and his surveyor, Maxey Sheppard, LSLS.
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> The Salt Fork of the Red River is a "Small Bill" stream. All of the original land surveys in the vicinity cross the river

affirmed.[18]

II

I agree with the Court that the Trust's suit against the Department to determine title to the bed of the Salt Fork is barred by immunity.[19] In *State v. Lain*, we held that "[w]hen in this state the sovereign is made a party defendant to a suit for land, without legislative consent, its plea to the jurisdiction of the court based on sovereign immunity should be sustained in limine."[20] For the reasons the Court explains, the State's immunity from land claims is not waived by the Declaratory

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even though, in the vicinity of the inspection site, the stream bed widths recited in the patent field notes for the original surveys vary from a minimum of 70 varas (194 feet) to as much as 453.5 varas (1260 feet) and at a point 5 miles west, above Greenbelt Lake, there is a reported width of 463 varas (1286 feet).

The inspection point on the river was in the vicinity of the southwest corner of G.C. & S.F. Ry. Co. Survey No.7, Abstract No. 282, in the east line of the Socorro Irrigation Co. Survey No.5, Abstract No. 238. Aerial photography indicates that, at this point, the river is separated into two channels by a rather large island. Only the north channel was inspected.

As with many high plains streams, the Salt Fork of the Red River is a wide sand-bed river with numerous channels lying between the river banks. The area of inspection was less than one mile below the dam creating Greenbelt Lake and at this point the riverbed is dry except when occasional releases are made from the lake. The riverbed at the point of inspection is vegetated from bank to bank but not with typical upland vegetation. The banks of the stream are well defined on both sides of the bed. There exist at least three separate water channels between the banks but all of them are dry at this time. The portion of the riverbed north of the island at the point of inspection was found to be approximately 330 feet in width.

Based on the above-recited observations, it is my opinion that the Salt Fork of the Red River is a statutorily navigable stream at this point.

/s C.B. Thomson
C.B. Thomson, LSLS, RPLS, PE
Director of Surveying
Texas General Land Office

[18] ___ S.W.3d ___ (Tex. App.–Amarillo 2007).

[19] *Ante* at ___ (citing *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372-373 (Tex. 2009), and *State v. Lain*, 349 S.W.2d 579, 582 (Tex. 1961)).

[20] *Id.*

Judgment Act.[21] Immunity in this context serves important purposes. It preserves the separation of powers between the Legislative and Judicial Departments by limiting courts' authority to decide policy matters that may attend disputes over the State's ownership of property.[22] Immunity also respects the Executive Department's authority and discretion to handle property dispute issues on a consistent and comprehensive basis. In this case, for example, a decision on the navigability of the Salt Fork would have ramifications for other landowners, not only up and down the Salt Fork, but adjacent other streams as well. And immunity protects the State from the burdens of litigation that would require diversion of limited revenues from other purposes considered more important.

I also agree that immunity would not bar an *ultra vires* action by the Trust against an appropriate official for asserting the State's ownership of the bed contrary to law. Again, *Lain* holds:

> Well reasoned and authoritative decisions of the Supreme Court of the United States and of the courts of this state support the view that a plea of sovereign immunity by officials of the sovereign will not be sustained in a suit by the owner of land having the right of possession when the sovereign has neither title nor right of possession.[23]

We recently reconfirmed in *City of El Paso v. Heinrich* that *ultra vires* actions are permissible,[24] but history teaches that the line between such actions and actions for which the government retains

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[21] *Ante* at ___.

[22] *See Federal Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 413-415 (Tex. 1997) (Hecht, J., concurring) (stating that the decision whether to waive immunity from suit on a contract "involves policy choices more complex than simply waiver of immunity" and that "the Legislature . . . is better suited to deciding the kinds of political issues that . . . attend claims against the State").

[23] *Lain*, 349 S.W.2d at 581.

[24] *Heinrich*, 284 S.W.3d at 371.

immunity is hard to draw. The specific Supreme Court decision to which *Lain* referred was *United States v. Lee*,[25] in which the Court, 5-4, upheld a suit against federal officials to void the seizure of General Robert E. Lee's wife's Arlington estate for nonpayment of $92.07 taxes after it had been sold to the United States for $26,800 for use as a national cemetery. *Lee* was the most celebrated case of several over many years in which the Court attempted to set out exactly when a suit for land from which the United States is immune could be brought against a government official. Toward the end of this exercise, the Court admitted that it had been "inconsistent"[26] in determining whether to allow "officer suits", observing that "it is fair to say that to reconcile completely all the decisions of the Court in this field . . . would be a Procrustean task."[27]

Eventually, the Supreme Court "cut through the tangle" of its decisions and applied to land disputes the general rule it had announced for officer suits in *Larson v. Domestic & Foreign Corp.*:[28]

> the action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.[29]

The difficulty with respect to land disputes evaporated with Congress' passage of the Quiet Title Act

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[25] 106 U.S. 196 (1882).

[26] *Block v. North Dakota*, 461 U.S. 273, 281 (1983).

[27] *Id*. (quoting *Malone v. Bowdoin*, 369 U.S. 643, 646 (1962)).

[28] 337 U.S. 682, 702 (1949).

[29] *Block*, 461 U.S. at 281 (quoting *Malone*, 369 U.S. at 647, in turn quoting *Larson*, 337 U.S. at 702) (internal quotation marks omitted).

of 1972,[30] which waived the federal government's immunity from suits for land under certain conditions but also "provide[d] the exclusive means by which adverse claimants [can] challenge the United States' title to real property.[31]

The Texas Legislature has not acted similarly to free us of the continuing struggle to determine when government officers may be sued though the government is immune. We held in *City of El Paso v. Heinrich* that an *ultra vires* suit is permitted when a government official has acted contrary to a statute requiring him to "perform[] in a certain way, leaving no room for discretion".[32] This rule may not be as restrictive as the rule in *Larson*, as its application depends on the difficult decision of what is properly within an official's discretion and what lies beyond. Locating the banks of a stream to determine navigability may[33] or may not[34] involve discretion; determining from a single measurement and a few surveys that "a stream retains an average width of 30 feet from the mouth up"[35] may be an abuse of discretion. But we cannot decide these issues here because the Trust has not brought an *ultra vires* action. The Department insists that a discretionary determination was made and that any *ultra vires* action the Trust may assert will fail. The Court

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[30] Act of Oct. 25, 1972, Pub.L. No. 92-562, 86 Stat. 1176 (codified at 28 U.S.C. § 2409a, 28 U.S.C. § 1346(f), and 28 U.S.C. §1402(d)).

[31] *Block*, 461 U.S. at 286.

[32] *Heinrich*, 284 S.W.3d at 371.

[33] *See Bradford*, 50 S.W.2d at 1069 (stating that a determination of navigability will not be held void where "the surveying officers . . . made the surveys in the exercise of their discretion and honest judgment").

[34] *See Brainard v. State*, 12 S.W.3d 6, 10 (Tex. 1999) ("The differences between the parties' surveys (and, in particular, their chosen river banks) are based on conflicting legal theories that we must resolve.").

[35] TEX. NAT. RES. CODE § 21.001(3).

removes that argument by holding that an appropriate state official may be sued, just as a private person would be, and judgment rendered against the State.

III

The Department contends that there are only two ways for the Trust to challenge the State's assertion of ownership of the Salt Fork bed. One is for the Trust to seek permission from the Legislature to sue.[36] The Department concedes that this may be difficult, citing only one instance in which the Legislature has ever granted consent in similar circumstances.[37] But it argues that the difficulty is justified by the important purposes immunity serves.

The Trust's only other alternative, the Department contends, is to proceed with its mining plans and risk the consequences. This is not simply a dare. The Department might reconsider its claim of ownership or otherwise decide to take no action against the Trust. Or the Department might sue for damages, in which case it would not be immune from the Trust's counterclaim to determine title.[38] The Department would have to determine whether its claim was strong enough to justify losing—the expense of litigation as well as the ramifications of an adverse decision. If the Department prevailed on a claim for common-law conversion, the Trust would be liable, if it acted in good faith, for only the net value of the property taken, and if it did not act in good faith, for the

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[36] *See* TEX. CIV. PRAC. & REM. CODE §§ 107.001-.005 (providing framework for legislative consent to sue).

[37] *Brainard*, 12 S.W.3d at 10.

[38] *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375-376 (Tex. 2006) ("[I]t would be fundamentally unfair to allow a governmental entity to assert affirmative claims against a party while claiming it had immunity as to the party's claims against it."); *Anderson, Clayton & Co. v. State*, 62 S.W.2d 107, 110 (Tex. 1933) ("[W]here a state voluntarily files a suit and submits its rights for judicial determination it will be bound thereby and the defense will be entitled to plead and prove all matters properly defensive. This includes the right to make any defense by answer or cross-complaint germane to the matter in controversy.").

gross value of the property and the Department's expenses in recovering it.[39] The Trust would not be liable for punitive damages unless it acted with malice.[40] The Trust would have to evaluate whether the strength of its claim justified its exposure or whether it would be to its benefit in the long run to apply for a permit and pay the State a royalty. A Department-initiated suit for conversion presenting roughly correlative risks to each side preserves immunity and the purposes its serves while providing a viable mechanism for resolving the ownership dispute.

But conversion would not be the only action available to the Department, nor would the Trust's risk be limited to common-law damages. By statute, a person who removes sand and gravel belonging to the State without a permit may also be liable for consequential damages[41] as well as "a civil penalty of not less than $100 or more than $10,000 for each act of violation and for each day of violation".[42] Further, mining the State's sand and gravel without a permit is a crime[43] punishable

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[39] *Moore v. Jet Stream Investments, Ltd.*, 261 S.W.3d 412, 428-429 (Tex. App.–Texarkana 2008, pet. denied)

[40] *Bennett v. Reynolds*, 315 S.W.3d 867, 871-872 (Tex. 2010); TEX. CIV. PRAC. & REM. CODE § 41.003(a) (stating that, with exceptions, "exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence"); *id*. § 41.001(7) ("'Malice' means a specific intent by the defendant to cause substantial injury or harm to the claimant.").

[41] TEX. PARKS & WILDLIFE CODE § 86.023 "A person who takes marl, sand, gravel, shell, or mudshell under the jurisdiction of the commission in violation of this chapter or a rule adopted under this chapter is liable to the state for the value of: (1) the material taken; and (2) any other natural resource under the department's jurisdiction that is damaged or diminished in value.").

[42] *Id*. § 86.024.

[43] *Id*. § 86.022 ("A person who violates Section 86.002 [that is, mines sand and gravel without a permit] . . . commits an offense that is a Class C Parks and Wildlife Code misdemeanor.").

by a fine of $25 to $500 per day.[44] With the addition of these statutory civil and criminal penalties, the State has gone to some lengths to discourage any provocation for it to litigate ownership disputes.

The Trust argues for a third alternative: a suit for a taking of its property without compensation in violation of article I, section 17 of the Texas Constitution. The Department acknowledges that it is not immune from such suits but argues that the Trust cannot sue for a taking in this situation. The Court agrees for what I take to be three reasons.

First, the Court notes that "the State has not expressed an intent to take property belonging to the Trust [but] . . . has merely identified the streambed as belonging to the State".[45] But to say that the State is claiming only what it owns obviously begs the question. The Department argues that the government cannot have the intent to take property necessary to trigger a constitutional right to compensation as long as it reasonably believes it owns the property, but the Court does not even require that government's belief be reasonable. And this case illustrates what the Department means by reasonable belief: from one measurement of the dry riverbed on the Trust's property and a few unidentified field notes, one can infer that the Salt Fork has an average width of thirty feet from the mouth up. With no more basis than that, the Department's assertion of ownership is little more than a grab. The rule the Court implicitly applies is that the State never takes something it claims to own, however unfounded the claim may be. The government cannot avoid its constitutional responsibility

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[44] *Id.* §§ 12.406 ("An individual adjudged guilty of a Class C Parks and Wildlife Code misdemeanor shall be punished by a fine of not less than $25 nor more than $500."); 86.002(b) ("Each day's operation in violation of this section constitutes a separate offense.").

[45] *Ante* at ___.

simply by wishful thinking.

Second, the Court states that "[t]he Trust's suit is an action to determine whether it owns the streambed, not one for compensation".[46] But the fact that the Trust *has not sued* for compensation to date does not mean that it *cannot sue* for a taking in this situation. The Trust *has not sued* a state official, yet the Court explains at length that the Trust *could* bring an *ultra vires* action. There is no less reason to consider whether the Trust *could sue* the Department for a taking if it asserted a claim for compensation. This case is not about pleadings; it is about immunity.

Third, the Court argues that "[a]llowing the Trust's claim of title to be adjudicated by means of a takings claim would sanction claimants' circumventing the State's sovereign immunity by . . . [c]reative pleading . . . ."[47] But it may just as well be said that allowing the State to assert immunity from a takings suit merely because it claims title would sanction the State's circumvention of its constitutional responsibility. If a takings claim—which the Department concedes immunity would not bar—can be asserted even though title is disputed, then its assertion cannot be dismissed as creative pleading.

Not only does the Court offer no persuasive reason for holding that the Trust has no takings claim,[48] it allows a contrary result in a similar case to stand by denying the petition for review today

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[46] *Ante* at ___.

[47] *Ante* at ___.

[48] The Department also argues that if the Trust had a constitutional claim, it would be for a regulatory taking because the Trust's only complaint is that it must obtain a permit for its proposed mining operations. "Physical possession is, categorically, a taking for which compensation is constitutionally mandated, but a restriction in the permissible uses of property or a diminution in its value, resulting from regulatory action within the government's police power, may or may not be a compensable taking." *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 669-670 (Tex. 2004) (footnote omitted). The Department contends that because the Trust has not pleaded and cannot show that the permit requirement severely impacts the value of the property, it has no regulatory takings claim.

in *Koch v. Texas General Land Office*.[49] There, Koch sued the General Land Office for taking limestone from her land for highway construction. The State claimed ownership of the limestone because its 1926 land patent to Koch's predecessor reserved "[a]ll of the minerals", despite our holding in a 1949 case that ordinary limestone is not a mineral.[50] The GLO argued that the rule in that case should not apply retroactively or to the State, that it therefore had a colorable claim to the limestone, and that "if the State believes it is the owner of property, its use of that property cannot be an intentional act to take the property of another."[51] The court rejected this Cartesian *credo ergo capio* argument:

> We are not persuaded that the State's subjective belief regarding its title to property, by itself, changes or dictates the capacity in which the State acts. . . . When a plaintiff alleges a state taking of property and title to that property is in dispute, the State cannot evade its constitutional obligations merely by asserting that it "believes" it is acting as landowner rather than as sovereign regardless of whether that belief is, in fact, accurate. Otherwise, the State would be in the position of unilaterally determining the outcome of takings disputes simply by declaring a subjective belief —whether right or wrong—that it thought it owned the property.[52]

The court noted that two other courts had held that a dispute over the ownership of property does

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See id. at 672-673. But the disagreement between the Trust and the Department is over ownership of the riverbed, not the requirement of a permit to mine it. This is not a regulatory takings case.

[49] 273 S.W.3d 451 (Tex. App.–Austin 2008, pet. denied).

[50] *Heinatz v. Allen*, 217 S.W.2d 994, 997 (Tex. 1949) ("In our opinion substances such as sand, gravel and limestone are not minerals within the ordinary and natural meaning of the word unless they are rare and exceptional in character or possess a peculiar property giving them special value, as for example sand that is valuable for making glass and limestone of such quality that it may profitably be manufactured into cement. Such substances, when they are useful only for building and road-making purposes, are not regarded as minerals in the ordinary and generally accepted meaning of the word.").

[51] *Koch*, 273 S.W.3d at 458.

[52] *Id*. at 458-459.

not preclude a suit for its taking.[53]

Koch and the present case are quite similar. The ownership issue in *Koch* was purely legal: what did "mineral" mean in the State's land patent. The ownership issue in the present case may be partly legal— what standards govern the measurements made to determine navigability—and partly factual—the actual measurements themselves. But the basic nature of the issues in the two cases is the same. In both cases, the State argues that it cannot take property it reasonably believes it owns, but the bases for its belief are shaky: in *Koch* it claims that limestone is a mineral in the face of a contrary decision from this Court, and in the present case it claims that the Salt Fork is thirty feet wide on average, source to mouth, on the strength of one measurement and some unidentified notes. And although Koch sued for damages while the Trust has sought only declaratory and injunctive relief, nothing would prevent the Trust from adding a claim for damages.

In *Koch*, the State actually removed the limestone, while here, the State has only asserted that the Trust cannot remove sand and gravel without a permit. But in both cases, the State claims ownership of the property in issue. A permit to remove sand and gravel is required, not for the purpose of regulating a landowner's use of his own property, but to protect the State's right to its property. The imposition of a royalty in connection with the permit is based on the State's ownership of the material being mined. The State claims the right to remove sand and gravel from the Trust ranch, just as it removed limestone from Koch's property, only it has not yet chosen to

[53] *Id*. (citing *Porretto v. Patterson*, 251 S.W.3d 701, 709-710 (Tex. App.–Houston [1st Dist.] 2007, no pet.) (holding that a person claiming ownership of property could sue the State for a taking for having leased it); *Kenedy Mem'l Found. v. Mauro*, 921 S.W.2d 278, 282 (Tex. App.–Corpus Christi 1995, writ denied) (holding that immunity did not bar a takings claim merely because the State disputed the plaintiff's ownership of the property). This Court later noted in *Kenedy*, however, that the State's immunity had been waived by statute. *Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 289 & n.71 (Tex. 2002).

exercise that right. At bottom, this distinction in the two cases is one without a difference.

In my view, an action for a constitutionally compensable taking of property is not precluded merely by a dispute between the claimant and the government over ownership of the property. To hold otherwise would allow the government to avoid its constitutional obligation whenever it chose to do so. Nor do I think a takings action can be precluded when the government's belief in its right to the property is colorable or even reasonable. Such a rule would depreciate the constitutional right too much. On the other hand, to hold that the government's claim to property may always be challenged in a takings action would vitiate the rule of *Lain*, that the government is immune from such suits, and abolish any need for *ultra vires* actions. It is not necessary to go that far in this case.

The dilemma presented here results not from the State's assertion of immunity as a shield to prevent being drawn into litigation, but its use as a sword to discourage all claims to streambeds. By imposing statutory damages and civil and criminal penalties for mining a streambed without a permit, the State has all but prohibited a claimant from acting on a right asserted in good faith and risking the consequences in an action brought by the State. Legislative consent to sue for title is thus made virtually absolute. The effect is to shift authority for determining whether the State has taken a person's property without compensation from the Judicial Department to the Legislative Department, in violation of the fundamental principle that it is for the courts to decide what the constitution requires.[54] In these circumstances, I would hold that a takings action must be allowed. If the State loses that action, it must pay for property it might prefer not to have. Thus as a practical matter, the availability of a takings action forces the State to consider more carefully the strength

[54] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

of its claim. The State may statutorily increase the punishment for conversion, but it does so at the risk of incurring damages for insubstantial claims of ownership.

* * *

For these reasons, I would hold that the Trust may assert a claim for compensation against the Department under article I, section 17 of the Constitution. From the Court's decision to waive the State's immunity completely, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: August 26, 2011