

# IN THE SUPREME COURT OF TEXAS

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No. 07-0945

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TEXAS PARKS AND WILDLIFE DEPARTMENT, PETITIONER,

v.

THE SAWYER TRUST, RESPONDENT

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

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**Argued November 19, 2009**

JUSTICE JOHNSON delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE WILLETT, JUSTICE GUZMAN, and JUSTICE LEHRMANN joined.

CHIEF JUSTICE JEFFERSON filed a concurring opinion, in which JUSTICE MEDINA, JUSTICE WILLETT, and JUSTICE GUZMAN joined.

JUSTICE HECHT filed an opinion concurring in part and dissenting in part.

This appeal involves the issue of whether the trial court had jurisdiction over a claim against the Texas Parks and Wildlife Department to determine whether the Salt Fork of the Red River is navigable. The Sawyer Trust sued the Department for a declaratory judgment that the river is not navigable and that the Trust owns the riverbed where it crosses the Trust's property in Donley County. The Department filed a plea to the jurisdiction based on sovereign immunity. After the Department took the position that the river was navigable—and the State therefore owned the riverbed—the Trust added a constitutional takings claim. The trial court denied the Department's

plea and the court of appeals affirmed.

We hold that the Trust's claims for a declaratory judgment are barred by sovereign immunity and the Trust cannot assert a takings claim under these circumstances. We also hold, however, that the Trust is entitled to replead and attempt to assert an ultra vires claim against state officials if it chooses to do so. We reverse the court of appeals' judgment and remand the case to the trial court for further proceedings.

### **I. Background**

The State of Texas owns the soil underlying navigable streams.<sup>1</sup> TEX. PARKS & WILD. CODE § 1.011(c); TEX. WATER CODE § 11.021; *see Maufrais v. State*, 180 S.W.2d 144, 148 (Tex. 1944); *State v. Bradford*, 50 S.W.2d 1065, 1069 (Tex. 1932). By statute, a “navigable stream” is “a stream which retains an average width of 30 feet from the mouth up.” TEX. NAT. RES. CODE § 21.001(3). The taking of sand and gravel from state-owned waters and beds, including those of navigable streams, is regulated by the Department. TEX. PARKS & WILD. CODE § 1.011(d); TEX. NAT. RES. CODE § 51.291; 31 TEX. ADMIN. CODE § 69.101.

The Salt Fork of the Red River crosses property in Donley County owned by the Sawyer Trust. The Trust had an opportunity to sell sand and gravel from the streambed but was concerned that the Department would seek control of the property and interfere with the sale. *See* TEX. PARKS & WILD. CODE § 86.002(a); 31 TEX. ADMIN. CODE §§ 69.104, 69.114(a). The Trust sued the

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<sup>1</sup> Subject to specified limitations, title to certain streambeds has been transferred by the State. *See* TEX. REV. CIV. STAT. art. 5414a-1. The State and the Trust contend their respective rights to the sand and gravel in the bed of the Salt Fork turn on the issue of navigability. We assume, without deciding, that their positions are correct.

Department<sup>2</sup> for a declaratory judgment that the Salt Fork was not navigable.<sup>3</sup> The Department filed a plea to the jurisdiction. It asserted that (1) the Trust had not pled a claim that fell within a waiver of sovereign immunity, and (2) the Trust's claims were not ripe because the Department had neither taken action contrary to the Trust's interests nor manifested any intent to do so.

Pursuant to agreement of the parties, and at the urging of the trial court, a surveyor from the General Land Office visited the streambed on the Trust property. He then filed a letter with the trial court setting out that his visit was "for the purpose of determining if the stream was statutorily navigable." He concluded that the Salt Fork was navigable at the point where he measured it on the Trust's property. The Trust then amended its pleadings and added an allegation that the State's claim of navigability constituted a taking of its property under the federal and Texas Constitutions. The trial court denied the Department's plea to the jurisdiction.

The court of appeals affirmed. It held that a declaratory judgment action seeking the determination of a disputed fact issue—the navigability of the stream—is not a suit against the State that implicates sovereign immunity. \_\_\_ S.W.3d \_\_\_. The court of appeals concluded that although the declaratory action "may have the collateral consequence of resolving a factual dispute that impacts a claim being made by the State, it is not an action that is in essence one for the recovery of money from the State or for determination of title; therefore, legislative permission to prosecute is unnecessary." *Id.* at \_\_\_.

The Department no longer urges its ripeness challenge to the Trust's claim: it maintains that

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<sup>2</sup> The Trust also sued, but then non-suited, the Texas Commission on Environmental Quality.

<sup>3</sup> The Trust also sued for injunctive relief. The parties do not address that claim and neither do we.

the Salt Fork is navigable. Nevertheless, the Department asserts that sovereign immunity deprived the trial court of jurisdiction because (1) there is no general right to sue a State entity for a declaration of rights—such relief is available only in an ultra vires claim against a state official; (2) determination of whether a stream is navigable constitutes a determination of the State’s title to property and sovereign immunity bars a suit that would have such an effect; and (3) the Trust’s pleadings fail to state a constitutional takings claim. The Trust counters that the trial court had jurisdiction because the suit is (1) a permissible declaratory judgment action under the Texas Constitution; (2) an authorized declaratory judgment action to determine a boundary line as opposed to a trespass to try title suit to determine ownership rights; and (3) a constitutional takings claim because the State has destroyed value and use of the Trust’s property. Alternatively, the Trust argues that if this suit involves an ultra vires claim that it should have brought against a governmental actor, we should remand the case with instructions to modify the parties.

## **II. Discussion**

### **A. Standard of Review**

Whether a trial court has jurisdiction is a question of law subject to de novo review. *See Tex. Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

Generally, sovereign immunity deprives a trial court of jurisdiction over a lawsuit in which a party has sued the State or a state agency unless the Legislature has consented to suit. *See, e.g., Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). But when the State or a state agency has taken a person’s property for public use, the State’s consent to suit is not required; the Constitution grants the person consent to a suit for compensation. *See, e.g., State v.*

*Holland*, 221 S.W.3d 639, 643 (Tex. 2007); *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980).

## **B. Declaratory Relief**

The Declaratory Judgments Act (DJA) generally permits a person who is interested in a deed, or whose rights, status, or other legal relations are affected by a statute, to obtain a declaration of rights, status, or other legal relations thereunder. TEX. CIV. PRAC. & REM. CODE § 37.004(a). The Department urges, however, that there is no general right to sue a state agency for a declaration of rights. We agree.

### **1. Actions Against State Entities**

While the DJA waives sovereign immunity for certain claims, it is not a general waiver of sovereign immunity. *See id.* § 37.006(b); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009) (noting that the DJA waives immunity for claims challenging the validity of ordinances or statutes); *IT-Davy*, 74 S.W.3d at 855-56. But generally, the DJA does not alter a trial court's jurisdiction. *IT-Davy*, 74 S.W.3d at 855. Rather, the DJA is "merely a procedural device for deciding cases already within a court's jurisdiction." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). And a litigant's couching its requested relief in terms of declaratory relief does not alter the underlying nature of the suit. *Heinrich*, 284 S.W.3d at 370-71; *IT-Davy*, 74 S.W.3d at 855. Consequently, sovereign immunity will bar an otherwise proper DJA claim that has the effect of establishing a right to relief against the State for which the Legislature has not waived sovereign immunity. *See City of Houston v. Williams*, 216 S.W.3d 827, 828-29 (Tex. 2007) (per curiam).

The Trust argues that sovereign immunity does not apply because the Department acted outside its legal authority when it asserted the Salt Fork was navigable and the State owned the streambed. We disagree—the Department is immune from suit.

The rule remains as it was set out in *State v. Lain*:

When 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 . . . .

349 S.W.2d 579, 582 (Tex. 1961). Neither *Heinrich* nor the DJA creates an exception to a state agency's immunity in suits for title to land. *See Heinrich*, 284 S.W.3d at 370-73. If the Trust's suit against the Department is in substance a trespass to try title action, it is barred by sovereign immunity absent the Legislature's having waived its immunity. *See Lain*, 349 S.W.2d at 582.

## **2. Contesting Title with the State**

Generally, a trespass to try title claim is the exclusive method in Texas for adjudicating disputed claims of title to real property. *See* TEX. PROP. CODE § 22.001(a) (“A trespass to try title action is the method of determining title to lands, tenements, or other real property.”); *Martin v. Amerman*, 133 S.W.3d 262, 267 (Tex. 2004). “Real property” generally includes the sand and gravel on a tract of land, *see, e.g., Maser v. U.S. Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984), and in this case the Department does not claim otherwise.

In 2007, the Texas Legislature added an exception to the rule that a trespass to try title claim is the exclusive method for adjudicating disputed claims of title to real property. Section 37.004(c) of the Texas Civil Practice and Remedies Code provides that, notwithstanding the trespass to try title statute, a person interested under a deed, will, written contract, or other writings constituting a

contract may obtain a determination of title based on a property boundary line “when the sole issue concerning title to real property is the determination of the proper boundary line between adjoining properties.” TEX. CIV. PRAC. & REM. CODE § 37.004(c); *see* TEX. PROP. CODE § 22.001(a). The Trust argues that the claims in this case constitute a boundary dispute and that “new section 37.004(c) can easily and logically be construed as a legislative waiver of any sovereign immunity that has ever in the past impeded private titleholders’ efforts to litigate their boundary disputes against the State.” We disagree that the claims here constitute a boundary dispute.

The central test for determining jurisdiction is whether the “real substance” of the plaintiff’s claims falls within the scope of a waiver of immunity from suit. *See, e.g., Dallas County Mental Health & Retardation v. Bossley*, 968 S.W.2d 339, 343-44 (Tex. 1998). The real substance of the Trust’s pleadings, evidence, and arguments is that the Salt Fork is not navigable and the State has no ownership rights in its bed. Its allegations are summarized in its live pleading in the section entitled “Causes of Action Against Defendants”:

Defendants’ claim of ownership and attempts to enter the property to limit or control Landowner’s activities, and that of third parties, *by asserting rights of ownership and the right to control, regulate or prohibit the removal of sand and gravel* constitute an improper claim to and use of the property by Defendants and unreasonably interfere with the Landowner’s rights to use and enjoy its property. (emphasis added)

Under the “Relief Sought” section of its pleadings, the Trust sought a declaratory judgment that no navigable stream is present on its property, despite the Department’s contention to the contrary, and injunctive relief precluding the Department from entering the Trust’s property in an attempt to limit, control, or interfere with the removal of sand and gravel from the Trust’s property.

We need not decide whether section 37.004(c) effects a waiver of the State's immunity from suit for boundary disputes because this controversy is not over the boundary between State-owned land and Trust-owned land; rather it is over whether the State owns any land at all. The case involves rival claims to ownership of the entire streambed. Consequently, the Trust's suit in substance is one to determine title to land. Such a suit against the State is barred by sovereign immunity absent legislative consent. *See Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003); *Lain*, 349 S.W.2d at 582.

The Trust also urges that it may maintain its suit against the Department because whether a stream is navigable is a judicial determination. It cites to *State v. Bradford*, in which this Court stated,

The public policy of this state with respect to navigable streams long has been established and enforced, and it is not a question left to the discretion and judgment of ministerial officers. Under the law, those officers were and are not clothed with the power to settle questions of navigability of streams, but, in view of the very nature and importance of the matter, for obvious reasons, it is a question for judicial determination.

50 S.W.2d 1065, 1070 (Tex. 1932) (citations omitted). We agree with the Trust that the issue is one for judicial determination. But as we discuss later in greater detail, such a claim is an ultra vires one that must be brought against a governmental official and not the State.

Here the Department, as a defendant, has asserted its sovereign immunity and the Trust has not shown any exceptions to or waiver of it. While courts may determine questions of navigability when they have jurisdiction, a navigability dispute does not comprise an exception to or waiver of sovereign immunity and vest jurisdiction in the courts when the State or a state agency is sued.



In sum, notwithstanding the manner in which they are pleaded, the Trust's claims for declaratory relief are claims against the Department to determine title to the bed of the Salt Fork and are barred by sovereign immunity. *See Lain*, 349 S.W.2d at 582.

### **C. Takings Claim**

#### **1. Analysis**

The Trust also asserts that a waiver of immunity is not required because this is a suit based on a constitutional taking. The Trust argues that a taking has occurred because the Department's claim of ownership unreasonably interferes with the Trust's rights to use and enjoy its property. The Department urges that the Trust's claim is not a valid takings claim because the Trust seeks only declaratory and injunctive relief based on the dispute over title to the bed of the Salt Fork—a dispute that will be determined by whether the Salt Fork is navigable—but which is nothing more than a title dispute nonetheless.

We agree with the Department. Although the Trust referenced the United States and Texas Constitutions, it did not assert a valid takings claim giving the trial court jurisdiction over its claim.

The Texas Constitution provides that “[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person.” TEX. CONST. art. I, § 17. Likewise, the United States Constitution provides “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. Sovereign immunity does not shield the State from claims based on unconstitutional takings of property. *See, e.g., Holland*, 221 S.W.3d at 643; *Steele*, 603 S.W.2d at 791. Whether the government's actions are sufficient to constitute a taking is a question of law.

*E.g., Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001).

To establish a takings claim, the claimant must seek compensation because the defendant intentionally performed actions that resulted in taking, damaging, or destroying property for public use without the owner's consent. *See id.* Whether a taking has occurred depends largely on definitional and conceptual issues. *See* 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 6.01[1] (3d ed. 2006).

The premise for a constitutional takings cause of action is that one person should not have to absorb the cost of his property being put to a public use unless he consents. *See Steele*, 603 S.W.2d at 789. In contrast to a trespass to try title claim, which quiets title and the right of possession to property, a successful takings claim entitles a claimant to compensation, not to possession of the property. *See* TEX. CONST. art. I, § 17 (“No person’s property shall be taken . . . without adequate compensation being made . . .”) (emphasis added); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995) (stating that section 17 of the Texas Constitution waives immunity only when a claimant is seeking compensation); *cf. Martin*, 133 S.W.3d at 264-65 (“[a] trespass to try title action is the method of determining title to lands, tenements, or other real property.” (quoting TEX. PROP. CODE § 22.001)).

In this case, the Trust asserted in its amended pleadings that through the Department’s contention that a navigable stream exists on the Trust’s property, the Department wrongfully claimed title to part of the Trust’s property. The only relief sought by the Trust was declaratory and injunctive relief to effectively determine its ownership of and right to possess the bed of the Salt Fork. The Trust did not seek compensation—the only relief available in a takings claim—nor did

it seek a declaration that the Department had taken Trust property for public use. *See Bouillion*, 896 S.W.2d at 149. The difference between a takings claim and a trespass to try title claim was clearly articulated by the court of appeals in *Porretto v. Patterson*:

In a trespass to try title or to quiet title action, an owner sues to recover immediate possession of land unlawfully withheld. A prevailing party's remedy is title to, and possession of, the real property interest at issue in the suit.

On the other hand, a takings claim is one in which a landowner alleges that the government has taken his property for public use without permission, for which he seeks compensation. The available remedy is a key distinction between the two. While one suit quiets title and possession of the property, the other allows only for just compensation for the property taken or used—the prevailing party does not regain use of land lost to the public's use, or win possession of it.

251 S.W.3d 701, 708 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citations omitted).

Here, the Department has merely identified the streambed as belonging to the State because the State asserts the Salt Fork is navigable. *See* TEX. NAT. RES. CODE § 21.001(3); TEX. PARKS & WILD. CODE § 1.011(c); TEX. WATER CODE § 11.021; *Bradford*, 50 S.W.2d at 1068-69. The Trust stated in its amended pleadings that the State “wrongfully claim[ed] title” to the streambed, resting its assertion on the Department's contention that a navigable stream exists on the property. It is undisputed that the Department has not taken action to apply materials in the streambed to public use by actions such as selling them. *Cf. Porretto*, 251 S.W.3d 701 (takings claim was based on the State's leasing of property); *State v. BP Am. Prods.*, 290 S.W.3d 345 (Tex. App.—Austin 2009, pet. denied) (takings claim was based on the State's grant of an oil and gas lease); and *Koch v. Gen. Land Office*, 273 S.W.3d 451 (Tex. App.—Austin 2008, pet. denied) (takings claim was based on the General Land Office's removal and sale of limestone). It has not done anything that would require

it to compensate the Trust if the streambed is not navigable. Thus, the Trust cannot colorably claim that it seeks compensation by means of a suit in the nature of an inverse condemnation cause of action.

In a case such as the one before us, where the question of who owns the property is the only issue and title and possession are the only available remedies, the record and the briefs show conclusively that the Trust does not have a constitutional takings claim for compensation. *See Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007) (holding that a remand to permit a claimant to replead would serve no legitimate purpose when the underlying claim was a breach of contract claim and immunity could not be overcome). If the Trust owns the property, it is not entitled to compensation for a taking. And if the State owns the property, the Trust is not entitled to compensation because nothing was taken from it. The Trust confirms the foregoing conclusions when it says in this Court that it “does not seek money damages” and “does not seek to establish liability.”<sup>4</sup> While the Trust has requested that if the State is granted relief in any respect, the Trust be permitted to modify the parties to assert an ultra vires claim against state officials, it makes no similar request to replead to assert a claim for compensation. The reason why is clear, as we have set out above.

Generally, a party is not entitled to relief it does not request. *State v. Brown*, 262 S.W.3d 365, 370 (Tex. 2008). And just as the Trust’s suit is not one to determine the boundary between land owned by the State and land owned by the Trust, it is not a takings claim. Allowing the Trust’s

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<sup>4</sup>The Trust also does not seek consequential damages. *See Omnia Comm. Co. v. U.S.*, 261 U.S. 502, 510 (1923) (stating that “for consequential loss or injury resulting from lawful government action the law affords no remedy”).

claim of title to be adjudicated by means of a takings claim would allow claimants to circumvent the State's sovereign immunity by creatively pleading such claims. Creative pleading cannot be used to effect the loss or waiver of the State's sovereign immunity. *See IT-Davy*, 74 S.W.3d at 856.

## 2. Response to the Dissent

The dissent would allow the Trust to pursue a takings claim even though the Trust has no claim for compensation. It would do so because,

[b]y 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.

\_\_\_ S.W.3d at \_\_\_ (Hecht, J., dissenting). But even recognizing the practical effects of statutory damages and civil and criminal penalties for taking state-owned property still does not mean that the government has taken property belonging to the Trust. Under the circumstances, we fail to see how the Trust's claim is or can be for compensation, which is the only constitutional remedy for a takings claim.

Further, it seems that the dissent has mingled takings claims and ordinary claims for which legislative consent is required by its statement that “[l]egislative consent to sue for title is thus made virtually absolute.” Legislative consent is not required for a constitutional takings claim to be brought. And as to a statutory waiver of immunity, the Legislature has specified that it does not intend a statute to waive sovereign immunity “unless the waiver is effected by clear and unambiguous language.” TEX. GOV'T CODE § 311.034. Whether Legislative consent to sue for title can be found in the statutory construct that protects materials in navigable streambeds by providing

penalties for selling them without the State's permission is relevant to the Trust's title determination claim for which legislative consent is required; it is not relevant as to a takings claim for which the Constitution provides consent. Finally, construing the imposition of statutory damages and civil and criminal penalties for taking public property as effecting a constitutional taking creates a structure in which title to public property is placed at risk of transfer to private persons by default. And the dissent's proposed construct would not necessarily be limited to determining who owned the bed of a stream. It might well apply to any title dispute involving the State. Such a situation would significantly affect the Legislature's power to manage the limited resources of the State in regard to litigating title claims. We do not believe such a departure from the existing framework of statutory law and our precedent is warranted.

#### **D. Ultra Vires Claim**

The Trust asserts that if the Court determines the suit cannot proceed against the Department, the Court should remand the case to permit it to add state actors as parties and pursue an ultra vires claim. The Department urges that the suit should be dismissed because there is no basis for arguing that a department official has acted ultra vires.

A suit against a state official for acting outside his authority is not barred by sovereign immunity. *See Heinrich*, 284 S.W.3d at 370-74. While suits to try the State's title are barred by immunity, in some instances a party may maintain a trespass to try title action against governmental officials acting in their official capacities. *See Lain*, 349 S.W.2d at 581. In *Heinrich*, the Court affirmed the rule that suits for declaratory or injunctive relief against a state official to compel compliance with statutory or constitutional provisions are not suits against the State. *See Heinrich*,

284 S.W.3d at 370-74. If a government official acting in his official capacity possesses property without authority, then possession is not legally that of the sovereign. Under such circumstances, a defendant official's claim that title or possession is on behalf of the State will not bar the suit. *See Lain*, 349 S.W.2d at 581-83. A suit to recover possession of property unlawfully claimed by a state official is essentially a suit to compel a state official to act within the officer's statutory or constitutional authority, and the remedy of compelling return of land illegally held is prospective in nature.

The State urges that evidence before the trial court showed a state surveyor had examined the river and determined it to be navigable and that “[g]iven the Department’s express statutory authority to exercise the State’s right of ownership over this sand and gravel, there is simply no basis for arguing that a department official has acted *ultra vires*.” We disagree.

The Trust and the dissent point out that the Department is in a unique position. It has sovereign immunity from the Trust’s suit to determine title to the streambed. Though the Trust strongly disagrees with the Department’s claim of navigability, the Trust seemingly has little recourse if the Department’s position that the stream is navigable cannot be challenged by an *ultra vires* suit. The Department suggests that the Trust could take materials from the streambed and if the State sought civil damages filed or criminal charges, then the State would have to prove it owned the materials in the streambed by proving the Salt Fork is navigable. A landowner should not be put in such an untenable position if it can be avoided. And while we disagree that the facts before us constitute a constitutional taking, we conclude that they constitute “possession” of the streambed by the State for purposes of *Lain*.

In *Lain*, we set out the manner in which trespass to try title claims against government officials should proceed and the manner of relief that should be granted when the officials file pleas to the jurisdiction:

[W]hen officials of the state are the only defendants, or the only remaining defendants, and they file a plea to the jurisdiction based on sovereign immunity, it is the duty of the court to hear evidence on the issue of title and right of possession and to delay action on the plea until the evidence is in. If the plaintiff fails to establish his title and right of possession, a take nothing judgment should be entered against him as in other trespass to try title cases. If the evidence establishes superior title and right of possession in the sovereign, the officials are rightfully in possession of the sovereign's land as agents of the sovereign and their plea to the jurisdiction based on sovereign immunity should be sustained. If, on the other hand, the evidence establishes superior title and right of possession in the plaintiff, possession by officials of the sovereign is wrongful and the plaintiff is entitled to relief. In that event the plea to the jurisdiction based on sovereign immunity should be overruled and appropriate relief should be awarded against those in possession.

*Lain*, 349 S.W.2d at 582.

The Department has the authority to make determinations on behalf of the State as to navigability of streams and to exercise the State's rights over navigable streambeds. Nevertheless, its pronouncement that a stream is navigable is not conclusive of the question. This Court established long ago that the question of navigability is, at bottom, a judicial one. *Bradford*, 50 S.W.2d at 1070.

Here it is undisputed that the part of the streambed in question and claimed by the State to be navigable lies on land owned by the Trust. If the Salt Fork is not navigable, the Trust owns the bed. We see no good reason that the process and principles we set out long ago in *Lain* should not apply. The Trust should be given an opportunity to amend and cure the pleading and party defects, if it chooses to do so, and have the suit proceed against the governmental actors laying claim to the



streambed. *See Koseoglu*, 233 S.W.3d at 840; *Lain*, 349 S.W.2d at 582.

### **III. Conclusion**

We reverse the judgment of the court of appeals. The case is remanded to the trial court for further proceedings in accordance with this opinion.

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Phil Johnson  
Justice

**OPINION DELIVERED:** August 26, 2011

