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December 15, 2023

**Via electronic filing**

Blake A. Hawthorne
Clerk, Supreme Court of Texas

Re: No. 22-0585, *TxDOT v. Self*

Dear Mr. Hawthorne:

Petitioner/Cross-Respondent Texas Department of Transportation (TxDOT) files this post-submission letter in response to (1) Justice Busby's invitation to the parties to submit briefing regarding *Koch v. GLO*, 273 S.W.3d 451 (Tex. App.—Austin 2008, pet. denied), and (2) Justice Blacklock's and Justice Young's requests that TxDOT's counsel provide written answers to two questions posed at oral argument.

## I.

Judith Koch owned land under a patent that granted the State a mineral estate. *Id.* at 453-54. As owner of the surface estate, Koch alleged that the GLO removed limestone from her land and obtained over $200,000 by selling it. *Id.* at 454. The GLO claimed that it owned the limestone because it was part of the land's mineral estate. *Id.*

In her suit against GLO, Koch sought declarations that: (1) the term "minerals," as contemplated by the patent and applicable statutes at the time of the conveyance, did not include the limestone and, therefore, that title to the limestone remained with her as owner of the surface estate; and (2) the GLO's removal of the limestone was an unconstitutional taking. *Id.* The GLO filed a plea to the jurisdiction based on sovereign immunity, which the trial court granted. *Id.*

On appeal, Koch raised two issues: whether sovereign immunity barred her first declaratory-judgment claim, *id.* at 455-57, and whether the GLO's removal of the limestone violated the takings provisions of the United States and Texas constitutions, *id.* at 457-60. As to the first issue, the court held that Koch's claims against the GLO seeking a declaration that the State's mineral estate did not include the limestone constituted a suit for land, for which no legislative consent to sue existed, and thus, sovereign immunity barred that claim. *Id.* at 456.

On the takings issue, though, the court determined that Koch asserted a valid claim under article I, section 17 of the Texas Constitution and, thus, that sovereign immunity was no obstacle. *Id.* at 460. The GLO had argued that "its claim of title to the disputed materials establishe[d] the absence of . . . intent to commit a taking," asserting 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." *Id.* at 458. In rejecting that argument, the court distinguished the intent standard from *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004), on which the GLO relied. *Id.* at 460. The court stated that "[t]he *Jennings* intent standard was developed to draw a line between mere negligence and an unconstitutional taking" and that "the *Jennings* intent standard is inapplicable in cases such as this, when the intentional act is the taking of the property at issue." *Id.* at 459-60.

*Koch* is distinguishable from this case. TxDOT is not asserting that it owned the trees that Lyellco's workers removed. That is, unlike the GLO in *Koch*, which claimed title in the limestone, TxDOT never asserted title in the trees. GLO excavated the limestone and sold it. TxDOT did not order Lyellco to cut down the trees so that it could have lumber or firewood to sell. Unlike the GLO, TxDOT is not claiming that its subjective belief as to ownership makes a takings claim invalid. And the intentional act here was not the taking of the trees, but rather the instruction to clear the right of way between the fences or remove the trees on the highway side of the fence. CR.11, 257, 307. Simply put, TxDOT did not have trees removed because it believed they belonged to the State.

Also, *Jennings* applies here. Unlike the GLO in *Koch*, the claim is that TxDOT's order to remove the trees was negligent, rather than intentional, conduct. As the *Koch* court explained, the *Jennings* intent standard differentiates between mere negligence and an unconstitutional taking. 273 S.W.3d at 459. TxDOT's alleged conduct here was at most negligence, as Plaintiffs themselves contend. *See* Respondent/Cross-Petitioner's Br. 27-28, 30-31. Plaintiffs' allegation that Lyellco mistakenly entered upon their land and cleared brush and vegetation without Plaintiffs' knowledge or consent because of TxDOT's erroneous instruction to clear the right of way does not assert an intentional taking. *Cf. State v. Gafford*, No. 04-03-00168-CV, 2003 WL 22011302, at *3 (Tex. App.—San Antonio Aug. 27, 2003, no pet.) (mem. op.) ("The evidence reflects that the State did not intend, authorize, or even know that it was removing trees from [appellee's] property until it was so informed.").

**II.**

**A.** At oral argument, Justice Blacklock asked whether TxDOT has "any appropriation or fund that it can use to pay people whose property it damages"—and, more specifically, whether "there is some mechanism that [TxDOT] can use to pay people without forcing them to sue the government and endure sovereign immunity litigation." OA Recording at 12:19-25, 13:13-21. The answer is yes.

A claimant may attempt to settle a dispute for property damage or inverse condemnation without filing a lawsuit by submitting a claim to TxDOT by calling, e-mailing, or writing TxDOT. The Texas Tort Claims Act requires a party to provide notice of its claim "no later than six months after the day that the incident giving rise to the claim occurred." *See* Tex. Civ. Prac. & Rem. Code § 101.101. If TxDOT investigates the claim and believes it is liable, the settlement (depending on the nature of the claim) is paid from TxDOT's appropriation under the General Revenue Fund.

**B.** Justice Blacklock also asked whether "the law charges TxDOT with knowledge of the property lines." OA Recording at 37:25-30. Justice Young also

asked the question. OA Recording at 42:50-56. To the best of counsel's knowledge, the answer is no.

Counsel for TxDOT has been unable to locate any authority stating a categorical rule that TxDOT is charged with knowing where property lines lie. Indeed, several principles point in the other direction. *First*, landowners (Plaintiffs here) are "presumed to know the boundaries of [their] own land." *McCabe v. Moore*, 38 S.W.2d 641, 643 (Tex. App.—Austin 1931, writ dism'd w.o.j.)). *Second*, when a dispute arises about the width of an easement, the language of the easement agreement controls the scope of the conveyance. *Atmos Energy Corp. v. Paul*, 598 S.W.3d 431, 464 (Tex. App.—Fort Worth 2020, no pet.). *Third*, the true location of the property line is an issue of fact. *City of San Angelo v. Sitas*, 183 S.W.2d 417, 420 (Tex. 1944). And *fourth*, "where boundary is the sole issue, it is necessary to establish, by adequate proof, the location of the boundary line between the properties." *Jones v. Smith*, 157 S.W.3d 517, 520 (Tex. App.—Texarkana 2005, pet. denied).

* * *

For the reasons stated here and previously, TxDOT requests that the Court reverse that the part of the court of appeals' judgment that affirmed the trial court's order denying its plea to the jurisdiction and render judgment dismissing Plaintiffs' claims against TxDOT.

Respectfully Submitted.

/s/ Philip A. Lionberger
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Assistant Solicitor General

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On December 15, 2023, this document was served on Andrew F. York, lead counsel for Respondents Mark Self and Birgit Self, via york@barronadler.com.

/s/ Philip A. Lionberger
Philip A. Lionberger

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