IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-8729
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M.F. GUETERSLOH, JR.,

Plaintiff-Appellant,

versus

THE STATE OF TEXAS, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the
Western District of Texas
(A-92-CV-359)
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(June 3, 1994)

Before GARWOOD, JOLLY and SMITH, Circuit Judges.[*]

PER CURIAM:

This is an inverse condemnation suit for money damages only

brought by plaintiff-appellant M.F. Guetersloh, Jr. (Guetersloh) in

the court below against the State of Texas and certain of its

agencies and officers in their official capacities under 42 U.S.C.

§ 1983 and the takings clause of the Fifth Amendment, as extended

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[*]   Local Rule 47.5 provides: "The publication of opinions that
have no precedential value and merely decide particular cases on
the basis of well-settled principles of law imposes needless
expense on the public and burdens on the legal profession."
Pursuant to that Rule, the Court has determined that this opinion
should not be published.

to the states by the Fourteenth Amendment.[1] Guetersloh claimed a temporary taking during and by virtue of a receivership, which had terminated prior to the judgment below, of a water company on the assets of which he had a lien which he had foreclosed before the receivership ended. Although defendants raised the Eleventh Amendment as a jurisdictional bar to this federal court suit, and the court below found that the suit was barred by the Eleventh Amendment, it nevertheless reached the merits and found Guetersloh's claims barred by limitations and *res judicata*, that there was no compensable taking, and that no damages were proved; and accordingly it dismissed the suit.

It is settled that the Eleventh Amendment is a jurisdictional bar to a suit for damages in federal court against a state or any state agency or state officer in his official capacity, and that any abrogation or waiver of such bar must be express and unequivocal. *Quern v. Jordan*, 99 S.Ct. 1139, 1146 (1979); *Penhurst State Sch. & Hosp. v. Halderman*, 104 S.Ct. 900, 907-8 (1984); *Ford Motor Co. v. Department of Treasury*, 65 S.Ct. 347, 350 (1945). Waiver of sovereign immunity in state courts does not waive Eleventh Amendment immunity from suit in federal court. *Penhurst* at 907 n.9. Under the circumstances, it is clear that the instant suit should have been dismissed for want of jurisdiction under the Eleventh Amendment. *See Barry v. Fordice*, 814 F.Supp. 511 (S.D.

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[1]   To the extent that Guetersloh may have sought damages from any of the state officers in their individual capacities, he does not complain on appeal of the dismissal on the merits of any such claims; nor do we perceive any error in any such dismissal, as it is plain, *inter alia*, that any such claim would be defeated by qualified immunity.

Miss. 1992), *aff'd on the basis of the district court opinion*, 8 F.3d 1 (5th Cir. 1993); *John G. & Marie Stella Kenedy Mem. Found. v. Mauro*, No. 92-7714, slip op. 4415 (5th Cir. May 27, 1994); *Harrison v. Hickel*, 6 F.3d 1347 (9th Cir. 1993). We note in this connection that, as the State of Texas through its Attorney General confirms and as Guetersloh admits, the courts of the State of Texas are open to inverse condemnation damage claims against state agencies on the basis of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, as well as on the basis of the Texas Constitution and laws. *See, e.g., Estate of Scott v. Victoria County,* 778 S.W.2d 585, 589-91 (Tex. App.SQCorpus Christi 1989; n.w.h.) (Benavides, J.). In short, application of the Eleventh Amendment does not of itself deny a judicial forum, with ultimate review available in the United States Supreme Court, for resolution of Guetersloh's Fifth Amendment takings claim. *Cf. Harrison* at 1352-54.

We accordingly modify the judgment below so that the dismissal of Guetersloh's claims against the State of Texas, the state agencies, and the state officers in their official capacities is for want of jurisdiction under the Eleventh Amendment; and, as so modified, the judgment is affirmed.

MODIFIED and AFFIRMED AS MODIFIED