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Supreme Court of Texas.

Texas Parks and Wildlife Department, Petitioner,

v.

The Sawyer Trust, Respondent.

No. 07-0945.

November 19, 2009.

Oral Argument

Appearances: Kristofer S. Monson, Office of the Attorney General,
Austin, TX, for petitioner.

Jody Sheets, Law Office of Jody Sheets, Dallas, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice
Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina,
Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett,
Justice Eva Guzman

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear
argument in the first cause, 07-0945, Texas Parks and Wildlife
Department vs. The Sawyer Trust.

MARSHALL: May it please the Court, Mr. Monson will present argument
for the Petitioner. The Petitioner has reserved five minutes for
rebuttal.

ORAL ARGUMENT OF KRISTOFER S. MONSON ON BEHALF OF THE PETITIONER

ATTORNEY KRISTOFER S. MONSON: May it please the Court. Heinrich
mandates dismissal of the Declaratory Judgment portion of this lawsuit
because it was brought against an entity not against an official. And
the case should not be remanded for repleading against an official
because that would, in essence, allow a different lawsuit against a
different defendant based on a different legal theory, which leaves the
only basis of jurisdiction over a suit against the Department as the

Trust's purported takings claim. The Trust's pleadings failed to state a valid takings claim and therefore failed to invoke an exception to immunity from suit for two reasons. First, their pleadings are, in substance, an attempt to assert title to property in a lawsuit brought against a state entity and that lawsuit is barred by State vs. Lain. And second, the remedy they seek is injunctive relief, not the money damages that are contemplated by Article 1, Section 17 or the Fifth Amendment. Moreover, that takings claim cannot be remanded for repleading because the uncontroverted evidence before the trial court at the time that it ruled affirmatively negates any potential alternative takings claim. I'd like to address Heinrich and that remand issue quickly before turning to the meat of the takings issue.

JUSTICE EVA GUZMAN: Is it your position that Heinrich forecloses all declaratory relief, that we should read it that broadly, I guess, a governmental agency?

ATTORNEY KRISTOFER S. MONSON: We think that Heinrich recognizes the long standing principle that declaratory relief is not available against state entities, because the Act does not waive the entity's immunity from suit. However to be clear, the legislature has provided in particular circumstances, such as suits brought by littoral property owners, the declaratory judgment relief is available against a state entity just for specific limited subject matters. But none of those are at issue here, this isn't a littoral property rights case, and Heinrich makes clear that to get it, you need (your A) claim, you have to sue an official. The facial failure to plead a claim against an official defeats the Trust's --

JUSTICE HARRIET O'NEILL: Well, why, if they amended to name an official, then why wouldn't they have a viable claim at that point if we ask that they replead?

ATTORNEY KRISTOFER S. MONSON: They wouldn't have, and that's a little bit different from the takings claim.

JUSTICE HARRIET O'NEILL: Well, I understand.

ATTORNEY KRISTOFER S. MONSON: But under Lain or under the cognate federal jurisprudence, they would have to bring essentially a claim and a judgment stating that there wasn't any legal basis for an official's assertion of control or entry onto the property. And the legal question there, it's our submission, would be different in kind from the question of navigability, which is the substance of both their dec action and their takings claim.

JUSTICE HARRIET O'NEILL: Well, wouldn't navigability answer the question?

ATTORNEY KRISTOFER S. MONSON: It would, but like so many questions that are barred by sovereign im-munity, that's a question the Courts have the capacity to answer, but it would be inappropriate to address in a lawsuit where a state entity is the defendant.

JUSTICE HARRIET O'NEILL: But I mean wouldn't it answer the question of whether the official acted ultra vires?

ATTORNEY KRISTOFER S. MONSON: It would be one way of answering that question, but it's not the exclusive means of answering the question, and I think this goes to basically the point that's raised in IT-Davy and in the federal cases involving the United States in cases like Larson and Malone, which are discussed in the history of the Quiet Title Act, which is that if the remedy that the plaintiff seeks in one of these lawsuits against an official is going to run against the government in such a way that it's going to bind the government, then the lawsuit is barred by immunity. IT-Davy is the perfect example. The Court acknowledged, yes, there exists this category of ultra vires claims against state officials, you've alleged that it violates state law for an official breach of contract, but we don't have to answer that knotty, difficult question because the sum and substance of the relief that you request is money damages against the state, which means that, in effect, you haven't pleaded an ultra vires claim at all. The key is whether -- and State vs. Lain makes this clear -- the key is whether the judgment that is sought would bind the state and determine the state's ownership of property or control state action. And if it does, the lawsuit is barred.

JUSTICE NATHAN L. HECHT: Well, wouldn't the judgment in Heinrich bind the government?

ATTORNEY KRISTOFER S. MONSON: It does bind the government, but as Heinrich recognized in making the official entity distinction, the substantive analysis that you have to go through to isolate the official as an appropriate defendant insures that all that the injunction will do is force the official to follow the law and act within the scope of his authority.

JUSTICE NATHAN L. HECHT: But how is that any different here?

ATTORNEY KRISTOFER S. MONSON: It's different here, for example, because --

JUSTICE NATHAN L. HECHT: If an individual officer was named?

ATTORNEY KRISTOFER S. MONSON: If an individual officer was named, you still couldn't have the lawsuit over navigability in the streambed because the substance of that lawsuit would determine the State's title to the minerals in and underneath the entire course of the Salt Fork of the Red River. There's no way to resolve that legal question without asking the same question that you would have to ask in a suit against the entity to determine title.

JUSTICE NATHAN L. HECHT: But in Heinrich the answer was going to determine the plaintiff's benefits, right?

ATTORNEY KRISTOFER S. MONSON: Well, I think that Heinrich is a little bit different, because in that case there was a contested fact question as to what the benefits were supposed to be. Everyone agreed that the law precluded the board from retroactively changing Mrs. Heinrich's benefits. So if it were in fact true that her benefits had been one thing or the other, a change in them would have been an ultra vires act, and so the Court remanded for determination of what the scope of her benefits was in the first place.

JUSTICE NATHAN L. HECHT: But if here the official had just undertaken to conserve as much property for the State as possible and apply a definition of "navigability" that the law shouldn't apply, isn't that the same kind of question that was involved in Heinrich?

ATTORNEY KRISTOFER S. MONSON: It is, but I submit that the question is whether the official acted outside of their statutory authority.

JUSTICE NATHAN L. HECHT: How will we know if we don't know whether it's navigable or not?

ATTORNEY KRISTOFER S. MONSON: Well, we know this one predicate issue, which is that the Department and its officials have authority to assert the State's title to minerals that are in navigable streambeds, as a general matter. So that's the first hurdle, whether there's statutory authority to do the type of thing that's being done. The next question is whether there's any reasonable basis for the official to take the action that they've undertaken. And I think this aspect of the law has become a little bit confusing because of the dictum in State vs. Lain suggesting that it's appropriate to determine title in the suit against the official and kind of sidestepping Lain's broad rule barring trespass-to-try-title claims. You know, we would submit that that concept has already been limited by Heinrich and by Koseoglu or "Koseoglu," however you want to say it, because the limitation on Epperson that the Court recognized that W.D. Hayden vs. Dodgen hadn't narrowed, Koseoglu narrows that exception to the United States vs. Lee principle.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are you ever entitled to a judicial determination of navigability or not? Is that just something that is immune from Court action altogether?

ATTORNEY KRISTOFER S. MONSON: Well, the State is immune from suits to determine navigability as a defendant. That doesn't mean the State can't initiate a lawsuit, and it doesn't mean that the legislature can't create a waiver of immunity from suit specific to the question, as it did in the Brainard case.

JUSTICE HARRIET O'NEILL: But that's very rare.

ATTORNEY KRISTOFER S. MONSON: It's not as rare as all that, Your Honor. I mean if it's a real problem, the legislature will grant the waiver. Well, just this past session, the legislature has granted permission to sue the Railroad Commission in the Major Oil and Gas case. It isn't the case that it never happens.

JUSTICE HARRIET O'NEILL: Has there been one since Brainard?

ATTORNEY KRISTOFER S. MONSON: Well, for navigability? Not in navigability specifically, but that doesn't mean that the legislature hasn't considered or rejected applications for these trespass-to-try-title suits. And in some we would say that it, the real core of this case is the legislature's prerogative to decide how the State's title is going to be determined in the first place. The legislature knows how to issue specific permission over specific controversy. It did that in Brainard. The legislature knows how to waive immunity for a category of property claims that involve an adversarial claim against the State based on natural features of property. It did that for littoral

property owners. And the legislature moreover, I think this is a somewhat unique fact and I'd like to discuss it, has the ability to resolve some property disputes by legislative action without letting it go to the Courts at all. The Small Bill itself is an example of when the legislature can exercise its prerogative to change the backlog Common Law rules to resolve a systemic Property Law question. The legislature can and has chosen to allow some of these lawsuits to go forward and be decided in the Courts. Its decision not to allow this type of lawsuit to proceed should be respected.

JUSTICE PHIL JOHNSON: What if they, there's a suggestion in some of the briefs that the Trust just takes the sand and gravel out and sells it, and the State then says that's wrong, they either sue them or they charge with a crime, theft.

ATTORNEY KRISTOFER S. MONSON: Okay.

JUSTICE PHIL JOHNSON: So what then, does the Trust at that point in time have the right to have determination made?

ATTORNEY KRISTOFER S. MONSON: Absolutely. And in fact, that's how State vs. Bradford and Hopes vs. Short worked. That is one of the options that this Court presently allows.

JUSTICE NATHAN L. HECHT: Has the Department taken a position in this, on the merits of this case outside the lawsuit? Have you advised the Respondent that you do or do not think that the Respondent owns the sand and gravel?

ATTORNEY KRISTOFER S. MONSON: Outside of the lawsuit, not to my knowledge, although I can double check and make sure. It's my understanding that this lawsuit was brought prospectively, based on the Trust's assertion of title to the entire parcel, and that they claim that there's no gravel that belongs to the State on that parcel as a prospective matter. Our pleadings said, "Well, we don't know the status of your parcel." We filed a special exception saying, "Please replead with more specificity." In the course of the Plead Jurisdiction Hearing, the trial court asked us to send somebody out to go and look at the river and physically inspect it. And it's the Department's position that the submission of that letter in response to the trial court's request is an assertion of the Department's control over the gravel in the streambed on the State's behalf.

JUSTICE NATHAN L. HECHT: Oh, so you have taken a position then?

ATTORNEY KRISTOFER S. MONSON: Yes. Our letter to the trial court takes the position that this is a navigable stream, which afforciare means that the gravel belongs to the state. But to turn to the takings claim at least briefly and talk about why this isn't a takings claim. so the only real question is whether you can go back against the official. This isn't a takings claim because the real substance of the plaintiff's lawsuit, even in their First Amended Petition, is that they own the parcel of property and therefore they can mine the gravel on it. That, the substance of that claim has to do with title to these minerals, this gravel that is on the property. That means that they have put in issue a question involving title to real property, that

means that this is a suit for land within the scope of the broad rules set out in *Lain*, and that means that because they have sued the Department, their suit is barred by sovereign immunity.

JUSTICE EVA GUZMAN: Can they reform their suit though to assert an ultra vires claim?

ATTORNEY KRISTOFER S. MONSON: Neither to assert an ultra vires claim nor a takings claim, Justice Guzman. And I would like to talk a little bit about what the uncontroverted evidence before the trial court showed, and I would like to direct the Court's attention to the Department's letter, which is on page 15 of Volume I of the Clerk's Record. It tells us a couple important things. One, this is a named river that people know about. It is a mile down from a major private dam that is a regulated water segment with regulated water rights under the TCEQ. Under the original survey notes when the parcels were laid out, it was navigable because it was more than 30-feet wide from the mouth up along its course, and in at least one place, measuring to an island in the middle of the bed and banks, not to the other side, the river is at least 330 feet long just at one place on the plaintiff's property.

JUSTICE EVA GUZMAN: Through their property, you maintain it's navigable?

ATTORNEY KRISTOFER S. MONSON: Yes. Although to be clear, one of the reasons that this would be an improper suit even if it were brought as an ultra vires claim, is that determining the navigability of this part of the river would determine navigability on other parts of the river as well, because navigability is based on the average width of the river from the mouth up. So this is not merely a situation in which resolving the question of navigability would establish that the official had acted ultra vires, it would also adjudicate the State's title to the minerals in and under the bed and banks of the river on other properties as well.

JUSTICE PAUL W. GREEN: Okay, so your position is that it's pretty clear in this case, say, as a matter of law, that it is a navigable stream?

ATTORNEY KRISTOFER S. MONSON: Yes.

JUSTICE PAUL W. GREEN: What about a case that's not so clear? In that case would it be your position that the landowner wouldn't have any way -- or nobody would have any way of determining whether they could mine that gravel or not without subjecting themselves to criminal liability?

ATTORNEY KRISTOFER S. MONSON: Well, I don't think that's true. They could call the Department and ask them to come out and tell them whether they think the stream is navigable.

JUSTICE PAUL W. GREEN: But they would have to accept that determination from the Department?

ATTORNEY KRISTOFER S. MONSON: If they don't agree with the determination, and I think that if you look at their affidavits it's clear that they can't actually controvert navigability, they're

entitled to go the legislature and ask for permission to challenge that determination.

JUSTICE PAUL W. GREEN: That would be the only way?

ATTORNEY KRISTOFER S. MONSON: That would be the only way, or to commence mining, as Justice Johnson suggested, and await potential prosecution. I see my time is up, and unless the Court has any other questions about the record.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Counsel. The Court is now ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Sheets will present argument for the Respondent.

ORAL ARGUMENT OF JODY SHEETS ON BEHALF OF THE RESPONDENT

ATTORNEY JODY SHEETS: May it please the Court, Counsel. I'd like to start where Counsel left off and work backwards. This so-called controverted evidence that Counsel talks about is a letter from a state official who went out and looked, did not do a gradient boundary survey as Oklahoma vs. Texas designed in the early 1920s, not like done in Brainard, where the elements are set out, not like Model vs. Boyd or any other case in the tradition of a river survey. His determination of navigability was going out and looking at the pasture.

JUSTICE HARRIET O'NEILL: But we don't even reach that question until we decide the immunity issue.

ATTORNEY JODY SHEETS: Yes.

JUSTICE HARRIET O'NEILL: And my question is it seems like all these paths lead to title. Why isn't this essentially a trespass-to-try-title claim, however it might be pled?

ATTORNEY JODY SHEETS: Well, let me try to answer that this way. I think we've got a confluence here of some competing types of well-established theories, and when they flow together, as the State would like to have you do in this case, it creates kind of toxic mix or bad gumbo, if you've spent anytime in New Orleans. But because you've got what many consider to be esoteric property concepts over here, on gradient boundary surveying, and that methodology is what determines navigability. That was not done in this case. Then you have the notion of sovereign immunity, then you have private property rights of the individual, and then you have this trespass-to-try-title juxtaposition with boundary dispute cases. And historically, and then the other prong is the question of navigability, which our juri-sprudence says navigability is a law question for a judge.

JUSTICE HARRIET O'NEILL: Well, so is a money damage claim a question for a judge, but the government is immune from those types of claims. So the fact that Courts decide navigability really doesn't answer the sovereign immunity question.

ATTORNEY JODY SHEETS: Well, but I think, I believe that is it the threshold factual inquiry, which the property owner is entitled to have

under Lain. And it's our belief that the recent amendment to the Declaratory Judgment Act removes the Martin vs. Amorman [Ph.] problem of submitting a boundary dispute to declaratory judgment even if the State's involved. And the threshold factual inquiry is navigability, that must be established by possibly a gradient boundary survey from the State's standpoint. So this is a takings case.

JUSTICE PHIL JOHNSON: But if we don't know who owns it, how can it be a takings case?

ATTORNEY JODY SHEETS: Well --

JUSTICE PHIL JOHNSON: The assumption is in a takings case that the Trust owns it.

ATTORNEY JODY SHEETS: Right. And --

JUSTICE PHIL JOHNSON: And isn't that the question we're here about because the person you contracted with said, "I don't want to buy it until you can show me that the State is not involved in this," or you have a permit, one or the other. So it really comes back, as Justice O'Neill suggested, all roads lead to title.

ATTORNEY JODY SHEETS: Well, Justice Johnson, please look at where our clients come from.

JUSTICE PHIL JOHNSON: Well, I understand, it's a difficult situation.

ATTORNEY JODY SHEETS: But our clients assumed, because they had farmed, ranched and paid taxes on this section for over a hundred years, that they owned it.

JUSTICE PHIL JOHNSON: Was the river there before they had it a hundred years ago? Or the riverbed, the riverbed.

ATTORNEY JODY SHEETS: Well, our view is there is no riverbed --

JUSTICE PHIL JOHNSON: I understand.

ATTORNEY JODY SHEETS: -- on this pasture. If you get into the navigability cases, they talk about there needs to be sufficient water to feed livestock. They've gotten a river declared by the State on their property without even the water that ought to go with it to feed their cattle, because Ben Thompson has said, "It looks like a river out here to me." Now, they were involved in a gravel contract, a lucrative gravel contract being proposed by Trinity Industries, the record shows, and Trinity indicated that Parks and Wildlife told them they needed a permit. Our clients responded, "No, we don't, we own it." So Trinity said, "You better be sure of that," so we filed this suit in Donley County for declaratory judgment that there was no navigable stream on this property. In the record are four affidavits. We have affidavits from the owners, that there's never been enough water there to satisfy the navigability issues, from a licensed state land surveyor, who checked the records in Donley County, and says there's never been a navigable stream noted in the records of Donley County. The general manager of Greenbelt Water Authority --

JUSTICE HARRIET O'NEILL: But again you're arguing the merits of navigability and the issue we're here to decide is whether we can reach that question.

ATTORNEY JODY SHEETS: Well, Your Honor, since it's a takings claim --

JUSTICE HARRIET O'NEILL: So let's talk about the takings claim.

ATTORNEY JODY SHEETS: Yes.

JUSTICE HARRIET O'NEILL: How can you assert a takings claim unless you start with the premise that you own the property? So don't you have to prove title before you can bring a takings claim?

ATTORNEY JODY SHEETS: Well, it's undisputed in this record that the Sawyers own the section of land on which this alleged river sits. So the question of whether there has been a damage, and as the Court is aware, the Texas law with regard to takings is broader in its wording than the Federal Constitution, because it says, "If you take, damage or destroy." And there's a very articulate description of the parameters of taking in the Steel case, a very detailed statement by Justice Pope, as to the breadth of it.

JUSTICE NATHAN L. HECHT: Is there any question that under the Small Act you own the surface?

ATTORNEY JODY SHEETS: No question.

JUSTICE NATHAN L. HECHT: And the estate?

ATTORNEY JODY SHEETS: No question. No one has disputed that. So the question --

JUSTICE NATHAN L. HECHT: Just about the sand and gravel?

ATTORNEY JODY SHEETS: Right. So you start with the proposition that we own the land, and the question is has something occurred where the State has damaged the value or taken that land? And for the State to casually, by suggestion without doing a survey say, "Yes, we own all the sand and gravel," that is a damage to the land that is unquestionably owned by the Sawyer Trust.

JUSTICE EVA GUZMAN: But if it's a navigable stream, the Sawyer Trust doesn't own it, right?

ATTORNEY JODY SHEETS: Well, but we contend that's circular. In other words, there's no doubt that we own the land. We say, "Your Honor, tell us if it's navigable."

JUSTICE EVA GUZMAN: And the State has asserted an ownership interest.

ATTORNEY JODY SHEETS: The State says nobody can talk about it, you can't talk about it. You could sue Ben Thompson, and as this Court said in Heinrich, "Really when we say, 'Go sue the State official,' nobody thinks that that's really not a suit against the State." It is a construct that's been used for a long, long time and fraught with some difficulties, particularly for the citizen landowner to try to figure

out. And there's been a good bit of discussion in the cases as to how difficult and confusing this can become. This Court in Heinrich indicates what is -- I'm never sure of Westlaw printouts, what page I'm really on, but this is page 10 of what I have. This Court said, "Parsing categories of permissible relief in cases implicating immunity inevitably, inevitably involves compromise. The law of remedies against governments and government officials is a vast and complex body of doctrine full of technical distinctions, fictional explanations, and contested compromises." So what we are saying is that this really is a takings case. And how the case got framed up, we went to the Donley County Court and said, "The State is trying to make us get a permit. Please tell us whether it's navigable or not." A plea to the jurisdiction is filed, as Counsel indicated, the Judge said, "Well, State, do you own this land or not?" They said, "We don't know yet." The Court literally took a recess and said, "Let's go call the State of Texas." So went into the office, called for Ben Thompson and said, "Are you all going to claim this or not?" They said, "We don't know. We ought to go look at it." So he goes out and looks and writes a letter suggesting that, yes, the State owns it. So it's at that point, right after he sends his letter, we amend and say, "If they're claiming that, that's a taking." And we pled the Constitution, we pled the Federal Constitution, we pled Article 1, Section 17, we pled 42 USC 1983, and to have the notion that we hadn't pled a takings claim we think is not right. So that's how we got where we are. We did not sue a state official because it's our contention that we have a takings. Now, I don't understand any of Parks and Wildlife's arguments that we're completely dead on this issue and can't amend.

JUSTICE PHIL JOHNSON: Who would you sue if you wanted to and what would you amend to say?

ATTORNEY JODY SHEETS: I suppose I'd amend to add a State official. The State's --

JUSTICE PHIL JOHNSON: Who would you add? Is it your contention that someone has violated the law, and if so, who?

ATTORNEY JODY SHEETS: Well, I would submit that that's part of the problem with this construct, the way it's being articulated and why there's so much confusion in the cases. And what the State's arguing is if we had sued Ben Thompson, for instance, on the front end, if he had just sent us a letter saying, "We're claiming we own the sand and gravel on this section," we could have sued him and then we all know that the State would have acted as if we had sued them, and we would have had some sort of movement forwards on that notion, and then we may or may not get any relief. What the State is saying now is that we went too far because we already know that the agency is going to stand behind Ben Thompson's letter and say, "The agency is telling you that we own it, not just Mr. Thompson," so you can't even get into an ultra vires situation because we've got the State itself saying we own that property. So it becomes convoluted at that point, we say not because of our behavior, but because of the technicalities of this construct between suing the official and suing the State when you really get to the same result.

JUSTICE PAUL W. GREEN: What about the implications of this, all of this to the landowners up and down the streambed? I mean it seems there

would be a determination for everyone just because of this one situation. Wouldn't that be affected?

ATTORNEY JODY SHEETS: If you get into these plains rivers, and from dealing with it in Brainard And Riemer [Ph.] and in this case, I can tell you that when you get downstream of dams on prairie rivers, you have segments that have water in them due to the idiosyncratic nature of certain parts of the waterflood.

JUSTICE PAUL W. GREEN: Right, and that's my point. Why isn't there a State interest, an overriding State interest in that, making it consistent up and down rather than a patchwork of, the state does own or does not own or whatnot?

ATTORNEY JODY SHEETS: Well, what I was trying to get to and not doing it very well was that the State's position in this case on the record is limited to that one section. And I'm saying that there are places on prairie rivers where you may have a few sections where there's never water running on it, and you can go a few miles downstream and because of creeks and gullies in the waterflood that will put water in the riverbed on those sections periodically so as to allow a gradient boundary survey to be properly done. And so I'm not convinced that a determination on the Sawyer section would necessarily or should necessarily bind everyone up and down the river, but this historical notion of once navigable always navigable does give you some -- it limits some of your running room there, I would say.

JUSTICE PAUL W. GREEN: Well, wouldn't it seem to point toward a remedy being, as was suggested, to go to the legislature and ask for permission to sue to solve that problem on a State level rather than on an isolated-section level?

ATTORNEY JODY SHEETS: The problem is that that doesn't get done. The waiver in Brainard took years to work that bill through the legislature, and no permission has been granted for this type of thing since that time on any river in Texas, and we know because we've tried. You cannot get it done. Therefore the remedies that the State keeps telling us we have are either to go out and sell the sand and gravel and sit there and wait for the State to come after you and then try to defend it, which these are ranching folks and tough-minded folks, but they're not willing to try that. And the option of going to the legislature is not working. So we are convinced that this position of ours as a takings claim must be recognized.

JUSTICE PAUL W. GREEN: Okay. So what do you think would be the binding effect of a decision in a case like you've described on the landowners up and down the streambed? Have any precedential value or not?

ATTORNEY JODY SHEETS: In other words, if we went to trial in Donley County on the boundary dispute with the State arguing there's a river across your pasture this wide, and us arguing there's not one at all, but if there is it's only this wide. If that went to trial and you got an adjudication of that?

JUSTICE PAUL W. GREEN: Right.

ATTORNEY JODY SHEETS: I think on this record it would only apply to that section.

JUSTICE PHIL JOHNSON: Well, how would the State, can you try that case only on your pasture? Because the State says the definition says from the mouth all the way up has to be a certain width, 30 feet, as I recall.

ATTORNEY JODY SHEETS: I think that's a problem for the State practically.

JUSTICE PHIL JOHNSON: So under the scenario we have here, every landowner in Texas who has something across their pasture if the State has not -- or if it's not determined it's navigable, the landowner sues the State to say, "In my pasture it's not navigable," and then the State would have to come in and defend that and effectively get into the burden of proving that the entire stream or river is navigable from the mouth in every situation?

ATTORNEY JODY SHEETS: Well --

JUSTICE PHIL JOHNSON: Am I missing something on that?

ATTORNEY JODY SHEETS: Justice Johnson, I think practically just from wrestling with that for years, I think what's going to happen tactically is you're going to end up with an application for a class action to bring in all these sections, and the State likes that a lot less than they do normally the one section.

JUSTICE PHIL JOHNSON: And so then what we're talking about is the landowner who has a grievance, there's no question, has a grievance. It's difficult.

ATTORNEY JODY SHEETS: Yes.

JUSTICE PHIL JOHNSON: But that landowner sues the State in Donley County, and then someone down in Ector County and then someone down in every other county sues, and pretty soon we have the -- and in every one of those then, it's going to turn into a class action and the State's going to have to defend all these class actions. It seems like that might be the result that we're looking at here, if we follow your thinking.

ATTORNEY JODY SHEETS: Well, that's possible, I have to acknowledge that. I think pragmatically that does not happen because, and a lot of that is just based on my experience in fighting the State in these river issues, is that typically the State tries to make it as a small argument as they can, so that you don't have a range war all up and down a river. And so it's my judgment that some of the imperatives of that sort of thing force this sort of give and take that allows an adjudication of this particular tract that is not surprising to the State or the landowner. I see I'm out of time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel.

JUSTICE DAVID M. MEDINA: How does the State handle wet-weather creeks?

ATTORNEY KRISTOFER S. MONSON: Wet-weather creeks?

JUSTICE DAVID M. MEDINA: Yes.

REBUTTAL ARGUMENT OF KRISTOFER S. MONSON ON BEHALF OF PETITIONER

ATTORNEY KRISTOFER S. MONSON: Under Model vs. Boyd and State vs. Bradford, wet-weather creeks are considered to be navigable waterways and are owned by the State, so long as they are an average of 30 feet from the mouth.

JUSTICE DAVID M. MEDINA: And how often does the stream have to flow? What if there's a major drought for 50 years and there's no water going through it?

ATTORNEY KRISTOFER S. MONSON: Well, I don't think we've answered that question. I mean the only data points we have where it's been fully addressed and adjudicated are, at least at this Court, are Model and Bradford. But in each of those cases, the evidence showed that some seasonal rain in at least some years put water into the rain creek, and that was enough to establish that it was a navigable watercourse because the bed and the banks had the requisite statutory width. I'd like to make one quick point about the procedure before trying to give the Court a little bit more comfort about how you measure these rivers, because I think that Mr. Sheets has tweaked the navigability jurisprudence in a way that's a little bit misleading. But to be clear, our position is that you shouldn't be rendering judgment in this case saying that they can't bring a judgment against an official because at this point, no official has been named. We think that we would win on a plea to the jurisdiction defending an official in his official capacity, but that's not an appropriate determination to make now. And this case is really about the legislature's choice about how to efficiently decide these navigability disputes. If the dispute is big enough, if there's a question all the way along the river, the Brainard case shows that in that situation, the legislature is willing to go to the Courts, but the legislature can also make the decision that it isn't important enough for these disputes to go into the Courts, and that call is for the legislature to make.

JUSTICE HARRIET O'NEILL: It seems awfully harsh on a landowner. If they wanted to use property that's, let's say it's clearly not navigable, they're stuck. There's nothing they can do and the State can just say, "We're not even going to answer that question. We may agree with you, but we're just going to stonewall you."

ATTORNEY KRISTOFER S. MONSON: I do see daylight. The ultra vires cause of action against an official can in some circumstances result in a favorable result for a plaintiff like the Trust. The allegation would have to be that there is no reasonable basis to believe that the stream is navigable rather than determine --

JUSTICE PHIL JOHNSON: What if the State just says, "We don't know and we're not going to say"? They had to sue you in Donley County and get the Judge to call the State to get them out there apparently. That's not --

ATTORNEY KRISTOFER S. MONSON: It's my understanding that if they had picked up the phone and called the Department, the Department would have gotten them an answer.

JUSTICE PHIL JOHNSON: What if the Department does say no, though? What does the landowner do in those circumstances? I mean they could go out there and they could pick it up, but the government sometimes just says, "We're too busy to come where you are." What do they do?

ATTORNEY KRISTOFER S. MONSON: Well, some of that's the cost of doing business in such a large state with fairly limited resources, but --

JUSTICE PHIL JOHNSON: That's the State's side, what does the landowner do?

ATTORNEY KRISTOFER S. MONSON: The landowner can either commence operations and wait for regulation, or they can bring -- I think that they are entitled in the course of the suit against the official to say, you know, "Show us the money, show us some basis for your" --

JUSTICE PHIL JOHNSON: Who would they sue if the State just said, "We're not going to come out," which official would they sue?

ATTORNEY KRISTOFER S. MONSON: They could sue, I'd say any named appointed official at the Department, for example.

JUSTICE PHIL JOHNSON: For what?

ATTORNEY KRISTOFER S. MONSON: For a declaratory judgment that the Department's assertion of control, the past actions --

JUSTICE PHIL JOHNSON: The Department is not asserting control. That's part of their complaint. The Department, they finally got them to take a position, but if a landowner, not this one, another landowner says, "We have a contract," and the State says, "We're just not going to come out there," which official would they sue when all they said is, "We don't have time, we're not coming out?" What could they sue them for?

ATTORNEY KRISTOFER S. MONSON: If that were the case, I'm not really sure how that would actually happen. I mean I've having a hard time considering the -- I'm having a hard time to understand how the Department wouldn't respond in that situation because I think they would.

JUSTICE HARRIET O'NEILL: But it doesn't really matter, because whatever they respond, good or bad, you know, they could say, "We've been out there," and they haven't. They could just say anything and there's nothing you can do about it as a landowner, right?

ATTORNEY KRISTOFER S. MONSON: Well, no, you could as a landowner say -- you know, say that the Department official asserted ownership and control on the basis of let's just pick military conquest. That's obviously an invalid basis for asserting title and control. You could get an injunction to stop that.

JUSTICE HARRIET O'NEILL: Well, but I mean let's presume that they can come up with something. Let's pre-sume that they can say, you know,

"I've spent five minutes, I looked at a map, I say it's navigable." I mean a colorable basis, then there's just nothing a landowner can do.

ATTORNEY KRISTOFER S. MONSON: If that happens, and I think the purpose of the ultra vires lawsuit is to make sure that at least that happens, then that's right, there is no recourse unless they go to the legislature. Once again, that choice is the legislature's to make.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Monson. The cause is submitted, and the Court will take a brief recess.

MARSHALL: All rise.

[End of proceedings.]

Texas Parks and Wildlife Department, Petitioner, v. The Sawyer Trust, Respondent.

2009 WL 4823926 (Tex.) (Oral Argument)

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