

No. 07-0945

**In the
Supreme Court of Texas**

TEXAS PARKS AND WILDLIFE DEPARTMENT,
Petitioner,

v.

THE SAWYER TRUST,
Respondent.

On Petition for Review from the
Seventh Court of Appeals at Amarillo, Texas

PETITIONER'S SUPPLEMENTAL BRIEF ON THE MERITS

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil
Litigation

JAMES C. HO
Solicitor General

KRISTOFER S. MONSON
Assistant Solicitor General
State Bar No. 24037129

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC-059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1820
[Fax] (512) 469-3180

COUNSEL FOR PETITIONER
TEXAS PARKS AND WILDLIFE DEPARTMENT

TABLE OF CONTENTS

Index of Authorities iii

Supplemental Issue Presented v

I. *City of El Paso v. Heinrich* Requires Dismissal 2

 A. *Heinrich* Abrogates the Court of Appeals’s Judgment Because it Rejects the Assumption That Courts Have General Jurisdiction Over Suits Against State Entities for Declaratory Relief 2

 B. The Jurisdictional Defect in the Trust’s Claim Against the Department Cannot Be Cured by Repleading Because It Is in Substance a Trespass-to-Try-Title Claim, Which is Barred by Sovereign Immunity 3

II. The Appropriate Remedy is Dismissal, Not Remand 5

 A. A Plaintiff Who Has Sued the Wrong Defendant Will, In Most Cases, Have the Opportunity to Bring a Subsequent Lawsuit Against the Proper Official Defendant 6

 B. On this Record, the Trust Cannot Replead to State a Claim Against Any Department Official Because Department Officials Have Acted Entirely Within Their Statutory Authority 7

Prayer 9

Certificate of Service 10

INDEX OF AUTHORITIES

Cases

<i>Block v. N.D. ex. rel. Bd. of Univ. & Sch. Lands</i> , 461 U.S. 273 (1983)	4
<i>Brainard v. State</i> , 12 S.W.3d 6 (Tex. 1999)	5
<i>City of El Paso v. Heinrich</i> , No. 06-0778, 2009 WL 1165306 (Tex. May 1, 2009)	v, 1-3, 5-8
<i>Fed. Sign v. Tex. S. Univ.</i> , 951 S.W.2d 401 (Tex. 1997)	5
<i>Harris County v. Sykes</i> , 136 S.W.3d 635 (Tex. 2004)	6
<i>Idaho v. Cœur d'Alène Tribe of Idaho</i> , 521 U.S. 261 (1997) (plurality op.)	5
<i>Perry v. People for Efficient Transp.</i> , No. 03-06-00147-CV, 2009 WL 1364361 (Tex. App.—Austin May 15, 2009, no pet. h.) (mem. op.)	6
<i>State v. Bradford</i> , 121 Tex. 515, 50 S.W.2d 1065 (1932)	4
<i>State v. Lain</i> , 162 Tex. 549, 349 S.W.2d 579 (1961)	4
<i>Tex. A&M Univ. Sys. v. Koseoglu</i> , 233 S.W.3d 835 (Tex. 2007)	5
<i>Tex. Dep't of Parks & Wildlife v. Sawyer Trust</i> , No. 07-06-00487-CV, 2007 WL 2390434 (Tex. App.—Amarillo 2007, pet. denied, mtn for reh'g granted) (per curiam) (mem. op.)	2, 3

Tex. Natural Res. Conservation Comm'n v. IT-Davy,
74 S.W.3d 849 (Tex. 2002) 8

Tex. Parks & Wildlife Dep't v. E.E. Lowrey, Ltd.,
235 S.W.3d 692 (Tex. 2007) 3

Constitutional Provisions, Statutes and Rules

TEX. CONST. art XVI, §59a 4

TEX. CIV. PRAC. & REM. CODE ch. 107 5

TEX. CIV. STAT. art. 5414a 4

TEX. NAT. RES. CODE §21.001 4

TEX. NAT. RES. CODE §51.291 7

TEX. PARKS & WILD. CODE §1.011(d) 7

TEX. WATER CODE §11.021 7

SUPPLEMENTAL ISSUE PRESENTED

What issues, if any, survive the decision in *City of El Paso v. Heinrich*, No. 06-0778, 2009 WL 1165306 (Tex. May 1, 2009)?

No. 07-0945

**In the
Supreme Court of Texas**

TEXAS PARKS AND WILDLIFE DEPARTMENT,
Petitioner,

v.

THE SAWYER TRUST,
Respondent.

On Petition for Review from the
Seventh Court of Appeals at Amarillo, Texas

PETITIONER'S SUPPLEMENTAL BRIEF

TO THE HONORABLE SUPREME COURT OF TEXAS:

The Court asked the Department to brief the impact of *City of El Paso v. Heinrich*, No. 06-0778, 2009 WL 1165306 (Tex. May 1, 2009), on this case. See Letter from Blake A. Hawthorne, Clerk, Supreme Court of Tex., to Counsel (May 1, 2009) (on file with court). The short answer is that *Heinrich* mandates reversal of the court of appeals's judgment and rendition of judgment dismissing the plaintiff's claims against the Department with prejudice.

I. CITY OF EL PASO V. HEINRICH REQUIRES DISMISSAL.

A. *Heinrich* Abrogates the Court of Appeals’s Judgment Because it Rejects the Assumption That Courts Have General Jurisdiction Over Suits Against State Entities for Declaratory Relief.

The court of appeals’s judgment in this case cannot survive *Heinrich*.

Heinrich rejects the proposition that there is a general right to sue governmental entities to obtain declarations of rights; rather, such relief is available only in an *ultra vires* suit brought against an official in his or her official capacity. 2009 WL 1165306, at *4. The Court concluded that:

- When such suits are brought, the entity retains sovereign immunity and any claims against the entity must be dismissed, *id.* at *4, *11;
- such suits must be brought against officials who are alleged to have acted *ultra vires*, and plaintiffs must demonstrate a violation of law at the jurisdictional level or face dismissal of their claims, *id.* at *8-*9, *10; and
- the remedy in an *ultra vires* suit is limited to prospective injunctive relief, which can include a prospective obligation to make expenditures required by statute, *id.* at *5-*7.

By contrast, the major premise of the court of appeals’s decision is that “[g]enerally, a party can maintain a suit to determine its rights without legislative permission as long as damages are not sought.” *Tex. Dep’t of Parks & Wildlife v. Sawyer Trust*, No. 07-06-00487-CV, 2007 WL 2390434, at *1 (Tex. App.—Amarillo 2007, pet. denied, mtn for reh’g granted) (per curiam) (mem. op.). Because government entities are generally amenable to

declaratory-judgment suits, the court of appeals reasoned, the Department must likewise be subject to a suit to determine whether a river is navigable. *See id.*, at *1.

This holding is inconsistent with *Heinrich*. The only available suit for declaratory relief would be an *ultra vires* claim against government officials, acting in their official capacity. 2009 WL 1165306, at *11. Accordingly, the Department retains its immunity from the generalized declaratory-judgment claim allowed by the court of appeals. That claim must be dismissed.

B. The Jurisdictional Defect in the Trust's Claim Against the Department Cannot Be Cured by Repleading Because It Is in Substance a Trespass-to-Try-Title Claim, Which is Barred by Sovereign Immunity.

Dismissal is appropriate in this case because the pleadings affirmatively negate any potential claim against the Department. The claim outlined in the live petition is a suit to determine navigability of a stream. CR.3. A suit to determine navigability necessarily determines the State's rights in the stream bed, because the State has at least some property rights in the beds of every navigable stream. *See* Department's Motion for Rehearing at 4-5. Because a lawsuit to determine the State's title to property can never be brought against the Department without Legislative consent, plaintiff's petition is incurably defective. *E.g., Tex. Parks & Wildlife Dep't v. E.E. Lowrey, Ltd.*, 235 S.W.3d 692, 694-95 (Tex. 2007) (rendering dismissal judgment because jurisdictional defect could not be cured).

The only factual allegations plaintiff has made concern whether the Salt Fork is navigable, CR.3, which will necessarily result in a determination of the State's ownership

interests in the stream bed. The background rule in Texas is that if a stream is navigable, then the State has a property interest in it. *E.g.*, *State v. Bradford*, 121 Tex. 515, 528-29, 50 S.W.2d 1065, 1069 (1932).¹ With the significant exception of streams affected by the “Small Bill”, the background principle in Texas is that the State owns the beds of all navigable streams, which means that the State owns at least the natural resources within every stream that meets the statutory definition of navigability or is otherwise navigable in fact. TEX. NAT. RES. CODE §21.001; TEX. CIV. STAT. art. 5414a (the “Small Bill”). And even for Small Bill streams, the State still retains title to the sand and gravel in any navigable stream or river as well as other necessary public rights. TEX. CIV. STAT. art. 5414a; *see Bradford*, 50 S.W.2d at 1076 (reasoning that Small Bill did not violate Article XVI, §59a of the Constitution because the State retained title to natural resources in Small Bill streams). Thus, resolution of the Trust’s navigability claim will *also* determine the extent of the state’s title to the sand and gravel deposits in the Salt Fork stream bed.

Because this navigability-determination claim *is* a suit to try the State’s property interest in the Salt Fork stream bed, it is barred by sovereign immunity. It is beyond doubt that the State is immune from suit for attempts to try its title to real property. *E.g.*, *State v. Lain*, 162 Tex. 549, 552-53, 349 S.W.2d 579, 582 (1961).² Because the only legal issue

1. “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, lakes, bays, inlets and other areas within tidewater limits within its borders.” *Bradford*, 50 S.W.2d at 1069.

2. The same principle applies in federal court: the United States has immunity from suits seeking to challenge its title to property, except under the narrow circumstances in which Congress has provided a waiver of that immunity. *See Block v. N.D. ex. rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292-93 (1983)

implicated by the facts alleged in the petition is barred by sovereign immunity, the Trust's suit against the Department must be dismissed.

Nor is it any answer to argue, as the Trust has throughout this litigation, that the courts have jurisdiction to make navigability determinations. *E.g.*, Respondents' Merits Br. at 7-8. The entire point of immunity is that it bars lawsuits over which the courts would have jurisdiction but for the identity of the defendant. *E.g.*, *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 411-12 (Tex. 1997). The Trust is entitled to petition the Legislature for a waiver of sovereign immunity to try this case. *See* TEX. CIV. PRAC. & REM. CODE ch. 107. If that waiver is granted, the court will obviously have power to make the navigability determination. *E.g.*, *Brainard v. State*, 12 S.W.3d 6, 25 (Tex. 1999).

II. THE APPROPRIATE REMEDY IS DISMISSAL, NOT REMAND.

Heinrich concluded that a suit for declaratory relief against a government entity must be dismissed when it should have been framed as an *ultra vires* suit against a government official, in her official capacity. 2009 WL 1165306, at *11. Dismissal on sovereign immunity grounds is appropriate only when the jurisdictional defect is incurable. *E.g.*, *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). Under *Heinrich*, then, failure to name the official as a defendant in her official capacity is an incurable

(remanding suit by North Dakota to establish navigability status of river to require North Dakota to demonstrate compliance with immunity waiver). Likewise the states federal courts can decide a state's title to land only under circumstances of the state's choosing. *Idaho v. Cœur d'Alène Tribe of Idaho*, 521 U.S. 261, 272 (1997) (plurality op.); *id.* at 290-91 (O'Connor, J., concurring).

jurisdictional defect requiring dismissal. Such dismissal is always with prejudice. *Harris County v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004).

A. A Plaintiff Who Has Sued the Wrong Defendant Will, In Most Cases, Have the Opportunity to Bring a Subsequent Lawsuit Against the Proper Official Defendant.

Dismissing the claims against a government entity when a plaintiff has sought declaratory relief against the entity, but not against any official, makes sense. Under *Heinrich*, the entity can never be an appropriate defendant in such a lawsuit.

This result works no unfairness. If a claim against an entity is dismissed, the plaintiff can always file a subsequent lawsuit against the relevant officials in their official capacities. While that subsequent lawsuit would be subject to any of the ordinary defenses the officials might raise, those defenses would have impacted the suit against the entity regardless. Most importantly, as *Heinrich* makes clear, defendant officials are entitled to challenge jurisdiction over the claim against them by arguing that the live petitions do not, as a matter of law, describe a violation of law. 2009 WL 1165306, at *8-*10. If they have acted within their authority, the lawsuit is in effect a suit against the entity, rather than the officials, and must be dismissed. *Id.*; see, e.g., *Perry v. People for Efficient Transp.*, No. 03-06-00147-CV, 2009 WL 1364361, at *2-*4 (Tex. App.—Austin May 15, 2009, no pet. h.) (mem. op.) (correctly applying this analysis).

B. On this Record, the Trust Cannot Replead to State a Claim Against Any Department Official Because Department Officials Have Acted Entirely Within Their Statutory Authority.

In this case, the live pleadings affirmatively demonstrate that plaintiffs cannot bring a subsequent lawsuit that falls within the *ultra vires* exception. Under *Heinrich*, an *ultra vires* suit may be maintained only if the plaintiff demonstrates that its complaint encompasses a violation of law. 2009 WL 1165306, at *8-*10. Plaintiff's petition asks for a declaration of navigability based on the fact that the Department might assert an ownership claim to the property. CR.3. While the trial court was considering the plea, the Department sent a surveyor from the General Land Office to inspect the stream in question. CR.15. The inspection revealed that the stream is of a width that makes it navigable as a matter of law. *See* Department's Reply Br. at 10-12. By providing the memo resulting the results of that inspection to the trial court, the Department asserted the State's title to the sand and gravel in the streambed.

These facts foreclose any potential future *ultra vires* claim against a Department official. The Department, and its officials, have express statutory authority to assert the State's title to stream beds. *See* TEX. WATER CODE §11.021 (State owns navigable streams); TEX. PARKS & WILD. CODE §1.011(d); TEX. NAT. RES. CODE §51.291 (State's interest in streambed gravel is exercised by Department); *see also* Department's Merits Br. at 2-4. Thus, there can be no claim that the mere assertion of title is *ultra vires*. And, while a claim of title based on nothing, or on fraudulent information, might arguably be *ultra vires*, the

Department's assertion of title to the stream bed in this case is based on an inspection made by a state-employed surveyor. CR.15. That inspection is more than an adequate basis for Department officials to assert the stream's navigability and, as a result, the State's ownership of the sand and gravel in the stream bed.

The purpose of the *ultra vires* fiction is to prevent the lawsuit against a state official from becoming a suit against the entity—not to provide an end run around the substantive limitations of the immunity doctrine. See *Heinrich*, 2009 WL 1165306, at *7-*8. The Court resolved this issue in *Texas Natural Resource Conservation Commission v. IT-Davy* when it held that it need not reach the issue whether a breach of contract is an illegal act because the substance of the lawsuit was to hold the entity liable for the contract—a claim that is barred by immunity. 74 S.W.3d 849, 855-56 (Tex. 2002). Likewise, an *ultra vires* suit against a government official related to ownership of property focuses on whether the defendant official has discretion to assert the State's title. If the jurisdictional issue focused on determining ownership of property, the case would become a trespass-to-try-title suit by another name. See Department's Reply Br. at 12-20. But if the jurisdictional inquiry focuses on the scope of the official's authority to assert title to property, it would fall within the exception recognized in *Heinrich* and require analysis of whether there is any legal impediment to the assertion of title.

PRAYER

The Court should grant the petition and render judgment dismissing the Sawyer Trust's claims against the Department with prejudice.

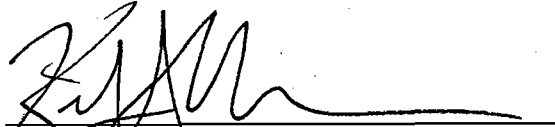
Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

JAMES C. HO
Solicitor General



KRISTOPHER S. MONSON
Assistant Solicitor General
State Bar No. 24037129

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC-059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1820
[Fax] (512) 469-3180

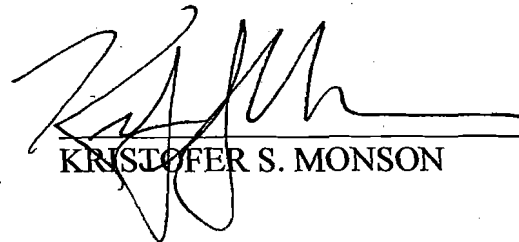
COUNSEL FOR PETITIONER
TEXAS PARKS & WILDLIFE DEPARTMENT

CERTIFICATE OF SERVICE

I certify that on June 1, 2009, a true and correct copy of this Petitioner's Supplemental Brief on the Merits was served by certified U.S. mail, return receipt requested, on all appellate counsel of record in this proceeding as listed below:

Jody Sheets
LAW OFFICE OF JODY SHEETS
5910 N. Central Expressway, Suite 275
Dallas, Texas 75206

COUNSEL FOR RESPONDENT



KRISTOFER S. MONSON