diversions out of the watershed were granted (S.F. 287-297).

This evidence relates to actual prior water appropriation rights which have been in existence up to 50 years and long before the Wagstaff Act was passed in 1931. (See list of permits and certified filings on page 18 of the CCA opinion.) That Act does not purport to authorize cities to expropriate water rights acquired before its enactment. It, therefore, is unnecessary to speculate on whether the term "to the prejudice of any person or property" in Art. 7589 has application to "an indefinite inchoate right based on some possible future need" as suggested on page 25 of San Antonio's Application since San Antonio's requested diversion would impair vested property rights now existing.

Likewise, it is unnecessary to speculate on whether the Wagstaff Act repealed Arts. 7589-7591 insofar as cities and towns are concerned. GBRA's Permit No. 1886 authorizes the appropriation of water solely for municipal purposes, the highest preferential use stated in Art. 7471. (The Commission denied GBRA's application for industrial, irrigation and hydroelectric uses.) The contest here is an in-basin municipal use against an out-of-basin municipal use. There is nothing in the Wagstaff Act which purports to prefer an out-of-basin over an in-basin municipal use or which

conflicts in any way with the prohibition in Art. 7589 against inter-basin transfers of water to the prejudice of existing pre-Wagstaff in-basin water rights. Whatever preferences are given to municipal uses under the Wagstaff Act have at least equal application to municipal uses within the Guadalupe basin in this case.

Petitioners' Fourth and Fifth Points have no support in the record and attempt to raise issues which do not arise in this case.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER EIGHTH COUNTERPOINT

EIGHTH COUNTERPOINT RESTATED

> Petitioners having applied for a permit to appropriate 100,000 acre feet of water per annum and having prayed in the trial court for judgment for that quantity of water, the Court of Civil Appeals did not err in giving effect to evidence regarding such quantity. (In reply to Sixth Point.)

San Antonio's Application No. 1956 requested a permit to increase the conservation pool in Canyon Reservoir from its planned capacity of 366,400 acre feet to 807,100 acre feet and to appropriate and divert 100,000 acre feet of water per annum for use in San Antonio. The first paragraph of the prayer in San Antonio's petition in Cause No. 108,098 is as follows:

> "That the order of defendant Board of Water Engineers of the State of Texas, of date July 5, 1957,

> denying plaintiffs' application No. 1956, dated January 11, 1956, which application sought a permit for the appropriation and diversion of 100,000 acre feet of water per annum, be by this Court cancelled and in all things set aside, and that said defendant Board of Water Engineers of the State of Texas be ordered by this Court to issue its permit to the City of San Antonio to appropriate said 100,000 acre feet of water per annum as prayed for in said Application No. 1956."

In the next paragraph, San Antonio prays in the alternative that the Commission be ordered to issue a permit "for such number of acre feet as said Board finds to be unappropriated and available for municipal use by plaintiff City of San Antonio."

However, San Antonio offered no evidence in the trial court that 100,000 acre feet per annum or any lesser quantity of water was available for export to San Antonio and offered no evidence as to what minimum annual quantity would be required to justify the necessary cost of pumps, pipelines, treatment plant, etc., to render the project economically and hydrologically feasible. The case San Antonio presented to the Commission was based upon the large size reservoir and an annual appropriation of 100,000 acre feet, and San Antonio made no effort to present a different case to the district court. Therefore, it was both proper and necessar for the defendants in the trial court to introduce evidence to counter the relief sought by San Antonio in its application to the Commission and in its pleadings to the district court.

Under the doctrine of "primary jurisdiction," the courts' jurisdiction is limited to a review of the acts of the administrative agency in relation to the application before it and evidence directed to that matter is proper and relevant. Assuming, for the sake of the argument, that the district court could have considered evidence of a lesser yield from the smaller reservoir (now completed), San Antonio offered no such evidence.

San Antonio's assumptions that Canyon Reservoir will yield a total of 100,000 acre feet of water per annum and that 50,000 acre feet will be available for diversion to the San Antonio River basin without impairing existing water rights in the Guadalupe River basin are contrary to the undisputed evidence and wholly unsupported by any evidence. (See discussion under Tenth Counterpoint, post.)

STATEMENT, ARGUMENT AND AUTHORITIES UNDER NINTH COUNTERPOINT

NINTH COUNTERPOINT RESTATED

The Court of Civil Appeals did not err in failing to hold Art. 7472c unconstitutional. (In reply to Seventh Point.)

As noted under the Sixth and Seventh Counterpoints, supra, the permit issued to GBRA authorizes an appropriation solely for municipal purposes, the number one use preference stated in Art.

7471. San Antonio's argument that the Wagstaff Act is rendered unconstitutional if it is construed to "grant to the Texas Water Commission the discretion to ignore the priorities established in Art. 7471 and refuse to grant a permit for the highest priority user, a municipality" is purely academic because the Commission did not ignore the preferences stated in Art. 7471 but honored them in this case. Further, it will be noted that this statute prescribes preferences in uses but not in users, making no mention of cities and towns as such. For example, under this statute and under Art. 7472b (part of the Wagstaff Act) which authorizes all political subdivisions of the State to condemn inferior use water rights to be used for municipal purposes, a political subdivision such as a river authority, seeking water for municipal purposes, has precedence over a city seeking water for industrial, recreation or other inferior purposes.

The question posed by Petitioners' Seventh Point is not reached in this case but if it were, it would appear that the language in the caption of the Wagstaff Act, to wit: "... declaring the policy of the State to the use of public waters; ..." is broad enough to cover the State's policies declared in Art. 7472c (also part of the Wagstaff Act) and the caption meets every constitutional requirement.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER TENTH COUNTERPOINT

TENTH COUNTERPOINT RESTATED

> The issuance of a permit to Guadalupe-Blanco River Authority to use 50,000 acre feet of water per annum for municipal purposes within the Guadalupe watershed did not constitute a finding that an equal amount of water could be diverted out of the watershed without impairing existing non-consumptive water rights of prior appropriators. (In reply to Eighth Point.)

As noted above, San Antonio offered no evidence in the trial court as to the hydrology of the Guadalupe River or the dependable yield of Canyon Reservoir after honoring existing water rights on the river. It was shown, as an admission against interest, that San Antonio's hydrologist and expert witness at the hearings before the Water Commission testified that if San Antonio diverted 100,000 acre feet of water per annum out of the larger Canyon Reservoir proposed by San Antonio, so long as water was available after honoring prior vested rights downstream, the reservoir would be completely dried up and San Antonio could obtain no water at all from the reservoir for 52 consecutive months during a recurrence of the critical 1950-1957 drought (S.F. 130-134). The larger reservoir would not have provided a dependable supply for San Antonio and the smaller reservoir would, of course, be even less feasible for a municipal water supply which, by its nature, must

be available and dependable every day of every year (S.F. 125-127, 133-134).

The only testimony of the yield of Canyon Reservoir was that of GBRA's engineer and expert witness, Mr. James A. Cotton of Dallas. Mr. Cotton testified that, while he recognized that prior water rights downstream must be satisfied, he did not make his yield study on that basis. The reason was that the largest (and controlling) rights below were the 1,300 cubic feet per second of time (cfs) of hydroelectric rights of Texas Power Corp. and Texas Hydro-Electric Corp. which were non-consumptive uses and the flow necessary to satisfy them was fully adequate to satisfy all other rights below and provide an additional supply for in-basin use (S.F. 94-95, 106-110).

Mr. Cotton testified that his study did not contemplate the diversion of water directly out of Canyon Reservoir to San Antonio but that the yield of the reservoir for that purpose would be entirely different than the yield would be if the water were released to flow downstream and to satisfy the controlling large non-consumptive rights below (S.F. 94-95, 106-110). Mr. Dillingham also testified to the difference in yield between in-basin and out-of-basin uses and that the release of all water captured in Canyon Reservoir in a manner to provide additional firm supply below

the hydroelectric plants would benefit these plants rather than impair their water rights (S.F. 169-179).

San Antonio offered no evidence on this subject and their assumption that the grant of 50,000 acre feet of water per annum to GBRA for in-basin use constituted an implied finding by the Water Commission of the availability of an equal amount of water for export to San Antonio is contrary to the evidence and totally without any support in the evidence.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER ELEVENTH COUNTERPOINT

ELEVENTH COUNTERPOINT RESTATED

The Court of Civil Appeals did not err in considering and giving effect to the official publication of the Texas Water Commission listing permits and certified filings on the Guadalupe River. (In reply to Ninth Point.)

Exhibit GB-9 of which San Antonio complains is an official publication of the Texas Water Commission and admissible in evidence Under Art. 7477(16) and Art. 3731a (as amended in 1961). It contains a list of all permits and certified filings on the Guadalupe River as shown by the records of the Commission.

In addition, actual copies of the principal and controlling water rights held by the defendants and intervenors in the trial court were later introduced in evidence (Exhibits GB-10/11 and

GB-19/25; Seguin - 1 and 2; and C. P. & L. - 3/5).

The admission of the Water Commissions' official abstract of water rights on the Guadalupe River was proper and nothing therein could possibly be considered to have improperly influenced the trial judge's findings or judgment in this case.

CROSS ASSIGNMENTS

STATEMENT, ARGUMENT AND AUTHORITIES UNDER FIRST CROSS-POINT

FIRST CROSS-POINT RESTATED

> The trial court erred in excluding Exhibit GB-33 and Exhibit GB-34, being letters from the Board of Water Engineers designating GBRA as the sole agency of the State to deal with the Corps of Engineers in regard to Canyon Reservoir.

GBRA offered two letters addressed in 1951 and 1955, respectively, by the Chairman of the Board of Water Engineers to the District Engineer of the Fort Worth District of the Corps of Engineers, U.S. Army, advising that GBRA had been designated by the Board as the sole agent of the State to deal with the Corps of Engineers in connection with the construction of Canyon Reservoir. These letters have been sent up in kind as Exhibits GB-33 and GB-34 for the purpose of GBRA's bills of exception only. The trial court declined to admit these letters in evidence (S.F. 322).

GBRA submits that such letters constitute an integral part of the facts relating to the Canyon project and its history. The evidence shows that the Canyon project was authorized by the Congress only because GBRA committed itself to pay the incremental cost of the conservation pool (S.F. 76, Ex. GB-26, 27). GBRA relied upon these letters in making this commitment. They also show that it was a useless and meaningless gesture for San Antonio to tender a presentation long after Congress had authorized the Canyon project and long after GBRA in reliance upon such letters had committed itself to pay a minimum of $1,400,000 (and a possible maximum of some $8,000,000) in order to obtain Congress' approval of the project. GBRA submits that for these reasons, the trial court erred in excluding such letters from the evidence.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER SECOND CROSS-POINT

SECOND CROSS-POINT RESTATED

The trial court erred in excluding GBRA's Exhibit GB-32 dealing with the plan approved by the San Antonio River Authority and GBRA for the furnishing of water to San Antonio from the proposed Cuero Dam and Reservoir Project on the Guadalupe River in exchange for the return of an equal amount of water from the proposed Goliad Reservoir on the San Antonio River.

San Antonio introduced in evidence near the close of the trial certain excerpts from a preliminary report from the Board of Water Engineers dated May, 1961, which was issued long after the close of the Canyon Reservoir hearings in 1956. These excerpts dealt with projected future water needs of San Antonio and potential sources from which such water needs may be supplied (S.F. 310-315). San Antonio having opened the subject of its post-1956 plans for water, GBRA then offered in rebuttal an agreement made in 1963 between it and the San Antonio River Authority entitled, "A Plan for the Interchange of Surface Water Between the Guadalupe and San Antonio River Basins" (Ex. GB-32, S.F. 316). This agreement contemplates a plan to satisfy San Antonio's future surface water requirements, if any, from a reservoir to be constructed in the middle reach of the Guadalupe River near Cuero, Texas. Under this plan, San Antonio would receive one-half the yield of the Cuero project or some 180,000 acre feet per annum, and, in exchange, would return a like amount of water to the Guadalupe River below its confluence with the San Antonio River, such return water to be developed by a reservoir to be constructed on the San Antonio River near Goliad, Texas, in lieu of the proposed Kenedy Reservoir. The trial court excluded this evidence (S.F. 326).

San Antonio River Authority was created by the Legislature in 1937 (Art. 8280-120) as an agency of the State to develop the water resources of the San Antonio River and includes within its boundaries all of Bexar County and the San Antonio watershed in other counties. By amendment in 1961, it was provided that one-half of the twelve directors of the Authority must reside in Bexar County. Mr. Martin Gieseke of San Antonio is Chairman of the Authority and is the same person who was Chairman of the San Antonio City Water Board in 1953-1956 when San Antonio was pursuing its plan to get water from Canyon Reservoir. The new plan developed by the two river authorities eliminates the problems of leakage, yields, prior water rights and other matters which have beset San Antonio's Canyon Reservoir plan and resolves the conflict between the two river basins.

The 1961 Commission report introduced in part by San Antonio and the 1963 SARA-GBRA agreement offered as rebuttal by GBRA were both prepared long after the Canyon hearings were closed in 1956. While GBRA recognizes the rule that events transpiring after the date of the Commission's acts and orders under attack are not ordinarily admissible in evidence, nevertheless San Antonio opened the subject and invited rebuttal. GBRA submits that under these circumstances it should have been permitted to rebut

San Antonio's evidence and that the trial court, therefore, erred in excluding Exhibit GB-32.

WHEREFORE, Respondent, Guadalupe-Blanco River Authority, prays that the Application for Writ of Error be refused.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT,
GUADALUPE-BLANCO RIVER AUTHORITY

A copy of this reply has been mailed to opposing counsel this 18 day of August, 1965.

_____
Victor W. Bouldin

IN THE SUPREME COURT OF TEXAS

A-10,989

CITY OF SAN ANTONIO, ET AL.,

Petitioners

v.

TEXAS WATER COMMISSION, ET AL.,

Respondents

REPLY OF GUADALUPE-BLANCO RIVER AUTHORITY TO REPLY OF CITY OF SAN ANTONIO ON GUADALUPE-BLANCO RIVER AUTHORITY'S MOTION TO DISMISS

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REPLY OF GUADALUPE-BLANCO RIVER AUTHORITY TO REPLY OF CITY OF SAN ANTONIO ON GUADALUPE-BLANCO RIVER AUTHORITY'S MOTION TO DISMISS

TO THE HONORABLE SUPREME COURT OF TEXAS:

REPLY TO PETITIONERS' FIRST COUNTER-PROPOSITION

In regard to the motion to dismiss for want of jurisdiction that part of this joint appeal which concerns the denial of a permit to San Antonio, San Antonio places its sole reliance on cases holding that substantial evidence cases involve only questions of law. The cases are, of course, correct. They simply do not reach the contention made in the Motion to Dismiss.

There is a significant difference between an attack on the granting of a permit and an attack on the denial of a permit. The granting of a permit can be set aside by showing that any single

Tex. 591, 325 S.W. 2d 384 (1959) this Court stated:

> "The decision [of the Court of Civil Appeals] thus rests upon two separate and independent grounds, either of which, if correctly decided or immune to review, will support the judgment.... The application for writ of error does not question the first of these holdings.... Since the first question is not raised in the application for writ of error, ... we would be required to affirm the judgment of the Court of Civil Appeals even if the application were granted and every point of error therein sustained." (See also City of Deer Park v. State, 154 Tex. 174, 275 S.W. 2d 77, 84 (1954)).

Since San Antonio has failed to assert error to each of the grounds which are independently sufficient to sustain the express judgments of the courts below sustaining the order denying it a permit, San Antonio has failed to invoke the jurisdiction of this Court to change the judgments of the courts below in Cause No. 108,098. GBRA, therefore, asks that the appeal be dismissed for want of jurisdiction insofar as it applies to the separate suit attacking the denial of a permit to San Antonio.

REPLY TO PETITIONERS' SECOND COUNTER-PROPOSITION

In regard to that part of this joint appeal concerning the granting of a permit to GBRA, San Antonio has one and only one point of error in its application for writ of error. This is the Second Point which makes a vague argument that the permit is void because it does not specify the constituent cities of GBRA to

which the municipal water will be supplied and, therefore, GBRA may discriminate in supplying water to its constituent cities.

GBRA moved to dismiss this appeal attacking the granting of its permit on two grounds:

1. San Antonio has no standing to attack the granting of this permit because it is not an "affected person" within the meaning of Article 7477, V.A.C.S.

2. San Antonio has no standing whatsoever to attack the granting of this permit on the ground of possible injury to or discrimination against the constituent cities of GBRA. San Antonio is not one of these constituent cities and has no authority to speak in their behalf, especially when most of these cities are intervening parties supporting the permit of GBRA and none oppose it.

San Antonio makes no reply to the second ground.

First, let us set the record straight in regard to San Antonio's argument that this Court's opinion in Board of Water Engineers v. City of San Antonio, 155 Tex. 111, 283 S.W. 2d 722 (1955), bears on the question of San Antonio's standing in this case. Not only were the facts different but there was no contention that San Antonio was without justiciable interest in that case. As this Court stated in the first sentence of its opinion, the contention was

that there was no "justiciable controversy." To quote the Court:

> "This ... suit ... presents questions as to (a) existence vel non of a justiciable controversy within our Uniform Declaratory Judgments Act of 1943 .... (283 S.W. 2d at 723.)
>
> * * *
>
> ". . . But lack of justiciable controversy is argued ... on the theory that respondent's failure to allege an abuse of discretion or arbitrariness concedes a discretion of the Board. . . . This alleged concession is said to make the suit one for a mere 'advisory opinion' as to the constitutionality of the statute in question. We do not so regard it.
>
> "The expressions 'advisory opinion' and 'justiciable controversy' as here used refer to the requirements ... that (a) there shall be a real controversy between the parties, which (b) will actually be determined by the judicial declaration sought. (283 S.W. 2d at 724.)" (Emphasis supplied.)

San Antonio fails to distinguish between "case" or "controversy" and "standing" or "justiciable interest."

Second, there is no legal significance to the fact that the Motion to Dismiss was not urged earlier by GBRA. Dismissal for want of justiciable interest presents fundamental error and is proper if raised originally in the Supreme Court. Holland v. Taylor, 153 Tex. 433, 270 S.W. 2d 219, 220 & 221 (1954).

With these clarifications in mind, San Antonio's reply is reduced to a mere recitation that Article 7477 provides for judicial review. This is true. But only for an "affected person."

And San Antonio, possessing no water rights of any kind within the entire watershed of the Guadalupe and Blanco Rivers, and not being within the territorial limits of the GBRA, and not even being within the watershed of either of these two rivers, is not an "affected person" within the meaning of Article 7477.

As previously indicated, however, the Court need not reach this broader question of whether San Antonio is an "affected person," because San Antonio has one and only one point of error challenging GBRA's permit. It has abandoned all others. And that point concerns possible injury to or discrimination against the constituent cities of the GBRA which are parties herein and speak for themselves.

No legal test has been devised which would grant to San Antonio justiciable interest to complain on behalf of other cities when San Antonio itself could not possibly be injured or discriminated against by GBRA in supplying water. And San Antonio does not suggest a legal test which would support its justiciable interest or its authority to complain as public guardian for these constituent cities of GBRA.

The Texas courts have adhered to the requirement of special injury peculiar to a party as a basis for justiciable interest. See cases collected in Estes v. Granbury, 314 S.W. 2d 154, 155

(Tex.Civ.App. - Fort Worth, 1958, err. ref.) But there is no injury peculiar to San Antonio any more than to Amarillo or Texarkana. The purported injury complained of is to the constituent cities of GBRA. San Antonio is a complete stranger to the relations between GBRA and its constituent cities.

Since San Antonio has no justiciable interest in the sole point of error attacking GBRA's permit, GBRA asks that San Antonio's appeal be dismissed or application for writ of error refused for want of jurisdiction insofar as the appeal concerns the separate suit attacking GBRA's permit.

REPLY TO PETITIONERS' THIRD COUNTER-PROPOSITION

In regard to the motion to dismiss as moot that part of this appeal attacking the denial of a permit to San Antonio on the ground of the Water Resources Administration and Development Act of 1965, San Antonio refers to that part of the Act which says that the Water Rights Commission "need not be bound" by the State Water Plan to be prepared by the Water Development Board. It is not the forthcoming State Water Plan which renders San Antonio's case moot. It is the public policy of the State against trans-basin diversion of water which will be needed in the basin of origin as declared by the Legislature in the 1965 Act coupled with the finding mentioned below that the Guadalupe River Basin is a basin of

deficiency for planning purposes which San Antonio does not attack and is, therefore, bound by, which renders San Antonio's case moot.[1/]

But the Court need not reach this question. Without regard to the new 1965 Act, both courts below expressly support the denial of a permit to San Antonio on the ground that:

> "Foreseeable needs for water within the Guadalupe River watershed exceed the total amount of water which can be supplied when the River has been fully developed and the Guadalupe is not a basin of surplus supply for planning purposes." (Finding 13(e) in the trial court; approved by the Court of Civil Appeals. 392 S.W. 2d at 209-10.)

If the Water Rights Commission has only the discretion to follow this express Legislative policy, the holding of both courts below is independently sufficient to support the denial of a permit to San Antonio.

San Antonio challenged this ground for denial of its permit in the Court of Civil Appeals by a proper point of error. See Brief for Appellants, Tenth Point, restated and argued on pages 35-37. The Court of Civil Appeals expressly affirmed this point. (392 S.W. 2d at 209-10.) And San Antonio abandoned the point in

1/ The same basic public policy was repeated by the Legislature in the adoption of a resolution (S.J.R. 19 - Vol. 3, Vernon's 1965 Session Law Service, page 80) submitting a proposed constitutional amendment as to use of the Texas Water Development Fund to a vote of the people.

its Motion for Rehearing and in its Application for Writ of Error.

Since San Antonio has utterly failed to invoke the jurisdiction of this Court as to a ground which is independently sufficient to support the judgment of the courts below, this Court should dismiss the appeal of the separate suit relating to the denial of San Antonio's permit for want of jurisdiction.

San Antonio seeks to bolster its position by referring to documents not in the record to suggest that the San Antonio and Guadalupe Rivers may constitute one river basin. A reference to San Antonio's arguments on pages 24-26 of its Application and on pages 19-21 of its brief in the Court of Civil Appeals will disclose that San Antonio has tried this case on the theory that the two rivers constitute separate watersheds and basins and has vigorously argued that the Wagstaff Act has the effect of repealing Art. 7589 which deals with diversions from one watershed to another. It is now too late for San Antonio to contend to the contrary.

For the foregoing reasons and those stated in the Motion to Dismiss, GBRA respectfully submits that this Court is without

jurisdiction to hear either of the causes involved in this joint appeal.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT,
GUADALUPE-BLANCO RIVER AUTHORITY

A copy of this Reply, properly stamped and addressed, has been mailed this 22nd day of January, 1966, to Mr. John D. Wheeler, attorney for Petitioners, and to the other attorneys of record in this cause.

_____
Victor W. Bouldin

ORIGINAL

A10989

IN THE SUPREME COURT OF TEXAS

A-10,989

CITY OF SAN ANTONIO, ET AL.,

Petitioners

v.

TEXAS WATER COMMISSION, ET AL.,

Respondents

BRIEF OF RESPONDENT, GUADALUPE-BLANCO RIVER AUTHORITY

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IN THE SUPREME COURT OF TEXAS

A-10,989

CITY OF SAN ANTONIO, ET AL.,

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BRIEF OF RESPONDENT,
GUADALUPE-BLANCO RIVER AUTHORITY

TO THE HONORABLE SUPREME COURT OF TEXAS:

STATEMENT OF THE NATURE AND RESULT OF SUIT

The Court of Civil Appeals' statement of the nature and result of the suit is substantially correct.

PRELIMINARY STATEMENT AND ARGUMENT

GBRA has heretofore filed a motion to dismiss Petitioners' application for writ of error on the ground that Petitioners have failed to invoke the jurisdiction of this Court to grant effective relief. GBRA now urges that motion and submits the following argument subject to the motion.

The history of this controversy is stated as briefly as possible as follows:

The Act creating GBRA (Art. 8280-106, enacted in 1935) charged the Authority with the duty of preparing a Master Plan for the development and conservation of the waters of the Guadalupe River and its tributaries. This Master Plan was prepared and was approved by the State Board of Water Engineers (Commission) in 1942 (S.F. 87). It included Canyon Reservoir in the upper reaches of the Guadalupe River as one of the projects required to accomlish this purpose. Since flood control was a principal purpose, the Canyon Project was recommended for construction by the Federal Government in cooperation with GBRA as local sponsor (S.F. 89).

After the end of World War II, while San Antonio did nothing (S.F. 86), GBRA succeeded in getting the Corps of Engineers, U. S. Army, to take this project "off the shelf" and also succeeded in getting the Congress to authorize the project for construction (S.F. 74-77 and 83-85). GBRA was designated by the Commission as the local State agency to cooperate with the Government in its construction and to serve as local sponsor. See GBRA's First Cross-Point and GB Exs. 33 and 34 - sent up as originals.)

In order to obtain Congressional approval, it was necessary for GBRA to guarantee to pay the incremental cost of $1,400,000 for adding a conservation pool to the Government's

flood control pool and, if the reservoir did not leak, to pay the proportionate part of the conservation pool representing an additional sum of six or seven million dollars (S.F. 84-86).

San Antonio filed a presentation on the Canyon project with the Commission and later filed an application for a permit. In each, it was stated that San Antonio desired to contract with the Government to enlarge the conservation (water supply) pool from the 366,400 acre feet as authorized by the Congress to 807,100 acre feet. The application for a permit requested that San Antonio be authorized to impound 807,100 acre feet of water and to appropriate and divert directly from the reservoir and from the watershed 100,000 acre feet per annum for municipal and domestic uses in Bexar County.

GBRA filed an application for a permit which conformed to the size of project as authorized by the Congress. It requested the authority to impound 366,400 acre feet of water and to appropriate 50,000 acre feet per annum for municipal and domestic uses and other annual quantities for industrial, irrigation and hydroelectric uses. It also requested the right to use the bed and banks of the Guadalupe River to convey water to places of intended use.

The two rival applications were heard jointly by the Commission. After 17 days of hearings, the Commission entered one order denying San Antonio's application in toto and another order denying GBRA's application for industrial, irrigation and hydroelectric water but granting GBRA's application for municipal and domestic water. Permit No. 1886 was later issued to GBRA under which:

> (1) GBRA was authorized to impound 366,400 acre feet of water and to appropriate not to exceed 50,000 acre feet of water per annum for municipal use and to use the bed and banks of the Guadalupe River to convey water from the reservoir to the pumping plants of the municipalities with whom GBRA contracts to supply water upon condition that
>
> (2) GBRA enter into a contract with the Corps of Engineers, U. S. Army, to use the conservation pool storage, such contract to be approved by the Commission, and further that no releases of water be made by GBRA to any municipality until a written contract between GBRA and such municipality is first approved by the Commission.

The term "municipal use" had theretofore been defined in the published rules and regulations of the Commission to have the following special meaning (see Rules, Regulations and Modes of Procedure, Board of Water Engineers, GB Ex. 29, p. 17 - a pamphlet sent up as an original exhibit):

> "Municipal use is the use of water within a municipality, town or community, whether supplied by a political subdivision or by a privately-owned public utility or other agency, primarily to promote the safety, life, health, comfort and business pursuits of the habitants, It specifically includes the use of water for fighting fires, flushing sewers, sprinkling streets, watering parks and parkways, and small quantities of water for recreational purposes such as swimming pools; the use of water in public and private buildings, industrial enterprises supplied by a municipal distribution system without special construction to meet its demands, and homes, and the irrigation of homes and gardens. It does not include the irrigation of crops on a commercial scale, even within the limits of the municipality; such use of water is for an irrigation purpose. Nor does it include large recreational uses such as lakes; such use of water is for a recreational purpose." (All emphasis, except the last two, supplied.)

The right of conservation districts and other public or private agencies, corporations and individuals to appropriate water for service to others was well established in the law of this State at that time. Mr. Wells A. Hutchins says on page 171 of his "Texas Law of Water Rights":

> "Throughout the history of water legislation in Texas runs the principle that water may be appropriated either for the personal use of the appropriator, or for service to others. As said by the El Paso Court of Civil Appeals, 'statutory appropriations, when filed in compliance with law, give to such appropriators the right to take the water to nonriparian lands, there to use it for themselves or to dispose of it to water consumers.'"

The Legislature has created scores of conservation districts ranging from basin-wide river authorities to districts composed of from one to ten cities to provide a common water supply for various users. (See Art. 8280-101 to 341, V.T.C.S.)

Within the time prescribed by Art. 7477, San Antonio filed two separate suits in the District Court of Travis County, one attacking the order denying its application (No. 108,098), the other attacking the order granting GBRA's application in part (No. 108,099). After GBRA's contract with the Corps of Engineers was approved by the Commission and after Permit No. 1886 was issued, San Antonio amended its petition in the suit attacking the order granting GBRA's application in part (No. 108,099) to attack also the permit as issued.

Both suits were filed before this Court decided Southern Canal Co. v. State Board of Water Engineers, 159 Tex. 227, 318 S.W. 2d 619, in 1958, in which the de novo trial requirements of Sec. 13 of Art. 7477 were held to be inoperative, and it was held that suits of this class must be tried under the substantial evidence rule. Nowhere in its pleadings in either suit does San Antonio allege that the two orders of the Commission complained of are not supported by substantial evidence. Instead, San Antonio alleged that the Commission's action

in issuing each of such orders "constitutes an abuse of such discretion as is vested in such Board." The core of this controversy centers in the conflicting views of the parties as to the extent of the Commission's discretion. San Antonio's view is most aptly stated in its Seventeenth Point in its brief filed in the Court of Civil Appeals, as follows:

> "The Court erred in its First Conclusion of Law (Tr. 232). While the Texas Water Commission was vested with the discretion to ascertain whether there was unappropriated water at the source, and to deduct therefrom prior water rights, this was the extent of its discretion in this case and it was not within the discretion of the Texas Water Commission to deny the granting of Appellants' application to the extent of the net unappropriated water in the source and its action in so doing was contrary to law, arbitrary and capricious."

The view of all Respondents herein is stated in the trial court's First Conclusion of Law, assailed by San Antonio, which is as follows:

> "The Texas Water Commission was vested with a broad discretion in either granting or denying Plaintiff's Application No. 1956 and Guadalupe-Blanco River Authority's Application No. 1964."

This is the crux of this controversy. All of San Antonio's Points of Error assigned in its application for writ of error, except Point 9 which concerns a matter of evidence, are based upon San Antonio's view expressed above and each

relates to a constituent element of this fundamental contention. If, as Respondents believe, this Court held in Southern Canal, supra, and the Austin Court of Civil Appeals held in Clark v. Briscoe Irr. Co., 200 S.W. 2d 674 (1947 - no writ hist.), that the Commission's discretion is not limited to a mere mathematical calculation to determine, in San Antonio's words, "whether there was unappropriated water at the source, and to deduct therefrom prior water rights" but the Commission may give consideration to other statutory criteria in passing upon applications for the appropriation of public waters, then the judgments of the two lower courts must be affirmed for this reason alone and without regard to the numerous other reasons discussed infra.

In reliance upon its theory (1) that the grant of a permit to GBRA for 50,000 acre feet per annum constituted an implied finding that unappropriated water existed at the source for trans-basin diversion to San Antonio (a non-sequitur as shown below) and (2) that the Commission had no discretion to deny San Antonio a permit for any reason but San Antonio was entitled, as a matter of law, to a permit to the full extent of the water allegedly found to be unappropriated, San Antonio:

(a) filed motions for summary judgment without evidentiary support, on the theory that it was entitled to a permit as a matter of law;

(b) objected to all evidence offered by GBRA and Respondent Intervenors to show that the orders of the Commission are supported by substantial evidence on the ground that "... the Board of Water Engineers was compelled under the plain terms of the law to grant the permit to the City of San Antonio to the extent of the unappropriated water which they had found ..." (S.F. 69);

(c) "... offered no evidence of any character showing, or tending to show, that the two orders entered by the Texas Water Commission on July 5, 1957, were unreasonable or were not supported by substantial evidence or that the Texas Water Commission was arbitrary and capricious in making and entering said orders and in issuing Permit No. 1886." (Trial court's finding of fact No. 11);

(d) offered no evidence of any character to rebut the extensive evidence offered by GBRA and the Intervenors to show that such orders are

reasonable and are supported by substantial evidence; and

(e) stands before this Court today without evidence in this substantial evidence proceeding under which the judicial function is to review the evidence to determine whether the administrative orders are supported by substantial evidence.

FUNCTIONS OF THE COURTS IN REVIEWING ADMINISTRATIVE ORDERS

The functions of the courts in reviewing orders of the Commission which either grant or deny an application for a permit to appropriate public waters, and in reviewing similar discretionary orders of other administrative agencies, have been clearly defined by this Court. Southern Canal Co. v. State Board of Water Engineers, supra; Board of Water Engineers v. Colorado River Municipal Water District, 152 Tex. 77, 254 S.W. 2d 369 (1953); Fire Department of City of Fort Worth v. City of Fort Worth, 147 Tex. 505, 217 S.W. 2d 664 (1949); Jones v. Marsh, 148 Tex. 362, 224 S.W. 2d 198 (1949); Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W. 2d 73 (1939). First, the administrative order is presumed to

be valid. Second, the burden is on the plaintiff to prove that the order is invalid. Third, the method of making such proof is that "the evidence is heard anew and the reasonableness of the agency's action is independently adjudged by the court on the basis of evidence admitted in the judicial proceeding." (Southern Canal, p. 622.)

Notwithstanding these clear holdings, San Antonio made no effort to introduce any evidence which would shed light on the question of whether the Commission's orders are reasonable and valid. The Commission, represented by the Attorney General, rested when San Antonio failed to undertake to discharge its burden of proof and, before taking leave of the court, urged a motion for judgment in each case. These motions were later granted by the trial judge. (See final judgment.)

GBRA and the Intervenors were of the view that the trial court and appellate courts should be informed of the several reasons for the Commission's choice of GBRA to receive a permit and, notwithstanding that the Commission's motions for judgment were obviously good, elected to develop the facts by the introduction of evidence.

The chaos in the administration of the public waters of this State which would result from the adoption of San Antonio's

theory is self-evident. The Court can appreciate the concern of the Texas Water Rights Commission, the Attorney General, GBRA and all other Respondents over the contention that the Commission has no discretion but to grant a permit for the appropriation of all water requested by San Antonio if unappropriated water is found to exist at the source.

The Respondents' views as contrasted with those of San Antonio are expressed in the following holdings of the Court of Civil Appeals (p. 205):

> "In order to determine whether the Commission's discretion is limited to the 'mathematical function' of finding whether there is unappropriated water in a source of supply, as appellants contend, it is necessary to review the statutes found in Chapter 1, Title 128, V.T.C.S., declaring the State's water policy and prescribing the duties and functions of the Commission."

The Court then reviews a number of the principal water statutes and concludes (p. 207):

> "The statutes found in Chapter 1, Title 128, demonstrate conclusively that the Legislature has made provision for a comprehensive system of administration of the State's water resources through the Texas Water Commission and the above discussed statutes further demonstrate that the Legislature has vested the Commission with very broad discretion in either granting or denying applications for permits."

and that those statutes:

> "... all demonstrate the intention of the Legislature to delegate discretion to the Commission which extends beyond a 'mathematical calculation' of unappropriated waters."

The court further says:

> "It was the policy expressed in the foregoing statutes which prompted the Supreme Court to say in Southern Canal Co. v. State Board of Water Engineers, supra:
>
> > "'By the enactment of the Articles contained in Chapter 1 of Title 128 of our statutes the Legislature has sought, in a comprehensive way, to regulate the use of waters from our rivers, streams and lakes to the end that they will be conserved and used for the greatest public good and in the public interest. To make certain that such waters are so conserved and used the Legislature has created The State Board of Water Engineers and has entrusted to it broad discretion, within certain statutory limits, in determining whether an application for a permit to appropriate and divert such waters to a particular use shall be granted or denied.'"

The "broad discretion" which this Court held in Southern Canal to be vested in the Commission is clearly shown by the following statutes:

(1) Articles 7506 and 7507, which require the Commission to determine whether or not the granting of an application would be "detrimental to the public welfare";

(2) Articles 7589-7591, which require the Commission to determine whether or not the proposed diversion of water from one watershed to another would be "to the prejudice of any person or property situated within the watershed from which such water is proposed to be taken or diverted";

(3) Article 7472c, which requires the Commission "to observe the rule that as between applicants for rights to use the waters of the State, preference be given not only in the order of preferential uses declared, but that preference also be given those applications the purposes for which contemplate and will effectuate the maximum utilization of waters and are designated and calculated to prevent the escape of waters without contribution to a beneficial public service";

(4) Article 7472d, which directs the Commission "to ascertain from necessary investigation the character of the principal requirements of the distinct regional division of the watershed areas

of the State for the uses herein authorized, to the end that distribution of the rights to take and use the waters of the State may be the more equitably administered in the public interest, and privileges granted for the uses recognized may be economically coordinated, achieving the maximum of public value from this resource; and recognizing alike the distinct regional necessities for water control and conservation, and for control of harmful floods";

(5) Article 7472d-1, which requires the Commission to investigate the quantity, quality and location of all surface water resources of the State and "to prepare and submit to the Legislature a state-wide water report of the water resources of the State with a correlation and relationship of these resources and to make recommendations to the Legislature for the maximum development of the water resources of the State ...." (These functions have been enlarged and transferred to the Texas Water Development Board by the Water Resources Administration and Development Act of 1965.); and

(6) Article 7472e, which requires the Commission to review all proposed Federal water storage and flood control projects and to determine the effect of such projects on water uses on the respective streams, the public interest to be served, integration of such projects with other water conservation activities, the protection of the State's interest in the Texas water resources and other matters affecting the feasibility of the project.

There is no statutory basis for San Antonio's contention that the Commission is a mere statistical agency without discretion in passing upon applications for permits to appropriate public waters and the adoption of such a policy would destroy the administrative system established by the Legislature to coordinate the development of the State's water resources. This was decided against San Antonio in Southern Canal.

Among the reasons for sustaining the order denying San Antonio's application and granting GBRA's application in part are two which are based upon the non-discretionary directives of Arts. 7506-7507:

(a) San Antonio offered no evidence that there is unappropriated water in Canyon Reservoid available for export to San Antonio;

(b) San Antonio's proposed use would impair vested water rights now owned by cities, political subdivisions and corporations within the Guadalupe Valley.

The discretionary reasons are stated by the Court of Civil Appeals (p. 209) as follows (numbers are added for clarity):

"In its findings of fact the trial court found that:

1. "The City of San Antonio has an ample water supply for its present uses and has no need for an additional water supply for at least 15 to 20 years from time of trial;

2. "That the cities along the Guadalupe do not have an ample water supply and there is a present and immediate need for reservoir storage on the Guadalupe River to firm-up a water supply for use within the watershed;

3. "That the dependability of the natural flow of the Guadalupe River which has historically been supplied by the Comal Springs and other springs fed from the Edwards Limestone Formation, has been destroyed because of increased pumping of water from the Edwards Limestone Formation particularly in San Antonio and Bexar County and the natural flow of the river from said springs can no longer be depended upon for a secure water supply;

4. "That foreseeable needs for water within the Guadalupe River watershed exceed the total amount of water which can be supplied when the

river has been fully developed and the Guadalupe is not a basin of surplus supply for planning purposes;

5. "That the diversion from Canyon Reservoir and the watershed of the Guadalupe River into the City of San Antonio and the watershed of the San Antonio River would be of prejudice to persons and property situated within the Guadalupe River watershed;

6. "That Canyon Reservoir, irrespective of leakage, would not be a dependable water supply for the City of San Antonio;

7. "That the water stored in Canyon Reservoir can be used within the watershed of the Guadalupe River approximately 20 times by successive appropriators downstream before such water is discharged into the Gulf of Mexico and the retention of such water within the watershed will effectuate the maximum utilization of such waters and will achieve the maximum of public value from this resource;

8. "That Canyon Dam and Reservoir are situated in the Balcones Fault Zone which is noted for its underground faults and caverns and for its porous limestone which may cause substantial leakage of water from the reservoir when complete, thereby making said reservoir useful only for flood control purposes;

9. "That the City of San Antonio has made no effort to develop a supplemental surface water supply from the San Antonio River in the basin of which said city is situated and considerably more than 100,000 acre feet of water can be developed from said river on a dependable basis, without danger of leakage, and that it is the general policy of the Texas Water Commission to require reasonable development of local surface

water resources before authorizing the diversion of water from another stream or watershed."

STATEMENT, ARGUMENT AND AUTHORITIES IN REPLY TO PETITIONERS' FIRST POINT OF ERROR

SAN ANTONIO'S POSITION

San Antonio did not assign error to any of the foregoing grounds on the basis of lack of substantial evidence. Nor does it contend that there is overwhelming substantial evidence to show its application would best serve the public welfare. Instead, it relies exclusively on four points, as follows:

(1) The San Antonio City Council passed an ex parte ordinance deciding that it should obtain water from Canyon Reservoir;

(2) San Antonio filed a presentation on the Canyon site and was the first to file an application for a permit;

(3) "Cities" have an overriding statutory preference over all other political subdivisions in appropriating water for municipal and domestic use which supersedes all other users and all other

statutory requirements; and

(4) By issuing a permit to GBRA for 50,000 acre feet of water per annum the Commission "must have" found that that quantity was available for export to San Antonio.

1. City Council's Discretion. On the first point, it is sufficient to say that the Legislature has not delegated to the city councils of the numerous cities of the State the discretion to decide for themselves the source where they shall take public waters or the quantities they shall take. This discretion has been vested in the Commission and Art. 7492 requires cities, like all other persons, to apply to the Commission for a permit.

2. Footrace to the Commission's Office. San Antonio argues that the public interest, which is the overriding principle of State water policy, is best served by deciding between rival applicants for the same water for the same number one preferential use on the basis of "who won the race to the courthouse," without regard to any other consideration. The absurdity of this contention and its totally destructive effect upon a sound system of administering the water resources of the State in the public interest are self-evident.

San Antonio aborts the fundamental principle of the appropriation doctrine (Art. 7472) that "As between appropriators, the first in time is the first in right." Ignoring the language which limits this principle to one who has acquired a water right and perfected it by applying the water to beneficial use (an "appropriator" as defined in Art. 7473), it attempts to apply this statute to applicants for a permit to become an appropriator. Neither this nor any other statute so provides. The public interest requires that a choice between rival applicants for the same water for the same use be made on more substantial grounds.

San Antonio also errs in arguing that the mere filing of an ex parte "presentation," without notice or public hearing, guarantees to the one making such filing a right to appropriate any unappropriated water which may be found at the site, over all other applicants and irrespective of all other considerations. The presentation statutes (Arts. 7496-7499a) expressly negative any such intention and the totally destructive effect of such a policy on the sound administration of the public waters is also self-evident.

The presentation statutes authorize anyone seeking to investigate the feasibility of a water conservation project to

obtain the benefits of the doctrine of "relation back" in the event a permit is later granted pursuant to the presentation. This doctrine is expressed in Art. 7523 as follows:

> "When any permit is issued under the provisions of this chapter, the priority of the appropriation of water, or the claimant's right to use of such water, shall date from the filing of the original application [for a permit] in the office of the Board."

Article 7496 extends the "relation back" to the date a presentation is filed "should a permit thereafter be granted thereon." This statute does not say that one filing a presentation shall have a preferential right to a permit. The presentation is filed ex parte, without notice or hearing, and is intended only to protect the priority date of the holder if, and only if, a permit is later issued to him.

In his work, "The Texas Law of Water Rights," Mr. Wells A. Hutchins says (p. 220, note):

> "Rights that pertain to a presentation cease at the expiration of the time allowed unless a permit is granted pursuant to it."

The statutes do not say that the Commission may, in its discretion, refuse to file a presentation if it complies with the stated requirements. A determination that a presentation complies with the stated requirements and the subsequent