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Supreme Court of Texas.
Canyon Regional Water Authority, Petitioner,
v.
Guadalupe-Blanco River Authority, Respondent.
No. 06-0873.

November 15, 2007.

Appearances:
Gregory S. Coleman, Yetter & Warden, LLP, Austin, TX for petitioner.
David P. Blanke, Vinson & Elkins, LLP, Austin, TX, for respondents.

Before:

Chief Justice, Wallace B. Jefferson, Nathan L.Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W.Green, Phil Johnson, and Don R. Willett, Circuit Justices.

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CHIEF JUSTICE JEFFERSON: Be seated, please. Court isready to hear argument in 06-0873, Canyon Regional Water Authority versusGuadalupe-Blanco River Authority.
CLERK: ... court. Mr. Coleman will presentargument for the petitioner. Petitioner has reserved five minutes forrebuttal.

ORAL ARGUMENT OF GREGORY S. COLEMAN ON BEHALF OF THE PETITIONER

MR. COLEMAN: Good morning, and may it please theCourt. The Court of Appeals' decision in this case seriously misapplied thisCourt's Sabine [Sabine & E. T. Ry. Co. v. Gulf & I. Ry. Co., 92 Tex. 162, 46S. W. 784 (1898)], precedent. In stands Legislative priorities on their head, byusing a regulation designed solely to protect water intakes from disruptiverecreational uses. For this, the construction of a water intake simply becauseit 'might' have some effect on a recreational use, it's exactly backwards. GBRAhas never alleged or argued that Canyon's new intake even minimally affects anyactual public use of Lake Dunlap. And the court can not properly rely on theregulation I'm talking about, which is Section 290.41 (E to C), to find apractical destruction under Sabine. But even if it could potentially dothat, GBRA never presented any evidence of any actual infringement of therecreational use of Lake Dunlap nor could it even show that a marginally largerrestrictive zone,

if it in fact is being enforced, would practically destroy therecreational use of Lake Dunlap.

JUSTICE WILLET: As a mathematical point, how muchof the lake would actually be affected by the new use?

MR. COLEMAN: Well, our argument, your Honor, isthat it's clearly about . 25 percent. GBRA has argued that it's about twice that.But what their calculation forgets--

JUSTICE WILLET: Quarter of one percent?

MR. COLEMAN: One quarter of one percent. But--Even under their calculation which leaves off the pre-existing 200-footrestrictive zone for the dam, it would be one-half of one percent, so that's theonly dispute. We think we're right about it but it's-- It's one quarter of onepercent down at the bottom of the dam. You know, we included this little diagramin the back of our brief and, and really the only tension that's there is theirargument, is if you put your boat in and water ski five or six miles down thislake, that this tiny little blip at the bottom, the last 25 yards before youreach the dam, that somehow your recreational use of this lake has beendestroyed because you have to turn around 25 yards earlier than you might,otherwise, have had to do. And, and I do remind the court, they never proved,that any boater actually does have to turn around 25 yards earlier at all,that's not proved in the record. But even if the court were to assume that,their argument on practical destruction is that this tiny, tiny de minimis$ieffect on recreational use of the lake, as a matter of law, satisfies practicaldestruction. And that's not true and no case has ever held that to be so. To getthere, GBRA makes this argument: That you don't look at the lake, you just lookat this little partials, arc, circle, whatever it is, and you look only at thatuse and you look at only one public use, and so within that affected areabecause it will have an effect on recreational use. You should find thatpractical destruction exists. If that is the right analysis - and it's not-practical destruction means nothing in the Sabine-- court's paramountimportance case or under that analysis because there will always be practicaldestruction of some small portion of land or some use related to eithercondemnation or of, of actual land or an easement. And I would point the court--course to our hydrant example that, that we give in our reply brief, that youcan have a huge public park and you condemn ten square feet for a hydrant andthen, the owner of the park points at the ten square feet and say, 'Well, wecan't use that ten feet anymore for park even though, you know, we, we stillhave a thousand acre park.' You will always have practical destruction of sometiny percentage. And that's not what Sabine does, and that's not what any ofthe, the cases that follow it do. That's not what, what Swearingen [QuanahAcme & P. Ry. Co. v. Swearingen, 4 S.W.2d 136 (Tex. Civ. App.-Amarillo 1927,writ ref'd)], or Willacy County [Cent. Power & Light Co. v. Willacy County,14 S.W.2d 102, 103 (Tex. Civ. App.- San Antonio 1929, no writ)], or any of thosecourts have done. What they say is, 'This existing public use is entirelyinconsistent with the new proposed use that you can't have the two exist at thesame time.' And we believe that you can, in this case.

JUSTICE GREEN: This project has been completed. Andwhat's the effect of that on the kind the relief that is requested in thecase?

MR. COLEMAN: Well, we certainly think it doesmake a big difference. There, there are some cases-- I'm not sure I would saythat they've entirely waived all of their arguments because they failed to, toappeal the denial of their temporary injunction. But this intake had beenconstructed and had been in an operation for approximately six

months beforethey even moved for summary judgment. Surely, at that point, they could havebrought in some evidence about some real effect rather than saying, 'Look atthe-- the words of the regulation,' and just presupposed an effect. Theaffidavits that they put in do, do absolutely nothing of, of the kind. Theysimply say, 'We think this regulation will have this effect.' And as we'veargued again, these, these affidavit statements about access to the dam andabout impact on recreational use are simply legal conclusions. They're notfactual statements about what is actually happening there.

JUSTICE GREEN: Well, here's my question: So Canyonloses, what's-- what happens?

MR. COLEMAN: It's unclear, your Honor.

JUSTICE BRISTER: Take it apart.

MR. COLEMAN: Well, they're saying now in theirresponse brief that that's not what, what they're arguing. We have alwaysbelieved that, in fact, that is what their argument, that they would want us totake it apart and, and put it somewhere where they would prefer to have it. And,and I, I, I would-- The issue here is not whether we get to have an intake. Imean, we bought from them an additional ten million of gallons of water a day.They have always conceded that we have a right to have an additional intake inthe lake to take that water out because we can't get any other way. Theirargument is that they should get to decide where it goes, and that they are thekeeper of our statutory obligation under the Utility Code not only to make surewe have uninterruptible source of water which the prior intake didn't guarantee,and to ensure under the Water Code that it is the highest possible quality. Andat pages 247 and 248 of the clerk's record, we think that the correspondencethere shows that the place we chose to put it, was the place where the engineersbelieved would ensure that it was not uninterruptible, would ensure the bestquality water, would ensure that it wasn't too close to the dam, and wouldensure that it didn't interfere with the existing intake. What they say is, 'Weget to decide where you put it. We don't really care about your statutoryobligations to ensure the best quality water. We want to make sure, that skiersget that last 25 yards of skiing in and we're not worried about the fact that,you know, tens of thousands of Texans might have, you know, some green algae intheir water.' Okay? But our obligation is to ensure the best quality water andwe believe the record reflects that we chose the place that is within theexisting restricted zone for the dam to ensure not only that it'suninterruptible, but that it is the best quality of water. And we believe thatwe have a right. If GBRA is unwilling to allow us to put that intake there -which, which they agree we're allowed to an intake-that-- we then have nochoice with respect to either arguing the existing easement, or to go ahead andcondemn an additional easement to make sure that that water, that we've alreadypurchased, is of the highest quality.

JUSTICE HECHT: The Court of Appeals pointed to Mr.Blumberg's statement, that quote, 'New restricted area would obstract GBR's-- GBRA's access to critical portions of the dam.' Address that, if you would.

MR. COLEMAN: I, I would be glad to, JusticeHecht. That is a-- That's a false legal conclusion. There has been no evidencethat GBRA has chosen to fore-go maintenance of their dam. When they moved forsummary judgment, there was no evidence that they put in saying that theyhadn't. The statute or-- and the regulation that they rely on, doesn't say that.What the regulations says is, 'Don't use it for recreational use and you can'thave trespassers.' Well, their

maintenance of the dam, as fun as it may be, isnot recreational use and they own the fee simple, they're not trespassers.There's no legal argument that, that they can't-- And there's no evidence thatif they've ever said, 'You know, we need an injunction. We've got to be on amaintain our dam.' There was no evidence and they could've because the summaryjudgment hearing wasn't until six to seven months after our intake had beencompleted when they-- Their argument is that we've been trespassing. So there'sno legal support for that, your Honor. We hope that, that we can bypass thatargument. It really is not, not supported at all in the record. Just as webelieve that the recreational use argument is, is unsupported, there, theresimply isn't any evidence to suggest that any boats have had trouble turningaround. As I mentioned earlier, there's no evidence to suggest that any boatshave had to turn around any sooner or earlier than they ever had to before weconstructed the new intake. There's simply a legal conclusion, that based on thetext of the regulation, they would have to, and a legal conclusion, that turningaround earlier might be harmful to, to boats, and there's no basis for thatwhatsoever. We don't think the court should be distracted by these arguments.The, the core issue here that has been presented, we've submitted a summaryjudgment on condemnation. They have-- They've never contested the, the coreallegations about condemnation. They came back with a summary judgment thatraise paramount purpose, but the only evidence that they even submitted - puttingaside whether they even argued- that we-- that they had shown a practicaldestruction, are these two statements really in Mr. Blumberg's affidavit.Neither one of them supports the allegation. And both of them are directed at animproper application of the Sabine Standard. There, there simply is no wayto say, 'I'm going to look at this, you know, tiny little corner of Lake Dunlapand o-- and opine from that that, that recreational use on this lake has beendestroyed.' There's no evidence that anybody, you know, has been sitting intheir driveway saying, 'Let's go skiing. But let's not go to Lake Dunlap becauserecreational use there has been destroyed. We've got to go somewhere elsebecause we can't use--'

JUSTICE BRISTER: Partic-- Just-- Where you-- Whereyour client put it, that's not the only possible place they could put it?

MR. COLEMAN: No.

JUSTICE BRISTER: And as I understand they'reargument, it's that, you know, you didn't consult with us, you just hauled offand did it. And if we agree with your conclusion, then that's what everybodywill do. Rather than entities working together to work these things out, they'lljust haul off and say, 'We can do it here because if Supreme Court says wesays.' What's your response on that?

MR. COLEMAN: I, I have two responses, JusticeBrister: The first response is, 'we didn't just haul off and do anything, wesubmitted plans to them in July of 2004. In August of 2004, they submitted aletter back to us saying that they had reviewed the plans and didn't see anyproblems with the placement of, of the intake.' It was only a month and a half--

JUSTICE BRISTER: Changed their minds.

MR. COLEMAN: - later, that they changed theirminds about that. The second point has to do with this idea that we could, wecould put our intake somewhere else. The Sabine test does not require thisleast intrusive means analysis, that's not what Sabine says. It says that,'You can't effectuate this second public use or purpose through, through anyother means,' and everybody conceives that we could not get that extra tenmillion gallons a day out without putting in a second

intake. The first intake,couldn't handle that type of capacity. Their using the student note, that iscited in their brief to translate the Sabine test which says, 'You can't doit by other means,' to being something like least restrictive means to suggestthat we had to prove, that we couldn't put it anywhere else. But with respect toan intake, that would be, you know, essentially an impossible standard. We, wehave put into evidence and clearly show that where we put it is, we think, thebest place to make sure it's uninterruptible and to make sure the quality ofwater is what it should be. If we put it shallower, it might be interruptible.If we put it shallower, our engineers said that the quality of water won't be asgood. Could you put it there? Yes. But this-- The quality of water would sufferand that's not what the test requires. What the test requires is where, wherewe, in the exercise of our governmental authority, have chosen to put it. Doesit practically destroy their existing use? And the, and the answer to that is:No. It doesn't destroy that use. The Court of Appeals misapplied that standard.We believe that we're entitled to summary judgment. The district court correctlyruled here and we would ask this Court to reverse.

CHIEF JUSTICE JEFFERSON: The Court is ready to hearargument from the respondent.

CLERK: May it please the Court. Mr. Blanke willpresent argument for the respondent.

ORAL ARGUMENT OF DAVID P. BLANKE ON BEHALF OF THE RESPONDENT

MR. BLANKE: Good morning. I'd like to pick upfirst, Justice Brister, with, with your point and the response that you heardthat we somehow 'changed our mind' and if you'll look, this letter appears twiccin thc rccord: At 199 and 282. You'll find that what was submittcd to GBRA andGBRA's response was simply looking at the impact on the dam. In other words,whether constructing this intake structure where they elected to do so wouldsomehow cause some structural or operational issue with the dam itself. Andyou'll see at the conclusion of this letter, at this distance, there should notbe any impact on the Dunlap spillway structure. So rather than a wide rangingapproval of where this, this structure, this intake was going to go, rather youhad an engineer of GBRA looking at this solely from the stand point of whetherit was going to harm the dam's structure itself and saying, 'No, it would not.'When the broader issue was considered by GBRA and, and the records replete withthe exchange of correspondence between the attorneys and otherwise between GBRA,GBRA had made clear, for months before this construction began and certainlyprior to the time that the construction was finished, that they had an objectionto where this intake structure was going to be located. And you'll see in thecorrespondence, as well, from CRWA's engineer, acknowledgment of the fact thatGBRA had received complaints from recreational users about how you turn aroundthere, near the dam and complaints, that this was inhibiting the recreationaluse. In other words, the existing restrictive zone was a problem much lessincluding some new and oddly configured area as a result of wiped out--

JUSTICE GREEN: That, that whole area's prettynarrow and it's a river.

MR. BLANKE: That's correct.

JUSTICE GREEN: So whether-- It's hard to turnaround whichever part of the river you're on.

MR. BLANKE: That's right. If, if you just spendan afternoon at the Hula High and seen users there, it's, it's much the samesituation. But if you narrow that considerably, as is the result of G-- of, ofCRWA putting its intake structure where it did, it makes it all the moredifficult to turn around there.

JUSTICE GREEN: Is it your contention that, that,that the intake structure should be removed and put somewhere else? Is that whatyou're asking for?

MR. BLANKE: We are asking for this intakestructure to be located elsewhere. Now, when I say that, I want to make clearthat we also are stewards of this state's water resources. And while you see inthe-- in the briefing by CRWA, the claim that we somehow want to interrupt thewater service to tens thousands of people, that's certainly not the case. Whatought to happen is some orderly process where this is moved to a new locationthat does not destroy the existing public use as, as happened with the currentlocation of the intake structure.

JUSTICE GREEN: So you don't see it as a, as abalancing between recreational use and public use?

MR. BLANKE: No, we do not. And let me, let meexplain, if I might, little bit about Sabine's operation that the test thisCourt crafted in Sabine and then how it applies specifically to the publicuse that we have here. And in Sabine -- The court looked at the fact, thatwhere you have a public use, an existing public use, there's already socialutility, there's already a benefit to the public at large of that use.

JUSTICE HECHT: And the use here is more thanrecreation. It's power generation, and water supply, and flood control. Allsorts of things.

MR. BLANKE: For the lake -

JUSTICE HECHT: Is that true?

MR. BLANKE: - for the lake as a whole, JusticeHecht.

JUSTICE HECHT: Yeah.

MR. BLANKE: And, and let me explain. Theregulation here affects only the surface area of the lake. As you point out, thelake as a whole can be used for other things. But the regulation itself affectsonly the surface area.

JUSTICE HECHT: Right.

MR. BLANKE: And as a--

JUSTICE HECHT: So there's no, there's no contentionhere that the other uses of the lake are impacted at all?

MR. BLANKE: In terms of hydroelectric power andthings of that sort, that's never been our claim. But if you look at what theexisting public use is of that surface area, you can't generate power fromsurface area sitting out in the middle of the lake. Rather, the power generationis done as the water flows through at the bottom of that dam, that's where theygenerate the power.

JUSTICE HECHT: But they didn't build the lake forrecreation. I mean, that was a nice side effect but surely they were thinking ofthe power generation principally when they built it.

MR. BLANKE: In the, in the other uses and theother statutory charges of GBRA, your Honor. But one of the statutory charges ofGBRA is recreational use. And focusing now just on what that surface area isused for, it's not used for these other, other uses such as; hydroelectricpower, flood control and things of that sort. It's only public -

JUSTICE HECHT: And so--

MR. BLANKE: - use and is recreation.

JUSTICE HECHT: You think the practically destroyedelement focuses in on the surface?

MR. BLANKE: It does because that's what theregulation impacts.

JUSTICE HECHT: And then, do we look at the surfaceof the zone or the surface of the whole lake?

MR. BLANKE: What Sabine looked at, yourHonor, is simply the condemned land, the affected parcel. In Sabine, you hadtwo competing railroads. One wished to cross the other. And you had this yard,that was to be used by one of the railroads and crossing would mean that thataffected part, that to be condemned part, could no longer be used for yardpurposes. Now the court, in Sabine, didn't look at the railroad as a wholeand likewise did not look at the yard as a whole. It simply looked at theaffected property, the condemn property and said, 'Where you had that existingpublic use, you can't divert it for another and different public use, unlessthese two prongs are satisfied: First, that it's of paramount importance, inother words, the new use is more important than the existing use; and secondly,that you, the condemnor, have looked have looked at alternative means ofaccomplishing this and have reasonably determined that there is simply is noother way other than that which you have selected.'

CHIEF JUSTICE JEFFERSON: So practically, practicallydestroyed means any portion of the property, any, any-- Assuming your opponentis correct we're only talking about 25 yards, does that practically destroyrecreational use on the lake? Or how do you define-- How, how, how, would youhave the court define what that means?

MR. BLANKE: We'd asked the court to define itjust as have all the Texas Courts that have looked at this issue and the contextof the railroads and highways and things to this sort. At no point has a TexasCourt looked at whether the whole highway is going to be practicallydestroyed.

CHIEF JUSTICE JEFFERSON: Do we have any de minimisanalysis anywhere?

MR. BLANKE: None of these cases have addressedthat, your Honor, and suggested that there's some de minimis standard.Looking at highways, looking at railroads--

JUSTICE BRISTER: Is there some reason we shouldn't?I mean, world's changed a little bit since 1898 and there's few more people herein the state than there were back then. People are starting to be inevitablystepping on each other's toes and maybe we ought to say, 'Well, you know ...'Ask, ask the ski boat people to turn around a little harder. What's, what's theharm in that?

MR. BLANKE: The, the harm is the statistical lookthat we had here a moment ago where it's .25 percent or .5 percent. These thingsdon't lend themselves to that sort of definition to capture what's a deminimis impact.

JUSTICE WILLETT: What do you say it is without acourt-- What does GBRA's number crunching reveal in terms of the part of thesurface area affected by the new intake?

MR. BLANKE: The play between the two parties isbetween a half-of-percent and a quarter-of-percent. Now, because this is a smalllake, we're talking about a small area. If you were to translate that to thesome of the larger lakes in, in the state that would affect, in other words . 25percent or half a percent, could impact 50 acres or 90 acres. So when you resortto things like these percentages to try to capture whether you have some deminimis impact or not, it doesn't lend itself to capturing, well enough, thattype of assessment.

JUSTICE WILLET: So you don't think perhaps--

JUSTICE MEDINA: Under your argument it doesn'tmatter, but so, so how do you isolate the area to determine if it has an impact?I mean, is it just a few acres here? It's 20 acres. I mean, how far do you go oninto the river to determine what the impact is?

MR. BLANKE: Well, the impact is you look at theproperty to be condemned here. And we have these surface area--

JUSTICE MEDINA: In that situation you would alwayswin, it seems to me. And it [inaudible]--

JUSTICE WILLET: So how could you put it anywhere ifthat's your view?

MR. BLANKE: Well, because there is existing, inthat area -as CRWA-- as Canyon has pointed out in this papers- there is alreadyan existing area that can not be used near the dam. So what we asked Canyon--what we asked CWRA is locate your intake structure within the existing area thatis already off limits to public use.

JUSTICE HECHT: Because of the other intake orbecause of the dam's structure?

MR. BLANKE: Because of both. There's a certaindistance from the dam--

JUSTICE HECHT: That's not possible, is it? Justlooking on the map, looks like it has to extend that passed the dam's restrictedzone, it's not even 200-- 200 feet radius means a 400-foot circumference. Andthe distance out to the restricted zone from the dam is like 200 feet, isn't itsomething like that?

MR. BLANKE: Well, there's a-- My map may get alittle bit muddled here, Justice Hecht. But there is a restricted area that goesstraight out from the dam.

JUSTICE HECHT: Right.

MR. BLANKE: And that--

JUSTICE HECHT: Two hundred feet, I think it is.

MR. BLANKE: That-- I believe that's the case. Andlikewise, there's a restricted area that extends from the existing intakestructure -

JUSTICE HECHT: Right.

MR. BLANKE: - which also captures another arc.And the point of the engineers was you can fashion this in a way that locatesthis within the two zones that either eliminates all together or certainlyminimizes, much more than what's done by Canyon, the amount of the recreationaluse that's impacted. And that was [inaudible]-

JUSTICE HECHT: Well, I could see how you couldminimize it just by moving it ten feet closer to the dam. But there would-- Itwould be very difficult, just from looking at the map, to have it anywhere thatdid not create an additional restricted zone, of some size. Which then, givesrise to the question that Justices Molina and Willett were asking which is-- Andthen that use, that recreational use of that new zone is destroyed. So isn't--So, so you went that way too?

MR. BLANKE: No. Your Honor, pro-- I go back to,to Sabine and then address the particular point that you've made here. Thepoint of Sabine is: How do we best preserve the existing public use? And youneed to look at these alternatives to minimize the existing-- the disruption tothe existing public use. And that was not done here. It might be, Justice Hecht,that some small portion of this, inevitably, because of the best location forthis would have some impact. But what we submit is, it would not be near theimpact that we see for CRWA having not undertaken that analysis.

JUSTICE HECHT: That is-- There's a-- There-- Itseems to be a conflict there because either we look at the rest of the lake orwe

don't. If we look at the rest of the lake, then a tenth of the one percent issmaller than a quarter the one percent is smaller than a half the one percent.But their all small. If we don't look at the rest of the lake, it's a hundredpercent. I mean, the restriction applies to the whole restricted area.

MR. BLANKE: Right. But looking at that then, yourHonor, if, if the case says that looking on all the different locations, it'simpossible to locate this intake structure so as not to impact, that is, not topractically destroy the recreational use of some of the area, then the Sabine test allow-- allows that to proceed. But what we have in this record,your Honor, is we have nothing that indicates, and this of course, the reasonfor the San Antonio Court of Appeals decision on that second prong of theSabine test. There was no indication, there was no evidence that Canyon orCRWA had undertaken this analysis to figure out where is it that we can locatethis so, so that we can avoid this type of, of damage, this practicaldestruction of the existing public use.

JUSTICE WILLET: In it-- and there was someanecdotal complaints from recreational users?

MR. BLANKE: Yes.

JUSTICE WILLET: Aside from those anecdotalcomplaints, is there any data showing the frequency or popularity ofrecreational use on the lake? Has it waned or fallen off?

MR. BLANKE: Actually, that is a, a matter ofstipulation. The parties stipulated and it's, it's recited in our, our opening--our brief and then likewise in the summary judgment papers that Lake Dunlap isindeed a popular recreational destination for boaters, skiers, fisherman and thelike. [inaudible]--

JUSTICE WILLET: But, but the effect of the newintake has been what?

MR. BLANKE: The, the effect of the new intake is,as a matter of law, that area, which was not already encompassed within one ofthese restricted zones, is now no longer available for those stipulated users.

JUSTICE WILLET: How many fewer boaters are nowgoing to Lake-- to the lake. How many fewer jet skiers? How many fewerrecreational users as a whole are, are going there because of the new intake?

MR. BLANKE: Well, there is no statisticalinformation in that regard. And in like manner, that looks at, once again, thelake as a whole a opposed to the area that is actually affected by theregulation. And that area is, as a matter of law, and no longer available -

CHIEF JUSTICE JEFFERSON: Do you agree that -

MR. BLANKE: - for the existing public use.

CHIEF JUSTICE JEFFERSON: - do you agree, that thealternate intake point would mean that the water quality is less or that's aninterruptible source as supposed to where they located the intake? Sort of.

MR. BLANKE: We would not agree. There's somesuggestions on Canyon's part that the existing intake location is not acceptablebut we, we do not subscribe to that and have, have known of no instance wherethe water quality or its availability has actually been compromised as a resultof its location.

CHIEF JUSTICE JEFFERSON: Well, well, the existing one,that would-- the expand to be-- You couldn't-- They couldn't use that one, isthat correct? [inaudible]

MR. BLANKE: No. Perhaps I'm misunderstanding.There's a, a pre-existing -

CHIEF JUSTICE JEFFERSON: Right.

MR. BLANKE: - intake structure that, pursuant toa l-- easement back in the early 90's was located there again with GBRA'spermission and has operated from that point even to now without any difficulty.This is--

CHIEF JUSTICE JEFFERSON: Is there evidence-- We'retalking some moment ago about this 200-feet from the dam where there's alreadyrestricted access for recreational use. Is there evidence that the-- that if theintake were located there, this alternate site, that it would produce water thatwas of lower quality or that the source would be interruptible?

MR. BLANKE: No. That-- And that's, that's whatI'm saying is the void in the record. In other words, Canyon-- what should havebeen done here is examination of: Can you locate this elsewhere in a manner thatminimizes this? And they could have done so and come back and said, 'No.Hydrology studies show that it-- that we have a problem with the algae, or thatthe height of it is such that we are concerned that in times of drought, itmight be an interrupted flow or something like that.' The record has none ofthat. All the record reflects is this, according to Canyon, is a desirablelocation, not that other locations had been ruled out.

JUSTICE GREEN: Who set, who sets the 200-footrestricted zone?

MR. BLANKE: It's, it's set by the TCEQ, thisregulation that--

JUSTICE GREEN: What if they moved it out to 300feet?

MR. BLANKE: Then, then likewise, that wouldexpand that much more.

JUSTICE GREEN: You'd have the same, you'd have thesame complaint?

MR. BLANKE: I'm sorry.

JUSTICE GREEN: You'd have the same complaint?

MR. BLANKE: Exactly. In other words, that surfacearea, because the regulation would no longer be available for, for public use.

JUSTICE GREEN: And so-- But it really boils down tothe fact that ski boats can't turn-- who want to turn-- have to turn sooner thanthey would otherwise. Is that where it all boils down to?

MR. BLANKE: No. That area is no longer available-

JUSTICE GREEN: What-- I know ...

MR. BLANKE: - for any of these recreationalusers.

JUSTICE GREEN: But I mean, fisherman aren't goingto care because--

JUSTICE HECHT: No. Fisherman would care if they goto the spillway and the spillway's a good place to catch good fish, if placewith fished because the water comes to is little warmer there sometimes. That's-- They might ...

MR. BLANKE: In my, my experience with fishermenis much that way.

JUSTICE WILLET: Yeah.

JUSTICE GREEN: What I mean is not restricting theirability to turn around because they don't ski boats are the one's that reallyneed the extra room to turn.

MR. BLANKE: Yes. If you're focusing on the use ofthe lake as a whole in terms of that being impaired, it would be, it would bethose people who have it more difficult time doing something. But if you'relooking at what is the existing use actually in that area, it includes many moreuses other than simply just skiers turning around.

JUSTICE GREEN: Okay. With the adjoining landowners, they've not made complaints about this.

MR. BLANKE: Actually, the letter on the record isfrom an adjoining land owner. Mr. Dittmar's complaints about this new area, andhe is an adjoining land owner, are in the summary judgment record.

JUSTICE HECHT: Is there anything about dam accessthat decides a few words in Mr. Blumberg's statement?

MR. BLANKE: Yes, your Honor. On, on dam accessagain, the, the main point here really is the, the recreational use, that's,that's the main use of this area. But when Canyon moved for summary judgment andwe looked at the eas-- at the relief that they were seeking, opaque as it was,it simply said, 'We want a 200-foot restricted area.' And we looked at therequest, we looked at the regulation and if they are irr-- Their aim was asbroad, as they said in their condemnation plan, to exclude anybody from this200- foot restricted area. Then that likewise on the phase of the condemnationcounter claim would include ...

JUSTICE GREEN: But it says it's just recreationalusers and trespassers. You all wouldn't be either one of those.

MR. BLANKE: Well, that, that's certainly the casebut the condemnation counter claim didn't allow for any ingress or any egress byGBRA. It simply said, 'We want a 200-foot restricted area which includestrespassing and recreational use.' Now, certainly to the extent that they wantto make clear that we weren't a trespasser, it was incumbent upon them to makeclear that we would still have points of ingress and egress. But if you look at--

JUSTICE HECHT: If the only, if the only restrictionis the restriction imposed by the TCEQ Regulation, then that would not affectdam access, is that true or not?

MR. BLANKE: Well, the, the regulations says, 'Notrespassing.' So to the extent that they want to condemn, according toregulation that says, 'Nobody, including GBRA can use this,' it would affect, itwould affect our access to the dam. So on the face of it, what they were seekingwould affect the-- our access to the dam. And if we ...

JUSTICE HECHT: But if you're not a trespasser, itwouldn't apply.

MR. BLANKE: It-- That's exactly right, that'sexactly right.

JUSTICE BRISTER: Any further questions? Thankyou.

MR. BLANKE: Thank you.

REBUTTAL ARGUMENT OF GREGORY S. COLEMAN ON BEHALF OF THE PETITIONER

MR. COLEMAN: First thing's first, Justice Medina.That spillway would still be protected for fishing so-- Access to the dam. Wewere seeking on an easement; an easement is a non-possessory interest. There'sjust no way to read an easement for our intake to exclude trespassers. That,that is not an issue. With respect to a question that a number of Justices askedabout, 'How, how do you define this?' One other thing is this August 12th letterthat said, 'makes clear that they did have a requirement that we keep thatintake at least 85 feet from the dam.' There is no way that we could havedesigned an intake-- Even put as-- putting aside our statutory required interestin assuring an uninterruptible supply and highest possible quality, there's noway we could have put an intake anywhere that wouldn't have created, at leasthypothetically, an, an additional restricted zone. And again, GBRA talks as ifrecreational boaters have been prevented from going into this, this area. Butthere is, in fact, no evidence that anybody ever has been prevented from any-- entering this area; that, that buoies were put out, or that anything that's putout to prevent boaters from coming in basically all the way to-- within 200 feetof the dam. Our intake is approximately, a hundred and fifty feet from the dam.Their requirement was that it be at least 85 feet from the dam. Our Engineersbelieve it should be a little bit further out to ensure water

quality becausethe closer you get to the dam, the greater risk you have for siltation. A lot ofsediments builds up as you get closer to the dam and we wanted to keep away fromthat. What we hear a lot of is that we should have designed this to minimize anyrisk of harm to recreation. Our statutory requirements are that: We secure anuninterruptible supply and the highest possible quality of water that, that wetake in and, and that's what we tried to, tried to do. We did put it down withinthat 200-foot restrictive area near the dam. We didn't go three or four hundredfeet out from the dam somewhere out in the middle of the river where, where itreally would have interrupted recreational use a lot more. It is very close tothe dam and in that sense, our planners and designers did attempt to minimizeany effect on recreational use. We're not-- yes, Justice?

JUSTICE GREEN: Your restricted zone area, withthis-- the 200-feet circle, what, what is there to enforce that zone, outsidethe 200-feet TECQ marker?

MR. COLEMAN: Yeah. In the record doesn't reflect,your Honor. But if you're asking the question, there is nothing other that thebuoies that go across the 200-foot zone for the dam.

JUSTICE GREEN: So there's, there's nothing toenforce. The, the record doesn't show that there's anything inside to keepanybody out of that-- out of your zone?

MR. COLEMAN: The record does not reflect--There's no evidence that's been put in the record to suggest there's anything tokeep boaters any further than 200 feet from the dam.

JUSTICE GREEN: But they're not supposed to be?

MR. COLEMAN: The, the regulation that is asksGBRA to create its own regulations and exceptions are available. Again, there's-- been no evidence that the record does not reflect the effect of a request foran exception or how the TECQ may have ruled again. And we believe that wasGBRA's burden to come in and show, that in fact, there is some real restrictionbased on the effect of this regulation and not simply say, 'Look at the words ofthe regulation. Of course, nobody could come in here.' There has to be evidenceabout how things are in fact. And this record contains no evidence of how thingsare in fact. And that's the point I was trying to make earlier. There is no waythis intake could have been placed without, though at least, creating thepossibility of having this restrictive zone move outside. But it's done at the,at the end of the lake. Sabine does not say that, 'You look only at thecondemned property.' When the property in Sabine was taken, it said, 'Youcan no longer use the larger property as a yard and depot.' But it wasn't thewhole yard and depot that was taken. So there was, there was a partial taking,and then they said, 'And you can no longer use the yard and depot, essentially,at all.' Same is true in Snellen [Snellen v. Brazoria County, 224 S.W.2d 305(Tex. Civ. App.-Galveston 1949, writ ref'd n.r.e.)], where they said, 'It's notin effect.' Same is true in Willacy County and in Swearigen is-- whichis the alley that was not completely taken over but the, the alley itself wasentirely destroyed. So we believe that Sabine and the project really supportus and we'd ask the court to reverse.

CHIEF JUSTICE JEFFERSON: Any further questions? The fileis submitted and that concludes arguments for today. The marshal will adjournthe court.

CLERK: All rise. Oyez, oyez, oyez. The Honorable,The Supreme Court of Texas now stands adjourned.

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