

IN RE THE INTERREGIONAL § BEFORE THE TEXAS
CONFLICT BETWEEN THE REGION §
C AND REGION D REGIONAL § WATER DEVELOPMENT BOARD
WATER PLANNING GROUPS §

REGION C REGIONAL WATER PLANNING GROUP'S REPLY TO
REGION D BRIEF ON RESOLUTION OF INTERREGIONAL CONFLICT

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I. Region D appears to confuse the roles assigned by the Legislature to the Board and the TCEQ in the development of water supply projects.

The Texas Water Development Board is the state agency responsible for water planning and administering water financing in the state.¹ It is a planning agency. The purpose of the statutory authority the Board was entrusted by the Legislature to administer is to ensure adequate water supply to meet the demands of the citizenry of the State of Texas. In contrast, the TCEQ is the agency responsible for implementing laws relating to conservation of natural resources and protection of the environment.² Challenges to individual water supply projects that utilize surface water, or might potentially impact environmental resources, are properly brought before the TCEQ as part of the permitting process for those projects.

The Board is not legislatively equipped to consider granting the relief that Region D seeks. The Board is not an adjudicative agency designed to hear disputes over technical issues concerning water supply projects. Rather, the Board is a planning agency that reviews and approves water plans in a bottom-up approach, wherein water strategies are designed through an intensive localized process. Through that process, the Legislature placed the task of evaluating the detailed, technical, and complicated issues related to water supply planning in the hands of regional water planning groups (RWPG) composed of widely varied and specialized interests within each region.³ If a regional water plan fails to meet the requirements of Chapter 16, the remedy is for the Board to submit comments to the RWPG prior to the RWPG's final approval of its plan.⁴

¹ Tex. Water Code Ann. § 6.011 (West 2008).

² *Id.* § 5.012.

³ *Id.* § 16.053(c).

⁴ *Id.* § 16.053(h)(4),

The Legislature tasked the Board with reviewing regional water plans to assure the plans adhere to applicable requirements in Chapter 16.⁵ But the Legislature did not authorize the Board to second-guess the recommendations of the specialized regional water planning groups concerning the need for specific water supply strategies in meeting projected demands during the planning period. Nor did the Legislature grant to the Board any authority to substitute its judgment on a recommended water supply strategy for that of a RWPG.

On the other hand, the Legislature has vested the TCEQ with authority to hear disputes over projects to develop surface water.⁶ The TCEQ may call and hold hearings, receive evidence at hearings, issue subpoenas to compel the attendance of witnesses and the production of papers and documents, and make findings of fact.⁷ While an entity proposing to build a water supply reservoir is free to finance and construct the project without any involvement from the Board, construction of a water supply reservoir project cannot begin until the TCEQ has expressly approved the project through issuance of a water rights permit.⁸ Part of that permitting process includes an opportunity for persons affected by the proposed project to request a public hearing.⁹ Upon request of any affected person, the TCEQ must hold a public hearing wherein expert evidence may be presented to challenge the technical merits of the project.¹⁰ The Legislature allows the TCEQ to refer the public hearings to a specialized administrative law judge.¹¹ The review also includes the involvement of a specialized Public Interest Counsel, who ensures that the TCEQ's decision will promote the public interest.¹²

⁵ *Id.* 16.053(h)(4).

⁶ Tex. Water Code Ann. §§ 5.013(a)(1), 11.121-.134 (West 2008); likewise, the task of vetting groundwater development projects lies with local groundwater conservation districts. *Id.* § 36.113.

⁷ *Id.* § 5.102(b).

⁸ *See id.* §§ 11.121-.134.

⁹ *Id.* § 5.556.

¹⁰ Tex. Water Code Ann. § 11.132, .133 (West 2008).

¹¹ *Id.* § 5.311.

¹² *Id.* § 5.271.

The Legislature did not vest in the Board any similar public fact-finding authority.¹³ The Legislature exclusively vested authority to publicly vet the merits of specific water supply projects in the RWPG and not the Board. The RWPG must consider public comments on the individual regional water plans as part of the regional water planning process.¹⁴ The Legislature did not authorize the Board to solicit, receive, or consider public comment when it reviews regional water plans.¹⁵

The necessary complexities of challenges to the technical merits of a project like Marvin Nichols Reservoir must be adjudicated in a completely unrelated proceeding from the Board's water planning process, and by a separate agency. Region D's challenges to the technical merits of the Marvin Nichols Reservoir project are misplaced in this venue.

II. Region D's rephrasing of Section 16.051 of the Texas Water Code strips the statute of its plain meaning as written by the Legislature in an attempt to rewrite the law that the Board is charged with administering.

Under Section 16.051(a) of the Texas Water Code, the Board must develop a comprehensive state water plan. That plan is designed to do two things, for one purpose. "The state water plan shall provide for the *orderly development, management, and conservation* of water resources and *preparation for and response to drought conditions*["]¹⁶ The statute also requires that the plan must provide for development of water resources and preparation for drought "in order that sufficient water will be available at a reasonable cost to ensure public

¹³ See *id.* at Chapter 6, Subchapter D (West 2008); Black's Law Dictionary defines "fact-finding" as "The process of *taking evidence* to determine the truth about a disputed point of fact." BLACK'S LAW DICTIONARY 671 (9th Ed. 2009) (emphasis added). Further, a "finding of fact" is "A determination by a judge, jury, or *administrative agency* of a fact supported by the evidence in the record, usu. presented at the trial or *hearing*["] *Id.* at 708 (emphasis added).

¹⁴ Tex. Water Code Ann. §§ 16.053(h)(5), (h)(6) (West 2008).

¹⁵ See *id.* § 16.051.

¹⁶ *Id.* § 16.051(a) (emphasis added).

health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the entire state.”

Region D rewrote the law in its brief to the Board. According to Region D, Section 16.051(a) simply reads: “the state water plan shall.....protect the agricultural and natural resources of the entire state.” With this overly simplistic rephrasing of Section 16.051(a), Region D has inappropriately changed the meaning of the statute entirely. The Legislature expressly directed the Board to plan for the development, management, and conservation of water resources and the preparation for drought in order that *water will be available to*, among other things (including ensuring the public health safety and welfare, and furthering economic development), protect the agricultural and natural resources of the state.¹⁷

Section 16.051(a), as written by the Legislature, is essentially an assignment to the Board with three main components:

- 1) ensure development of water resources,
- 2) during extreme precipitation conditions,
- 3) for certain delineated priorities.

Region D’s rewriting of the statute essentially strips the water development and drought preparation components out of Section 16.051(a). However, the Legislature did not solely charge the Board with designing a plan to protect the agricultural and natural resources of the entire state from some suspected or unspecified threat or harm. Region D argues, under its rewritten version of Section 16.051(a), that the Board must protect the agricultural and natural resources of the entire state *from* the development of water supply strategies. But that is not what Section 16.051(a) requires. The plain language of Section 16.051(a), in its entirety, requires the Board to

¹⁷ *Id.* 16.051(a).

provide for water supply development and drought planning *in order that water will be available* to protect agricultural and natural resources.

The Legislature's directive makes sense in light of what it also required the RWPG to do in Section 16.053(a). Under that section, a RWPG for a particular region must ensure through water development and drought planning that water will be available to protect the agricultural and natural resources of that particular region. RWPG are responsible for ensuring that water supply is sufficient to protect agricultural and natural resources in the individual planning areas. Meanwhile, the Board is responsible for compiling the regional water plans into a comprehensive state water plan that, in turn, will ensure the same for the entire state.

The correct reading of Section 16.051(a) is, of course, contrary to Region D's position in this matter. Region D must rely on an incorrect and overly-simplified misconstruction of Section 16.051(a) because neither that section, nor any other legislative provision, allows the Board to remove the Marvin Nichols Reservoir project from the 2012 State Water Plan for the protection of agricultural, natural, or any other kinds of resources.

III. Region D improperly requests the Board to undertake a review process that is outside the scope of the matter presently before the Board.

Region D now challenges the Board to reconsider its decision to approve the 2011 Region C Regional Water Plan under selected statutory and administrative criteria against which the Board has already evaluated the plan. The Region C plan has endured a multitude of challenges since the Board's approval of the plan in 2011. Numerous entities and individuals opposing the plan have been heard by the Board and the courts. The only error cited by the trial court was that the Board incorrectly concluded that no interregional conflict existed between

Region C and Region D.¹⁸ The only relief sought by opponents of the Region C plan was for the Board to follow the rules requiring it to assist the regions in negotiating a resolution of the conflict.¹⁹ The Executive Administrator facilitated mediation between the RWPG for the purpose of resolving the conflict.

In its brief to the Board, and for the first time, Region D has challenged the merits of the 2011 Region C Regional Water Plan, most prevalently citing an alleged failure of the Region C RWPG to quantify potential impacts of the Marvin Nichols Reservoir project on agricultural and natural resources in the Region D planning area. The Board's adoption of the 2011 Region C Regional Water Plan into the 2012 State Water Plan demonstrates that the Board has evaluated the plan under all of the applicable regulatory requirements in Chapter 16 and the Board's rules, and has determined that the plan is satisfactory. The Board incorporated the water supply strategies recommended by Region C into the 2012 State Water Plan, accordingly.

The trial court declared simply that the Board's rules regarding interregional conflict apply to the issues of conflict identified in Region D's plan, and remanded the matter to the Board for further proceedings. The Eastland Court of Appeals then observed that the trial court's judgment remanded the case to the Board for it to follow the procedures in Section 16.053(h)(6).²⁰ That statute requires the Board to facilitate coordination between the involved regions and, if the conflict remains, resolve the conflict.²¹ The Court's directive, therefore, was not for the Board to reevaluate Region C's recommendation concerning the Marvin Nichols Reservoir project under the technical criteria in the Board's rules, but to resolve the conflict.

¹⁸ *Ward Timber, Ltd. v. Texas Water Development Bd.*, No. D-GN-11-000121 (126th Dist. Ct., Travis County, Tex. Dec. 5, 2011).

¹⁹ *Texas Water Development Bd. v. Ward Timber, Ltd.*, 411 S.W.3d 554, 569 (Tex. App.—Eastland May 23, 2013, no pet.).

²⁰ *Id.* at 560.

²¹ Tex. Water Code Ann. § 16.053(h)(6) (West 2008).