

JIM F. THOMPSON
Attorney at Law
P.O. Box 1107
Atlanta, Texas 75551
(903)799-5331
Fax: (903)796-6366

July 7, 2014

Office of General Counsel
Attn: Les Trobman
Texas Water Development Board
P.O. Box 13231
Austin, TX 78711-3231


Re: Region D Brief on Resolution of Interregional Conflict

Dear Mr. Trobman:

As designated by the Region D Planning Group and requested by the Texas Water Development Board, I am submitting Region D's Response Brief. I am sending you the Response Brief by U.S. Mail and email and am also sending it by U.S. Mail and email to all other persons listed on the mailing list in your letter of May 20, 2014.

Thank you.

Very truly yours,


Jim F. Thompson

cc: w/enc
Jim Parks
Jody Puckett
Russell Laughin
Bret McCoy
Richard LeTourneau
Walt Sears
Joe Reynolds

REGION D RESPONSE BRIEF ON RESOLUTION OF INTERREGIONAL CONFLICT BETWEEN THE 2011 REGION C AND REGION D REGIONAL WATER PLANS

SUMMARY

The position taken by the Region C Water Planning Group (“Region C”) in its brief on resolving the interregional conflict should be rejected. Region C misconstrues the significance of the conflict claimed by Region D. Region C makes the bold statement that the Board can, in essence, make any decision it wants. Then Region C argues that the Board should adopt Region C's position.

The problem with Region C's position is that it ignores the fact that Region D raised the conflict because the Marvin Nichols Reservoir has never been justified in light of the significant adverse impacts on agricultural and natural resources in Region D. Region D removed the Reservoir from its 2001 Regional Plan and has opposed the inclusion of the Marvin Nichols Reservoir in each Plan going forward for that reason. It has advised other regions that it would oppose the Reservoir in other regional plans or the State Water Plan due to those adverse impacts.

Since both the Board's decision on the conflict and its decision approving the 2011 Region C Water Plan were reversed and remanded, the Board should consider how its decision on resolving the conflict will address its need to reconsider the Region C Plan.

It makes no sense to resolve the conflict in Region C's favor if the Board cannot then legally find the Region C Plan and its proposal for Marvin Nichols comply with state law and agency rules. As the Region D brief showed, the Board should not approve the current 2011 Region C Plan with the Marvin Nichols Reservoir included because it does not comply with state law and agency rules.

RESPONSE TO REGION C ARGUMENTS

1. The Board's Discretion

Region C first argues that the Texas Water Development Board (“the Board”) has broad discretion to resolve the conflict in favor of Region C, rejecting Region D's claim of conflict.

While Region D agrees that the Board does have broad discretion to resolve such conflicts, the Board must do so in a fashion that complies with Texas law and the agency's rules and does not result in a meaningless act. Region D submits that the Board, therefore, needs to resolve the conflict in a way that then allows it to approve a Region C plan.

Plaintiffs in the case that led to this conflict resolution process requested that Texas Courts reverse and remand the decisions by the Defendant [TWDB] that

1. there is no interregional conflict in the Region C and D regional water plans, and
2. approved the Region C Plan in December 2010.¹

Texas courts did so, finding that there is an interregional conflict, which precluded the Board from making a valid decision to approve the Region C Plan.

The district court ruled that the two decisions of the Board must be reversed and remanded. The Attorney General appealed the rulings on both decisions. Upon review, the Court of Appeals stated:

The Board presents three issues: (1) whether the district court erred in denying the Board's plea to the jurisdiction; (2) whether the district court erred in declaring that an "interregional conflict" existed between Region C and Region D and declaring that the Board's interregional conflict rules applied to the conflict; and (3) **whether the district court erred in reversing the Board's approval of the 2011 Regional Water Plan for Region C and remanding the case back to the agency.**²

Region D's initial brief explains why a resolution of the conflict in favor of the 2011 Region C Water Plan would not resolve the matter. That Plan, with Marvin Nichols Reservoir, cannot be approved under state law and agency rules.

¹ Plaintiffs' First Amended Original Petition, page 13, Cause No. D-1-GN-11-000121; *Ward Timber, LTD., Ward Timber Holdings, Shirley Shumake, Gary Cheatwood, Richard Letourneau, and Pat Donelson vs. Texas Water Development Board*; in the 126th Judicial District, Travis County, Texas .

² *Tex. Water Dev. Bd. v. Ward Timber, Ltd.*, 411 S.W.3rd 554, 557 (Tex.App. – Eastland, no pet.).

The Board can resolve the conflict and approve the Region C Plan by simply requiring Region C to remove the Marvin Nichols Reservoir from its 2011 regional plan.

Thus, the Board has two interrelated decisions: how to resolve the conflict and whether to approve a Region C 2011 Plan. Region D has no interest in preventing Region C from having a properly approved plan. Region D's interest is that the Region C Plan comply with state law and agency rules.

2. Public Policy

Region C argues that the only sound public policy for resolving the conflict is for the Board to rule in favor of Region C. Region C is wrong.

a. Region C's position will lead to more litigation and uncertainty.

First, as the Region C Brief discusses in its Section III, any decision by the Board is subject to review by Texas courts. If the Board were to adopt the Region C proposal, it would likely set off another round of litigation on both the issue of conflict and the approval of the Region C Plan, once again placing the Region C Plan in limbo.

By adopting Region C's approach, the Board would not be resolving the underlying dispute over the inadequacy of the Region C Plan. It is not sound public policy to address the conflict issue without addressing the underlying dispute.

Moreover, there are better policy solutions in the short and long term.

b. Region C's position ignores the continuing nature of the planning process.

Second, any decision that the Board makes now will only apply to the 2011 Region C Water Plan. Regardless of the decisions by the Board on the two pending issues, Region C will have the opportunity in its 2016 regional plan to reconsider whether to include the Marvin Nichols Reservoir if it can meet the test of the state law and agency rules for such a project. Creating a continuing dispute in the interim, when it will be moot in 2 years, is not a sound public policy.

c. The Marvin Nichols project is not an indispensable component of the Region C Plan.

Region C has continually held the position that the proposed Marvin Nichols Reservoir is indispensable to its water planning, a position that was repeated in Region C's Brief to this Board.³ Region D disagrees with that premise and believes that any independent and fair review of Region C's Plan will reveal that the Marvin Nichols Reservoir is not necessary for Region C to meet its water demands for the 2011 planning cycle. The 2011 Region C Water Plan provides for supply strategies in excess of the projected needs. Only by failing to adopt reasonable strategies to meet reasonable demands can the Region C Plan show a need for the Marvin Nichols Reservoir. The Region C Plan does not show that the reservoir is indispensable in the planning period or even beyond.

In Section 4D.3 of the 2011 Region C Water Plan, the Marvin Nichols Reservoir is a recommended strategy for 3 entities: North Texas Municipal Water District (174,840 acre feet per year), Upper Trinity Water District (35,000 acre feet per year) and Tarrant Regional Water District (280,000 acre feet per year). Yet, the Reservoir is not indispensable to any of these entities. For two, the Reservoir is clearly not needed.

Table 4E.15 of the Region C Plan sets forth that the Upper Trinity Regional Water District ("UTRWD") is planning on using 17,500 acre feet from the Marvin Nichols Reservoir beginning in 2050. If the Marvin Nichols Reservoir is deleted from the plan, the UTRWD would still have more supplies than demand for both 2050 and 2060 (9,053 acre feet of excess in 2050, 19,970 acre feet of excess in 2060).

Likewise, Table 4E.7 sets forth that North Texas Municipal Water District ("NTMWD") is planning on 87,400 acre feet of supply from the Marvin Nichols Reservoir for 2030 and 2040, with that amount increasing to 174,800 in 2050 and 2060. If the Reservoir is deleted from the plan, NTMWD would still have excess supplies over demand (102,012 acre feet of excess in 2030, 23,773 acre feet of excess in 2040, 86,078 acre feet of excess in 2050, and 88,975 acre feet of excess in 2060).

³ Region C Brief at p. 3-5

The situation for the Tarrant Regional Water District (“TRWD”) is more complex, but the Marvin Nichols Reservoir is still not indispensable or even needed. Table 4E.4 sets forth that TRWD is planning on having 140,000 acre feet of supply from the Marvin Nichols Reservoir in 2030 and 2040, with that amount increasing to 280,000 acre feet of supply in 2050 and 2060. If the Reservoir is deleted from the plan, TRWD would have an excess of 700 acre feet in 2030, but projected demands would exceed projected supplies by 83,666 acre feet in 2040, 76,346 acre feet in 2050, and 134,853 acre feet in 2060.

Therefore, based on Region C’s own figures, if the Marvin Nichols Reservoir is deleted from its Plan with no other changes, the only entity that would fail to show supplies that meet the Plan’s projected demand would be Tarrant Regional Water District in the years 2040, 2050, and 2060. Region C in its Brief said the Board should resolve this issue in a reasonable manner. Listed below are the reasons Region D believes the inclusion of the Marvin Nichols Reservoir to meet the limited needs of TRWD is not reasonable.

First, whether it was projected to be needed at the time of the 2011 Region C Plan, it is clearly not indispensable now. The good work of TRWD, and others in Region C, to implement conservation practices has led to significantly reduced projections of need in Region C by Board staff. Those figures and the ones recommended by the Region C planning group show that the Region can easily get by without the Reservoir.

Even without looking at the current situation, the Marvin Nichols Reservoir cannot be shown to be indispensable to Region C if the plan is required to meet state law and agency rules and use reasonable assumptions.

For example, as shown on Page 4E.2 of the Region C Plan, wholesale water providers have supplies between 20% and 30% more than projected demands. In other words, instead of planning for demands projected like the rules of the Board contemplate and like other regions have done, Region C speculated that it will need much more water than demands suggest.

Thus, water suppliers have overestimated their demands, claiming 1) an extra margin of safety for climate change; b) the possibility of a drought more severe than drought of record; c) that demands may grow more rapidly than projected; and d) that some proposed management

strategies might not be developed.⁴ Rejecting such speculation makes it clear that the Marvin Nichols Reservoir is not needed.

Such speculative projections should not be allowed in any regional plan if the supply strategies involve water projects outside that region, especially if the impacts of such strategies have the type of impacts that the Marvin Nichols Reservoir will have on Region D.

Moreover, these justifications for excess supplies are for imagined shortages some 50 years out. Given the difficulty of projecting water needs in the long-term, and the ability of regions to reevaluate their demands and supplies every 5 years, such excess supply strategies for demands at the end of the planning horizon deserve close scrutiny.

If such policy reasons are not enough, such speculative demands need to be rejected as contrary to the rules of the Board. Agency rules, for example, define the drought of record at 31 TAC Section 357.10(10), and then repeatedly refer to this drought condition for use in planning. See, for example, the definition of existing supplies 357.10(12) and firm yield 357.10 (13). Board rules then provide requirements such as :

(a) RWPGs shall evaluate:

(1) source water availability during drought of record conditions; and

(2) existing water supplies that are legally and physically available to WUGs and wholesale water suppliers within the RWPA for use during the drought of record.

(b) Evaluations shall consider surface water and groundwater data from the state water plan, existing water rights, contracts and option agreements relating to water rights, other planning and water supply studies, and analysis of water supplies existing in and available to the RWPA during drought of record conditions.

(c) Evaluation of the existing surface water available during drought of record shall be based on firm yield....31 TAC 357.32.

⁴ 2011 Region C Water Plan at p. 4E.2

Likewise regional planning groups are directed to "plan for water supply during Drought of Record conditions." 31 TAC 357.34 (b), and to recommend water management strategies to be used during a drought of record 31 TAC 357.34 (a).

These and other rules for regional planning are mandatory requirements. They set out consistent planning requirements so that the State Water Plan is a collection of apples, not apples and oranges, and 15 other types of fruits, (i.e. different planning assumptions). In order for a state wide water plan to have meaning, the regional components that make up the plan must be based on the same definitions and protocols.

Board rules require consistency in regional planning at 31 TAC 357.60 and state in subsection (a)

RWPGs shall submit to the development Board a RWP that is consistent with the guidance principles and guidelines outlined in §357.20 of this title.

Section 357.20 then references Section 358.3 which makes it clear that it is the defined drought of record that is the basis for state and regional water plans, not some worse drought that has no basis in historic fact.

Development of the state water plan shall be guided by the following principles. ... (2)
The regional water plans and state water plan shall serve as water supply plans under drought of record conditions....

Finally, Board rules provide:

(a) In the event the Board finds that the RWP does not meet the requirements of the Texas Water Code §16.053, this chapter, and Chapter 358 of this title (relating to State Water Planning Guidelines), the Board shall direct the RWPG to make changes necessary for compliance with legal requirements. 31 TAC 357.63.

An analysis of the other three justifications given by Region C for its speculatively high projections shows that they are also either contrary to or inconsistent with Board rules for regional water plans.

There are also other reasons for rejecting Region C's indispensability claim.

First, there are a number of entities in Region C that will have excess water in 2060 that could be used to address any short falls by TRWD or others, if proper planning for efficient use of the resources were done. There is, in total, more than enough water to make up those TRWD's short falls.

Second, a recent report by the Texas Center for Policy Studies gives several reasons why TRWD does not need Marvin Nichols. For example, that report points to the position of Region C that drought contingency plans are not reliable and therefore should not be considered as ways to cut demand or expand supplies.⁵ The Region C plan states:

Drought management and emergency response measures are important planning tools for all water suppliers. They provide protection in the event of water supply shortages, but they are not a reliable source of additional supplies to meet growing demands. They provide a backup plan in case a supplier experiences a drought worse than the drought of record or if a water management strategy is not fully implemented when it is needed. Therefore, drought management measures are not recommended as a water management strategy to provide additional supplies for Region C.⁶

That position is contrary the position of the Legislature and the Board, which makes such plans mandatory and assume they will be used to reduce the peak use during drought conditions. Ignoring the role of its required drought contingency plans in stretching supplies during drought appears to be merely one more justification to keep the Marvin Nichols Reservoir in the regional plan.

The report of the Texas Center for Policy Studies explains that if Region C applied its drought contingency plans to its major supplies, such as reservoirs used by TRWD, much more water would be available during the peak use periods, i.e. times of drought. The report focuses on TRWD, its drought contingency plan and one of its reservoirs, Cedar Creek. The report shows that TRWD can reduce the demand for water from the reservoir during a drought by about 32,000 acre-feet. Using the same approach for other reservoirs used by TRWD and other major water suppliers would lead to very significant decreases in the demand-supply gap (need) during

⁵ Learning from Drought: Next Generation Water Planning for Texas, May, 2014, p. 31 – 33. Available at www.texascenter.org.

⁶ 2011 Region C Water Plan at p.6.7-6.8

drought conditions. Yet, Region C views such savings in water use as not worthy of evaluation as strategies to address peak demands.

The Region C Brief states that if Marvin Nichols Reservoir were deleted from its Plan, “rather than constructing one reservoir, Region C would be forced to recommend construction or expansion of a series of reservoirs and other infrastructures that would be considerably more expensive and would be more environmentally costly than the current proposal.”⁷

That contention is completely untrue. As the Region C Brief correctly asserts “the purpose of regional planning is to assure adequate water supplies for a region through a drought of record.”⁸

In order for the Region C Plan to assure adequate supplies through a drought of record, it needs to show that supplies will meet demands during such a period. As stated previously, if Marvin Nichols Reservoir is deleted from the Region C Plan, every water provider in Region C will have adequate supplies to meet demands with the exception of TRWD beginning in 2040 and continuing through 2060. TRWD’s deficits will be less than 85,000 acre feet in 2040 and 2050 and increase to approximately 135,000 acre feet in 2060. Is Marvin Nichols Reservoir less expensive and less environmentally costly than other measures to provide this limited amount of water supply to Tarrant Regional Water District? Region C’s own plan would indicate it is not.

According to the Region C Plan, Toledo Bend is a water supply strategy to be implemented that will provide water supply to TRWD and NTMWD.⁹ Their plan calls for Phase 1 to provide 100,000 acre feet to each entity beginning in 2050 and Phase 2 to provide the same amount of water to each entity in 2070. Simply by moving up the timetable a decade or so and increasing TRWD’s share of Phase 2 would eliminate any water shortages in Region C for the 2011 Plan. This Reservoir is already constructed, the water is impounded and available as a water supply. In addition, if future supplies are needed by either entity after 2060, the Region C Plan on Table 4D.2 states that up to 600,000 acre feet of supplies are potentially available to Region C from

⁷ Region C Brief at p. 8

⁸ Region C Brief at p. 10

⁹ 2011 Region C Water Plan at p. 4D.1 – 4D.7

Toledo Bend. According to the Region C Plan, agricultural and natural resource impacts are low with environmental and third party impacts medium low for this project.¹⁰

Additionally, there is water availability from Wright Patman Reservoir in Region D currently listed as three (3) separate alternate supply strategies for TRWD that would more than satisfy any potential shortage.¹¹ Again, this is a Reservoir already constructed with water impounded. Region D has consistently held the position in all negotiations with Region C that our Region is willing to work with Region C in obtaining additional water supplies from Wright Patman Reservoir and that it is a more certain supply source for Region C. Again, pursuant to Table 4D.2 of the Region C Plan, any of the Wright Patman water supply strategies would have substantially less impacts on the environment, as well as on agricultural and natural resources. These strategies are already in the Region C Plan and could simply be moved from an alternate strategy to a recommended strategy to meet any water demand shortages of TRWD.

As stated previously, there are ample supplies in the Plan as it exists now to cover any shortages of TRWD by sharing those water supplies. In each of the years that TRWD would have shortages (2040, 2050 and 2060), Dallas Water Utilities and North Texas Municipal Water District alone would have much more excess supply over demand in a drought of record than TRWD shortages.¹² Simply by sharing this excess, all entities of Region C would have ample supply without any change to the Region C Plan.

As set forth in the Region D Brief, the 2011 Region C Plan fails to comply with TWDB rules and state law regarding the impacts of Marvin Nichols Reservoir and the mitigation that would be required on the agricultural and natural resources of the state. The assertion in Region C's Brief that their plan is consistent with all applicable statutes and administrative criteria for regional water planning¹³ is incorrect. Likewise, the Region C Brief claims that the Marvin Nichols Reservoir is indispensable to the Plan, when clearly it is not – removing Marvin Nichols would put only one entity (TRWD) with a small deficit of water, such deficit being easily remedied by a

¹⁰ 2011 Region C Water Plan at 4D.5

¹¹ 2011 Region C Water Plan at 4E.21

¹² 2011 Region C Water Plan at p. 4E.11, 4E.18 and 4E.27

¹³ Region C Brief at p. 2

slight restructuring of the 2011 Region C Plan. Such a remedy would allow Region C to have every water supplier with more supply than demand throughout the planning cycle.

d. Texas courts have rejected Region C's claim that Region D's dispute with its Plan belongs at another agency.

In the court case leading to this matter, the Attorney General argued for the Board essentially what Region C claims in its brief, that the dispute is one for the TCEQ's permitting process. The AG raised this argument first in arguing that the Plaintiffs lacked standing. The Court of Appeals rejected the idea that Plaintiffs could not appeal the Board's decisions because the issues belong at another agency.

The Court of Appeals returned to this issue later in resolving the Board's claim that the trial court erred in reversing and remanding the Board's two decisions. The Court stated:

From the briefs, it appears that the Board has confused the planning process and the permitting process under the current approach to water planning. The planning process should encompass possible water strategies and the impact those water strategies will have on the agricultural and natural resources of the region involved, especially when an interregional transfer of water is involved. The Region D planning group in its Region D plan made a preliminary case that there is a substantial interregional conflict with Region C's plan, and that should be sufficient for the Board to require the two regional planning groups to attempt to resolve that conflict.¹⁴

Texas Courts did not agree the AG's argument that this dispute should be resolved at the permitting process. The Board must address the conflict issue and the underlying fact situation that led to the conflict. The Board must comply fully with the law and its rules.

3 Adjudication and Evidentiary Record

Region D agrees with Region C that the process for resolving the conflict and that for approval of a Region C plan is not adjudicatory in nature. The process that the Board is using is all that is required.

¹⁴ *Tex. Water Dev. Bd.*, 411 S.W.3rd at 575

Moreover, any court review of the decision on the conflict resolution or the Region C 2011 Plan will be handled by the courts as they did the original appeal of the Board's initial decisions on these matters. A reviewing court will determine if the Board has followed state law and its own rules. It will evaluate the Region C Plan that is then approved to see if it meets state law and the Board's rules on evaluating impacts to agricultural and natural resources. As Region D's initial brief explains, the 2011 Region C Water Plan, with the Marvin Nichols Reservoir, does not comply with state law and Board rules.

4. Resolution of the Conflict


Region C's brief concludes with a bold statement that there is only one reasonable way to resolve the conflict, Region C's way. Region C is wrong. The Board has a number of options, some of which are specifically set forth herein. The simplest option, however, is the one proposed by Region D. That approach will avoid future litigation and the resulting uncertainty for Region C water suppliers during the next two years, while also complying with state law and agency rules regarding the long-term protection of the agricultural and natural resources of the state.

RELIEF REQUESTED

The Region D Water Planning Group continues to request that the Board resolve the conflict by:

- 1) Leaving the Region D Water Plan of 2011 as is;
- 2) Advising Region C that before the Board can approve its 2011 plan, Region C must remove the Marvin Nichols Reservoir from its 2011 Plan because of the failure of Region C to show that the reservoir is consistent with the long-term protection of the state's agricultural and natural resources; and
- 3) Grant such further relief as the Board deems necessary.

Respectfully submitted,



Jim F. Thompson
Designated Representative for Region D