

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

June 19, 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 this Brief on behalf of Region D. I am sending you the brief by U.S. Mail and email and am also sending the Brief 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 Laughlin
Bret McCoy
Richard LeTourneau
Walt Sears
Joe Reynolds**

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

STATEMENT OF CASE

The Region C Water Planning Group (“Region C”) has listed Marvin Nichols Reservoir as a water management strategy in each of its Regional Water Plans. The Region D Water Planning Group (“Region D”) in its first Regional Water Plan in 2001 recommended Marvin Nichols as a water management strategy but after studying the impacts of the proposed reservoir, Region D later amended its 2001 Plan and rejected the Marvin Nichols Reservoir as a water management strategy. The 2006 and 2011 Region D Plans also rejected Marvin Nichols Reservoir as a water management strategy for any regional water plan or the State Water Plan because Region D held that Marvin Nichols Reservoir was not shown to be consistent with the long term protection of the state’s water resources, agricultural resources and natural resources as required by state law.

The Texas Water Development Board (“TWDB”) approved the Region D regional water plans with the rejections of the Marvin Nichols Reservoir, including the 2011 Region D Plan that explained in detail that there would be an interregional conflict if any other region included the Marvin Nichols Reservoir as a water supply strategy. TWDB then approved the 2011 Region C plan with that reservoir as a water supply strategy. TWDB did so taking the position that there was no interregional conflict because it did not find an over-allocation of a source of supply.

Several entities and individuals filed suit in District Court in January 2012 in District Court in Travis County in a case styled *Ward Timber, Ltd, et al v. Texas Water Development Board*. The District Court found that there was an interregional conflict. TWDB appealed the decision and on May 23, 2013, the 11th Court of Appeals affirmed the District Court’s decision, holding that an interregional conflict existed, that the planning process should encompass the impacts the proposed water management strategies will have on agricultural and natural resources of the region, and that any such conflict should be resolved in the manner that is most consistent with protecting the state’s agricultural and natural resources.¹

No further appeals were filed. Mediation was held in December 2013 between representatives of Region C and Region D and no agreement was reached. On May 19, 2014 Kevin Patteson, Executive Administrator of TWDB, issued a Final Recommendation to the Board. The Office of General Counsel of TWDB has requested the submission of legal briefs from Region D and Region C setting forth their positions.

¹ *Tex. Water Dev. Bd. v. Ward Timber, Ltd.*, 411 S.W.3rd 554 (Tex.App. – Eastland, no pet.)

ISSUE PRESENTED

How should TWDB resolve the interregional conflict

BRIEF ANSWER

TWDB should:

- 1) Adopt Region D's position that Region C has not shown that the inclusion of the Marvin Nichols Reservoir is consistent with the long-term protection of the state's agricultural and natural resources; and**
- 2) Require Region C to submit its 2011 plan with the Marvin Nichols Reservoir omitted.**

TWDB should do so because:

- 1) The Region C Plan fails completely at complying with the TWDB past rules and the rules currently in effect because it does not address the impacts on the agricultural and natural resources of the state by the Marvin Nichols Reservoir and the mitigation that would be required;**
- 2) The Region C Plan provides for supplies in excess of its demands and includes sufficient strategies without the Marvin Nichols Reservoir to meet its demands; and**
- 3) New 2016 Regional Water Plans will be submitted in 2 years and adoption of the recommendations of the Executive Administrator would unnecessarily delay use of the state funds for priority in Region C or Region D in the interim.**

Comments that have been submitted to TWDB adequately explain reason Number 2. TWDB is well aware of the problems with funding that would be created by ruling that Region C and/or D plans must be amended to comply with Texas law and TWDB rules, given that either region would have to meet the requirements of the 2012 rules, rather than those in effect at the time of the initial approvals of these plans.

These issues will, therefore, not be addressed in this brief.

ARGUMENT

The Region C Plan fails completely at complying with the TWDB past rules and the rules currently in effect because it does not address the impacts on the agricultural and natural resources of the state by the Marvin Nichols Reservoir and the mitigation that would be required.

Regional Water Plans and the State Water Plan are required to show that a water management strategy is consistent with the long term protection of the state's agricultural and natural resources.

Texas Water Code §16.051 (a) provides that "the state water plan shall.....protect the agricultural and natural resources of the entire state." §16.053(h)(7) states the TWDB may approve a regional water plan only after it has determined that:

- (A) All interregional conflicts involving that regional water planning area have been resolved;
- (B) The plan includes water conservation practices and drought management measures incorporating, at a minimum, the provisions of Tex. Water Code §11.1271 and §11.1272 (relating to water conservation and drought contingency plans); and
- (C) the plan is consistent with the long-term protection of the state's water resources, agricultural resources, and natural resources as embodied in the guidance principles adopted under Tex. Water Code §16.051(d).

TWDB's guidance principles are set forth in the current rules at 31 Tex.Admin.Code §358.3.² §358.3(4) provides that a regional water plan shall....protect the agricultural and natural resources of the regional water planning area. §358.3(9) provides for the consideration of all water management strategies "which are consistent with the long-term protection of the state's water resources, agricultural resources, and natural resources."

The Executive Administrator's Final Recommendation, issued May 19, 2014, seems to suggest that the TWDB defer its responsibility to require that each water management strategy be consistent with the long term protection of the state's agricultural and natural resources to other agencies. The recommendation also states that "at the planning stage, it should be sufficient that all regions affected by a particular strategy have identified those impacts." That is contrary to the requirements of Chapter 16, Texas Water Code and the rules of the TWDB.

Texas Water Code §16.051 and §16.053 require a finding that a water management strategy be consistent with the long term protection of the state's agricultural and natural resources. In addition, Courts have ruled on this issue. In *Texas Water Dev. Bd. v. Ward Timber, Ltd*, the Court stated 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."³

One of the key changes that Senate Bill 1 made to the water planning process was to create specific statutory criterion mandating that a regional water plan may not be approved by TWDB unless it is shown to be consistent with the long term protection of the state's agricultural and natural resources.⁴ In addition, the Regional Water Planning Guidelines set forth in Tex.Admin.Code §357.34 require that water management strategies contained in

² In 2012, the TWDB repealed its rules and guidance for approval of regional water plans and replaced them with the current set of rules which now apply to any approval of the Region C Water Plan or any amendment to any regional plan.

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

⁴ Tex. S.B. 1, 75th Leg., R.S., 1997 Tex.Gen. Laws 1010

a Regional Water Plan must include a quantitative reporting of environmental factors and impacts on agricultural resources. For each threat to agricultural resources and natural resources identified, the Plan must include a discussion of how that threat will be addressed or affected by the water management strategies evaluated.⁵

Table 4D.2 of the Region C Plan lists 29 major potentially feasible water management strategies for Region C. One of the recommended water management strategies in the Region C Plan, Marvin Nichols Reservoir, is listed as “high” on environmental factors, agricultural impacts, and third party impacts and “medium high” on impacts to other natural resources. Marvin Nichols Reservoir grades out highest (most harmful) of any of the 29 potentially feasible water management strategies listed in Table 4D.2 of the Region C Plan with respect to the adverse impacts on the environment, agriculture, natural resources and third party impacts.

The Region C Plan totally fails to address these negative impacts, much less give a quantitative reporting on these impacts. It does not provide, as has always been required for regional plans, a discussion of how the threats to agricultural and natural resources will be addressed or affected by the water management strategies evaluated.

Chapters 7.3 and 5.2 of the Region C’s plan contains a discussion on “Consistency with Protection of Agricultural Resources.” The Region C Plan makes a finding that the Plan will protect agricultural water use within Region C, but it does not address the actual impacts outside of Region C. The following are the only statements made with respect to agricultural impacts outside of Region C:

Chapter 7.3:

“The area of the proposed Marvin Nichols Reservoir site has some agricultural activity, including cattle raising. The area is also known to have some hunting and leases for game animals.”

Chapter 5.2:

“The potential impacts to agricultural and rural areas are limited to the loss of land from inundation of new reservoirs. The total rural acreage that would be flooded under the 2011 Region C Water Plan is 116,300 acres. Of this amount, many acres are bottom lands that are not currently used for agriculture. Impacts from new reservoirs will be mitigated as part of the permitting process. New reservoirs also can stimulate the rural economy through new recreational business and local improvements. The new reservoirs will provide a new water source for rural activities. Each of the proposed reservoir sites includes water set aside for local water supplies.

Possible third party impacts include loss of land and timber, impacts to existing recreational business on existing lakes due to lower lake levels, and impacts to recreational stream activities. Economic studies have been conducted for two of the

⁵ 31 Tex.Admin.Code §357.34(d)(5)

reservoirs proposed for Region C, and in each case they indicate a significant new economic benefit for the region of origin.”

Thus, the Region C Plan does not even treat timber as an agricultural resource, even though it is a major agricultural crop in the Region D area. The Plan addresses timber as a third party impact, not as agricultural resources that will be inundated. Thus, there is no assessment of the impacts on timber production.

The Plan also does not take into account impacts from the acreage which will be taken out of agricultural production, including timber production, as required mitigation. A fuller explanation of the mitigation issue is provided below.

There is clearly no effort to quantify or otherwise evaluate the impacts on agricultural resources (or other natural resources). There is nothing in the Plan that would allow TWDB to make its independent consideration of the impacts of the Marvin Nichols Reservoir on the state’s agricultural and natural resources. To the extent that the Region C Plan would have significant impacts to agricultural and natural resources within the state, those impacts must first be identified, which they are not in the Region C Plan, then quantitatively reported and addressed, which again they are not. The Region C Plan has failed to assess the impacts the proposed reservoir would have in the region where it is to be constructed and has therefore not met its statutory criteria for adoption by the State.

The Region D Plan discusses the impacts in detail and concludes that Marvin Nichols Reservoir is inconsistent with the state’s long-term interests in the protection of its water resources, agricultural resources, and natural resources. The Region D Plan concluded that the Reservoir cannot be approved in any regional plan. Thus, Region D found that approval of a regional water plan including the Marvin Nichols Reservoir would conflict with Texas law and would conflict with the Regional D Plan.

TWDB approved the Region D Plan with those findings.

The Region D Water Plan contains, in Chapter 7.6, four (4) pages of detailed analysis of the impacts of Marvin Nichols Reservoir on water resources, agricultural resources, and natural resources. Region D’s analysis of agricultural impacts includes timber, farming, ranching and other related industries. It includes a review of four (4) separate studies that have been conducted regarding potential impacts. It also reviewed impacts on natural resources and environmental factors. The findings of the Region D Planning Group are summed up in its conclusion in Paragraph 7.7:

“Due to the significant negative impacts upon environmental factors, agricultural resources/rural areas, other natural resources, and third parties, Marvin Nichols 1 Reservoir should not be included as a water management strategy in any 2011 regional water plan or the 2012 State Water Plan. Accordingly, inclusion of the Marvin Nichols 1 Reservoir in any regional water plan would be inconsistent with the Region’s efforts to ensure the long-term protection of the State’s water resources, agricultural resources and natural resources, also violating §16.051 and §16.053 of the Texas Water Code.”

In contrast, the Region C Plan does not make any such assessment or provide data with which TWDB can do so. Yet, Texas law and TWDB rules require such an assessment for proposed strategies such as the Marvin Nichols Reservoir.

The only assessments before TWDB from the regional plans reflect that Marvin Nichols Reservoir is not consistent with protecting the agricultural and natural resources of the State.

The impacts resulting from the loss of important agricultural and natural resources in Region D as mitigation for the Marvin Nichols Reservoir was not addressed in the Region C Plan.

It is likely that most, if not all, mitigation for lands that would be inundated by the Marvin Nichols Reservoir will be in Region D and because the Region C Plan does not even address this issue, the mitigation impacts alone will require TWDB to reject the Region C Plan as proposed including the Marvin Nichols Reservoir.

The guidelines for mitigation requirements are set forth in the Code of Federal Regulations. §230.93(a) provides, in part, that: “The district engineer must determine the compensatory mitigation to be required in a DA permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. When evaluating compensatory mitigation options, the district engineer will consider what would be environmentally preferable. In making this determination, the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory project.”⁶ With respect to the location of the mitigation, the guidelines state that “in general, the required compensatory mitigation should be located within the same watershed as the impact site.”⁷ Further, “in-kind mitigation is preferable to out-of-kind mitigation because it is most likely to compensate for the functions and services at the impact site.”⁸ In addition, the guidelines provide: “The district engineer must use a watershed approach to establish compensatory mitigation requirements in DA permits to the extent appropriate and practical.”⁹

Based on the rules and guidelines governing the federal entities that will ultimately decide the amount and location of the required mitigation, the mitigation will be forested lands (in-kind mitigation) located in the same watershed (Sulphur River) as the impacted area. As reflected in the Region D Plan, that is exactly what happened previously with the Jim Chapman Reservoir on the Sulphur River.¹⁰ In that case, a site with 5,900 acres of bottomland hardwood acreage required a total mitigation of 31,980 acres throughout Northeast Texas in the Sulphur River watershed.

The Executive Administrator’s Final Recommendation contains a recommendation that Region C should be encouraged to share mitigation for any project developed in Region D in proportion to the interest Region C entities have in the water produced by that project.

⁶ 40 C.F.R. §230.93(a)(2010)

⁷ 40 C.F.R. §230.93(b)(2010)

⁸ 40 C.F.R. §230.93(e)(2010)

⁹ 40 C.F.R. §230.93(c) (2010)

¹⁰ 2011 Region D Water Plan §7.6.2(4)

Although this recommendation is appreciated, it fails to console Region D or others who would be harmed by the Marvin Nichols Reservoir for the following reasons:

- 1) As discussed previously, it runs contrary to the rules, guidelines, and practices of the federal entities that will have to sign off on the location and amount of mitigation that will be required for a project; and
- 2) There is no means of enforcement. Region C will not be required to provide lands for mitigation, even if federal law allowed the designation of lands for mitigation in the area of Region C.

As previously set forth, the Region C Plan states in Chapter 5.2 that “the potential impacts to agricultural and rural areas are limited to the loss of land from inundation of new reservoirs.” That contention is patently untrue.

Under all studies performed on this issue, it is acknowledged that substantial acreage will be required to mitigate the environmental impacts of this proposed reservoir. These studies and their mitigation impacts are discussed in the Region D Plan¹¹ and a brief summary of those findings are set forth in this paragraph. A joint study by the Texas Parks and Wildlife Department and the United States Fish and Wildlife Service concluded a minimum of 163, 620 acres would be required for mitigation and that number could be as high as 645,578 acres. A study of the Texas Forest Service concluded the total acres affected by Marvin Nichols Reservoir could be as low as 258, 000 acres or as high as 820,000 acres. Even a study commissioned by the proponents of the reservoir, despite being criticized in the Region D plan on its methodology, estimated agricultural land loss between 165,000 and 200,000 acres. As the Court states in *Texas Water Dev. Bd v. Ward Timber, Ltd*, “even at the planning stage, it is evident that the impacts would be substantial.”¹²

The Region C Plan states the potential third party impacts include loss of land and timber, clearly confusing the fact that timber and agricultural land impacts should be addressed under impacts to agricultural resources.

By way of clarification, Texas Agriculture Code §2.001 defines “agriculture” as:

- 1) the cultivation of the soil to produce crops;
- 2) horticulture, floriculture, or viticulture;
- 3) forestry; or
- 4) the raising or keeping of livestock or poultry.

As stated in the Region D Plan:

“The Texas Forest Service Study estimated forest industry losses based on three (3) separate mitigation options. The low end impacts were estimated to be an annual reduction of \$51.18 million output, \$21.89 million value-added, 417 jobs and \$12.93 million labor

¹¹ 2011 Region D Water Plan §7.6.1

¹² *Tx. Water Dev. Bd.*, 411 S.W. 3rd at 559

income. The high end impacts were estimated to be annual loss of \$163.91 million industry output, \$70.10 million value-added, 1334 jobs and 41.4 million labor income.”¹³

The proposed Marvin Nichols Reservoir would flood 66,000 to 70,000 acres across four (4) counties in Northeast Texas, including over 45,000 acres of forested lands and requiring extensive lands to be set aside for mitigation purposes. For the TWDB to take the approach of waiting for other agencies to make a determination regarding the impacts to agricultural and natural resources, as it appears the Executive Administrator is suggesting, would be a failure to comply with the established law that the State Water Plan and Regional Water Plans protect the agricultural and natural resources of the state.

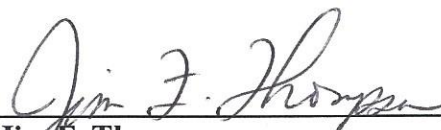
In *Texas Water Dev. Bd v. Ward Timber, Ltd*, the Court stated that if the two regions cannot agree, “the Board is in a position to resolve the conflict in the manner that is most consistent with protecting the state’s agricultural and natural resources.”¹⁴ In order to comply with this holding, based on the evidence before the TWDB, Marvin Nichols Reservoir should be removed from the Region C Water Plan.

RELIEF SOUGHT

The Region D Water Planning Group requests that TWDB rule as follows:

- 1) Leave the Region D Water Plan of 2011 as is;
- 2) Direct Region C to remove the Marvin Nichols Reservoir from its 2011 Plan based on the failure to show that it 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

¹³ 2011 Region D Water Plan §7.6.2

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