

**IN RE THE INTERREGIONAL
CONFLICT BETWEEN THE REGION
C AND REGION D REGIONAL
WATER PLANNING GROUPS**

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**BEFORE THE TEXAS
WATER DEVELOPMENT BOARD**

**BRIEF OF THE REGION C REGIONAL WATER PLANNING GROUP ON
THE RESOLUTION OF INTERREGIONAL CONFLICT**

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I. The Texas Water Development Board should resolve any conflict regarding the proposed Marvin Nichols Reservoir water supply strategy by supporting Region C's position on the project.

The Texas Water Development Board has broad discretion in resolving interregional conflicts that cannot be resolved by the pertinent regions.¹ The mediation between the Region C and Region D Regional Water Planning Groups² regarding the proposed Marvin Nichols Reservoir project ("Marvin Nichols") was unsuccessful. The Board must now resolve the conflict.³ May the Board resolve the conflict by supporting Region C's position on the Marvin Nichols Reservoir project?

It unquestionably may, and it should.

II. The law and sound public policy direct the Texas Water Development Board to support the position of Region C regarding the proposed Marvin Nichols Reservoir water supply strategy.

The standard by which the Board must resolve the conflict is one of reasonableness.⁴ Region C's recommendation of Marvin Nichols as a water supply strategy is consistent with all applicable statutory and administrative criteria for regional water planning. Conversely, Region D's position that Marvin Nichols should be excluded from the 2011 Region C Regional Water Plan (and, therefore, the 2012 State Water Plan) is inconsistent with the applicable statutory and administrative criteria for regional water planning. As discussed in greater detail below, the only reasonable way the Board can resolve this conflict is to support Region C's position on Marvin

¹ TEX. WATER CODE § 16.053(h)(6).

² The Region C and D Regional Water Planning Groups, Regional Water Planning Areas, and Regional Water Plans will be interchangeably referred to herein as "Region C" and "Region D", respectively.

³ TEX. WATER CODE § 16.053(h)(6).

⁴ See *Gilder v. Meno*, 926 S.W.2d 357, 365 (Tex. App.—Austin 1996, writ denied).

Nichols. Adopting Region D's recommendation would simply be unreasonable, if not arbitrary, capricious, or unlawful.⁵

A. Marvin Nichols is an indispensable component of the Region C Regional Water Plan because there are no reasonable alternatives to such a large potential source of supply.

The Marvin Nichols Reservoir project is not a new concept.⁶ The proposed reservoir has been recommended in some form or another in every State water plan since 1968.⁷ Even as recently as 2001, both Region C and Region D agreed that Marvin Nichols should be constructed to meet the growing water demands of the North Texas region.⁸

The reason is straightforward. It is hardly a secret—and not subject to any reasonable debate—that Marvin Nichols accounts for approximately 28 percent of the additional water supply that must be developed to bridge Region C's projected 50-year supply-demand gap.⁹ With an anticipated annual firm yield for Region C of approximately 489,840 acre feet, the Marvin Nichols Reservoir project is unrivaled in scale of reliable yield.¹⁰ As the 2011 Region C Regional Water Plan ("Region C plan") demonstrates, the Region C stakeholders have been unable to find any meaningful comparison in their efforts to identify a reasonable alternative to the Marvin Nichols Reservoir project.

In response to critics that suggest Region C should consider more conservation, water reuse, and expansion of existing supplies to address its projected water supply deficit, the 2011

⁵ See *G.E. American Commc'n v. Galveston Cent. Appraisal Dist.*, 979 S.W.2d 761, 765 (Tex. App.—Houston [14th Dist.] 1998, no pet. h.).

⁶ See Texas Water Development Board, *The State Water Plan*, November 1968, at 53.

⁷ *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 474 (Tex.2012).

⁸ Executive Administrator's Recommendation Memorandum to the Board Members, May 19, 2014, at 2.

⁹ TEX. WATER DEV. BD., 2012 WATER FOR TEXAS (2012), http://www.twdb.state.tx.us/publications/state_water_plan/2012/2012_SWP.pdf, at 46; 2011 REGION C WATER PLAN, Vol. 1, at 47-48 [hereinafter *2012 State Water Plan*].

¹⁰ FREESE AND NICHOLS, INC., ET AL., 2011 REGION C WATER PLAN (2011), https://www.twdb.state.tx.us/waterplanning/rwp/plans/2011/C/Region_C_2011_RWPV1.pdf Vol. 1, at 4D.8 [hereinafter *2011 Region C Water Plan*].

Region C Regional Water Plan includes the development of more municipal supplies through conservation and reuse than any other regional water plan in Texas.¹¹ Simply stated, the Marvin Nichols Reservoir project is a critical component of Region C's plan for the future.¹²

Conversely, Region D has no anticipated water supply deficit to overcome. In fact, the Region D stakeholders all seem to agree that the volume of their existing supplies will exceed their anticipated demands for the next 50 years.¹³ Indeed, Region D does not complain that it needs the water supplies to be provided by Marvin Nichols Reservoir to satisfy any unmet demands. Nor does it complain that the development of Marvin Nichols Reservoir will somehow undercut the existing supplies in that region.

The importance of the Marvin Nichols Reservoir to the economy of North Texas is truly indisputable.¹⁴ The North Texas economy is, in turn, vitally important to Texas and the national economy as a whole.¹⁵ Dallas-Fort Worth is the fourth largest metropolitan area in the nation.¹⁶ The population of the North Texas region has grown by 2.7 percent annually, on average, from 1940 to 2008, and it is still growing rapidly.¹⁷ One example of Region C's robust economy is the recent decision of the North American subsidiary of Toyota, the largest automaker in the world, to move its corporate headquarters, and approximately 4,000 employees, to North Texas within

¹¹ See *2011 Region C Water Plan*, *supra* note 10, at ES.7-8. A graph illustrating relative total current and planned reuse among all regions is attached.

¹² See *2012 State Water Plan*, *supra* note 9, at 47-48.

¹³ *Id.* at 53.

¹⁴ *2011 Region C Water Plan*, *supra* note 10, at ES.7.

¹⁵ Consider that the Dallas/Fort Worth metropolitan area has the largest concentration of corporate headquarters in the United States. Steve Brown, *Vacant Plano building to become data center*, Dallas Morning News, May 17, 2011, <http://www.dallasnews.com/business/commercial-real-estate/20110517-vacant-plano-building-to-become-data-center.ece>.

¹⁶ NORTH TEXAS COMMISSION, *Top Metropolitan Areas*, <http://www.ntc-dfw.org/northtexas/poplargestmetro.html> (last visited June 10, 2014).

¹⁷ *2011 Region C Water Plan*, *supra* note 10, at 1.1.

the next two years.¹⁸ Failure to meet water supply demands from entities like Toyota and their employees would potentially result in denials of service from water suppliers, which would chill economic growth throughout Region C, and possibly throughout all of Texas.

If Region C does not develop sufficient additional water supply to meet its anticipated water demands, it stands to suffer a devastating \$64 billion annual impact to its economy.¹⁹ Marvin Nichols represents over a quarter of the water needed by Region C to address the projected shortfall in water supplies during the 50-year planning period.²⁰ This enormous volume of water cannot be replaced in any reasonably efficient way.

B. The Board may resolve the conflict with Region D by supporting Region C's position on Marvin Nichols because the Legislature has granted the Board broad discretion to do so.

Chapter 16 of the Texas Water Code directs the Board to “prepare, develop, formulate, and adopt a comprehensive state water plan that incorporates the regional water plans” every five years.²¹ Further,

“The state water plan shall provide for the orderly development, management, and conservation of water resources and preparation for and response to drought conditions, in order that sufficient water will be available at a reasonable cost to ensure public health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the entire state.”²²

State water planning begins at the regional planning group level, ensuring that the process is shaped to a large degree by the economic interests prevailing in the designated regional planning areas. Consequently, the State Water Plan is largely a compilation of the 16 regional water plan

¹⁸ Steve Brown, *Toyota's Plano move to bring 4,000 jobs from California, New York, Kentucky*, Dallas Morning News, April 28, 2014, <http://www.dallasnews.com/business/business-headlines/20140428-toyota-s-plano-move-to-bring-4000-jobs-from-california-new-york-kentucky.ece>.

¹⁹ *2011 Region C Water Plan*, *supra* note 10 at ES.7.

²⁰ *2012 State Water Plan*, *supra* note 9, at 47-48.

²¹ TEX. WATER CODE § 16.051(a).

²² *Id.*

recommendations. The criteria by which regional water plans are to be developed are also outlined in Chapter 16.²³ The Board is charged with approving a Regional Water Plan, but only after determining that 1) all interregional conflicts involving a regional water planning area have been resolved, 2) the plan includes appropriate water conservation and drought contingency provisions, and 3) the plan is consistent with long-term protection of the state's water resources, agricultural resources, and natural resources as embodied in guidance principles adopted by the Board.²⁴ Where an interregional conflict exists, "the board shall facilitate coordination between the involved regions to resolve the conflict. If conflict remains, the board shall resolve the conflict."²⁵

After initially recommending the Marvin Nichols Reservoir project in its 2001 Regional Water Plan, Region D later changed that plan to reflect a newfound opposition to the project.²⁶ That opposition persists to date.²⁷

As observed by the Executive Administrator in his recommendation memorandum, the conflict falls outside of the Board's current definition of a conflict. The Eastland Court of Appeals has determined that an interregional conflict exists, nevertheless.²⁸ It must be resolved pursuant to Tex. Water Code § 16.053. The Texas Legislature has granted the Board broad discretion in resolving interregional conflicts when a coordinated resolution cannot be achieved. "If an interregional conflict exists, the board shall facilitate coordination between the involved

²³ *Id.* § 16.053(e).

²⁴ *Id.* § 16.053(h)(7).

²⁵ *Id.* § 16.053(h)(6).

²⁶ Executive Administrator's Recommendation Memorandum to the Board Members, May 19, 2014, at 2.

²⁷ BUCHER WILLIS & RATLIFF CORPORATION, ET AL., REGIONAL WATER PLAN PREPARED FOR REGION D – NORTH EAST TEXAS REGIONAL WATER PLANNING GROUP (2010), https://www.twdb.state.tx.us/waterplanning/rwp/plans/2011/D/Region_D_2011_RWPV1.pdf, Vol. 1, at 8-33, 8-36 [hereinafter *2011 Region D Water Plan*].

²⁸ *Ward Timber*, 411 S.W.3d at 575.

regions to resolve the conflict. If conflict remains, *the board shall resolve the conflict.*²⁹ This provision cannot be read as anything other than an investiture in the Board of full discretion in resolving interregional conflicts.

The Executive Administrator identified three alternative options for resolution:

- 1) Reduce the proposed footprint of Marvin Nichols;
- 2) Remove Marvin Nichols from the Region C plan for the current planning cycle; and
- 3) Retain Marvin Nichols as a recommended strategy, instruct Region C to revise its plan to acknowledge the steps taken to resolve the conflict, and direct Region D to remove references to the conflict from the Region D Regional Water Plan.

The Executive Administrator rejected option one. Region C agrees with the Executive Administrator's position here. The first option simply would not resolve the conflict. Region D is particularly concerned with the alleged loss of agricultural resources consumed by the footprint of the reservoir and potential related mitigation areas. Assuming such losses would occur, a smaller reservoir would still consume those resources, while serving only to create a greater deficit in Region C planning. Meanwhile, the Region C plan would be undermined because its projected demands would not be satisfied.

The Executive Administrator also rejected option two. Region C agrees with the Executive Administrator's position here. The second option is simply not reasonable because efforts to replace Marvin Nichols in the Region C plan would be extraordinarily costly both economically and environmentally.

The Marvin Nichols Reservoir project is obviously not the only water supply strategy identified or recommended in the Region C plan. The plan identifies a number of strategies for the development of new large supplies to meet projected demands of numerous water suppliers and users in North Texas. The Executive Administrator's recommendation names a few of those

²⁹ TEX. WATER CODE § 16.053(h)(6) (emphasis added).

supplies: George Parkhouse Reservoirs I and II, Toledo Bend Reservoir, and increasing the conservation level of Wright Patman Lake. However, none of the strategies identified in the Region C plan, including those mentioned by the Executive Administrator, could serve to replace Marvin Nichols. For starters, the Toledo Bend and Wright Patman projects are already recommended strategies for new water development in Region C.³⁰ The George Parkhouse projects would capture water already allocated to other recommended strategies, including Marvin Nichols Reservoir,³¹ but would yield less than half the amount of supply for Region C than would Marvin Nichols.³² Similarly, obtaining water from Lake Texoma is already a recommended supply³³ and, as such, cannot substitute for Marvin Nichols. While additional water could be obtained from Lake Texoma in the future, reallocating the currently unused water in that reservoir would literally take an act of Congress.³⁴ Region C simply cannot plan on such an uncertain supply.

Under the second option, rather than constructing one reservoir, Region C would be forced to recommend construction or expansion of a series of reservoirs and other infrastructure that would be considerably more expensive and would be more environmentally costly than the current proposal. That environmental toll is unnecessary because of Marvin Nichols. It would be unreasonable to shift the environmental impact of Marvin Nichols to one of greater scale at greater expense. The costliness of alternatives in comparison with Marvin Nichols makes them impractical if not unfeasible. The Region C plan includes every feasible water supply strategy available to meet the needs of the region. Stated simply, without Marvin Nichols, the Region C plan would not be nearly as good of a plan.

³⁰ *Region C Water Plan*, *supra* note 10 at 4D.7-10.

³¹ *Id.* at 4D.15

³² *Id.* at 4D.5-6.

³³ *Id.* at 4D.12.

³⁴ *Id.* at 4D.5.

The Executive Administrator recommends the third option. Region C agrees with the Executive Administrator's position here. Retaining Marvin Nichols Reservoir as a recommended strategy for Region C is the only feasible way to resolve the conflict in a manner that provides sufficient water to ensure public health, safety, and welfare concerns in Region C, furthers economic development in both Regions C and D, and protects the agricultural and natural resources of the entire state.³⁵

The Eastland Court of Appeals emphasized that the Board, in resolving the interregional conflict, should act in the manner that is most consistent with protecting the state's agricultural and natural resources.³⁶ The Court also recognized that the Legislature intended for the Board to balance water planning strategies with impacts on agricultural, economic, and natural resources.³⁷ The conflict between Regions C and D presents the Board with an opportunity to do precisely that—balance water supply needs, economic interests, agricultural resources, and natural resources. While Marvin Nichols will doubtlessly impact some amount of agricultural and natural resources—as any new reservoir would, the vast majority of agricultural and natural resources in Region D will not be affected by the project. Conversely, the elimination of Marvin Nichols as a water supply strategy would severely impact the economy of the entire Region C planning area and the state.

The Executive Administrator's recommendation memorandum suggests that Marvin Nichols could be treated as an alternative strategy pending an accelerated evaluation of developing other water supply strategies, including Wright Patman Reservoir, Toledo Bend Reservoir, and George Parkhouse Reservoir. Those strategies are only included as alternatives in the Region C plan because they are considerably more costly both economically and

³⁵ See TEX. WATER CODE § 16.051(a).

³⁶ *Ward Timber*, 411 S.W.3d at 575.

³⁷ *Id.* at 570.

environmentally than Marvin Nichols. Again, shifting the economic and environmental tolls of Marvin Nichols to projects that would result in greater economic and environmental cost for the same amount of water is simply unreasonable. The Region C plan already identifies every feasible water supply strategy it anticipates will be available to meet expected demands. Additionally, removing Marvin Nichols from the 2012 State Water Plan, or even converting it to an alternative strategy, would likely permanently undermine the project because it could become eligible for federal mitigation bank permitting.³⁸ Were that to happen, Marvin Nichols could succumb to the same fate as the Lake Fastrill and Waters Bluff Reservoir projects.³⁹

The Executive Administrator also recommends that the Board instruct Region C to accelerate consideration of alternative strategies to meet needs where uncertainties exist regarding current strategies. So long as Marvin Nichols remains part of the Region C and State Water Plans, no uncertainties exist. The purpose of the regional planning process is to assure adequate water supplies for a region through the drought of record. Region C has done that. Moreover, Region C has identified potential alternative strategies to ensure that water remain available even if a drought were to persist to a point worse than the drought of record. Nevertheless, the five year regional planning cycle continues to require Region C to conduct a near constant process of evaluating the feasibility of every reasonable alternative supply strategy.

C. The regional water planning process is not the legally proper venue for challenging Marvin Nichols because the Legislature has delegated that responsibility exclusively to the Texas Commission on Environmental Quality.

The Board is the state agency responsible for water planning and administering water financing in the state.⁴⁰ The Board does not regulate water use. As such, the Board is not charged

³⁸ See *Hearts Bluff*, 381 S.W.3d at 475.

³⁹ See *Sabine River Auth. v. U.S. Dep't of the Interior*, 951 F.2d 669, 673 (5th Cir. 1992); see *City of Dallas. v. Hall*, 562 F.3d 712, 716 (5th Cir. 2009).

⁴⁰ TEX. WATER CODE § 6.011.

with determining the technical merits of any particular water supply project. Rather, the Board is charged by the Legislature with establishing guidance principles for the development of the regional water plans and with reviewing the plans to determine whether they comply with the requirements of Tex. Water Code § 16.053(e).⁴¹ If the Board finds that a regional water plan was developed in accordance with the statutory requirements and administrative guidance principles, then it incorporates the recommended strategies into the state water plan making those strategies eligible for funding assistance.⁴²

Region D's opposition to Marvin Nichols amounts to nothing more than a protest of the merits of Marvin Nichols. The Board is not an adjudicative agency that may hear disputes over proposed water supply projects. The Legislature expressly and exclusively vested the Texas Commission on Environmental Quality with jurisdiction to consider such disputes.⁴³ An entity proposing the construction of a recommended water supply project must seek a permit from the TCEQ and, if authorized by TCEQ, may begin construction without the Board's further involvement or approval.⁴⁴ A challenge to the merits of a particular water supply project is a wholly separate procedure from regional and state water planning.

The Legislature crafted a set of criteria by which each regional water plan shall be developed.⁴⁵ The Legislature directed that each plan:

- 1) be consistent with guidance principles adopted by the Board;
- 2) provide information based on data provided by the Board;
- 3) be consistent with desired future conditions for groundwater;

⁴¹ *Id.* § 16.051(a), (d).

⁴² *Id.* §§ 16.051(a), 16.053(h)(7).

⁴³ *See Subaru of America, Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002) (explaining that exclusive jurisdiction rests with an administrative agency when a pervasive regulatory scheme, such as water rights permitting, indicates that the Legislature intended that scheme to be the exclusive means of remedying a problem); TEX. WATER CODE §§ 5.013(a)(1), 11.121-.134.

⁴⁴ *See* TEX. WATER CODE §§ 11.121-.134.

⁴⁵ *See id.* § 16.053(e).

- 4) identify a) each source of supply in the planning area, b) factors specific to each source of supply related to drought response, c) actions to be taken as part of the response, and d) existing major water infrastructure facilities to be used during water shortage;
- 5) have specific provisions for water management strategies during drought;
- 6) include but not be limited to consideration of a) any existing water or drought planning efforts, b) approved groundwater conservation district management plans, c) all potentially feasible water management strategies for the region, d) protection of existing water rights in the region, e) regional management of water supplies, f) provision for environmental needs, g) provisions for interbasin transfers, h) voluntary water transfer within the region, and i) emergency transfer of water;
- 7) identify stream segments of unique ecological value and unique value for the construction of reservoirs;
- 8) assess the impact of the plan on ecologically unique stream segments;
- 9) describe the impact of proposed projects on water quality; and
- 10) include information on a) projected water use and conservation, and b) the implementation of state and regional water plan projects.⁴⁶

The Legislature did not include opposition to otherwise feasible strategies for other regions among these criteria. Similarly, the Board has adopted 28 guidance principles for state and regional water planning. It developed the principles subject to an explicit instruction from the Legislature.⁴⁷ Like the Legislature's directives for regional water plans, the Board's guidance principles do not include voicing opposition to feasible water supply strategies in other regional water plans.⁴⁸

The statutory construction rule of *ejusdem generis* dictates that lists in a statute refer only to persons or things of the same kind or class.⁴⁹ This includes lists that begin with the term "including but not limited to . . ." ⁵⁰ Here, even though the Legislature used the term "not limited to" when outlining the items which must be considered by regional water planning groups during

⁴⁶ *Id.* § 16.053(e).

⁴⁷ *Id.* §§ 16.051(d), .053(e).

⁴⁸ See 31 Tex. Admin. Code § 358.3; see also *id.* § 357.20 (adopting state water planning guidance principles for regional water planning).

⁴⁹ *City of Houston v. Cook*, 596 S.W.2d 298, 299.

⁵⁰ *Id.*

the planning process, the provision should not be read to include items that are dissimilar from those included.⁵¹ All of the items listed by the Legislature to be considered and included in the regional water planning process concern evaluation of feasible water supply projects for the relevant regional water planning area, not contravention of particular strategies recommended by other regional water planning groups. Excluding Marvin Nichols from the 2011 Region C plan and the 2012 State Water Plan would require an interpretation that the Legislature intended that regional water plans include protests to another region's feasible water supply strategies. For the reasons noted above, such an interpretation is not in keeping with the spirit of Section 16.053, and would be unreasonable.⁵²

Indeed, under that interpretation, the Board would then have to determine that Region C altogether failed to adhere to the requirements of Section 16.053(e) and the Board's guidance principles in order to exclude Marvin Nichols from the 2012 State Water Plan. However, Region C has clearly adhered to the statutory requirements and administrative guidelines. The only reasonable action the Board may take is to support Region C's recommendation of including Marvin Nichols as a strategy in the 2011 Region C plan and the 2012 State Water Plan.

Supporters of Region D's position have insisted that their purpose is merely "to have the Board resolve conflicts with a goal of a more complete and *balanced* water plan."⁵³ But Region D takes the position that no reservoirs should be built because they are inconsistent with protection of agricultural, environmental, and natural resources.⁵⁴ The Region D Regional Water Plan states that "Region D has identified other areas . . . where additional . . . reservoirs could be developed . . . to provide water for other regions" Unfortunately, the Region D Regional

⁵¹ *See id.*

⁵² *See id.*

⁵³ *Ward Timber*, 411 S.W.3d at 560 (emphasis added).

⁵⁴ *2011 Region D Water Plan*, *supra* note 27, at 8-33.

Water Plan disregards the reality that Region C has already considered every feasible strategy. Instead, Region D advocates that reservoirs should only be a last resort after any other conceivable strategy is pursued. But that belies Region D's ultimate recommendation "that no reservoir sites in the North East Texas Region be designated as unique reservoir sites" because "pursuing *any new reservoir* in the Sulphur River Basin as a water management strategy or an alternative strategy should be viewed as directly inconsistent with the protection of natural resources within the region"⁵⁵ Such a position does not result in balance. Instead, such a position represents a wholesale rejection of otherwise feasible strategies considering, in a vacuum, only a few of the criteria required by the Legislature and the Board for regional water planning. The Board cannot reasonably accept Region D's position because doing so is not provided for by law and is not in keeping with the criteria required for regional and state water planning.

III. This proceeding is not an adjudication of rights that requires the Board to develop an evidentiary record.

The historical litigiousness of some within Region D should caution the Board to be mindful of the likely standard of review on appeal of a decision in this matter. Judicial review of the Board's resolution of an interregional conflict will likely be governed by the so-called "substantial evidence *de novo*" standard.⁵⁶ That is, the reviewing court may conduct an evidentiary hearing on the limited issue of whether the facts, as they existed at the time of the agency's decision, reasonably lead to the decision ultimately reached by the agency.⁵⁷

⁵⁵ *Id.*

⁵⁶ *Gilder*, 926 S.W.2d at 367; Ronald L. Beal, Texas Administrative Practice and Procedure § 13.6, at 13-39 (2009).

⁵⁷ *Board of Trustees of Big Spring Fireman's Relief & Retirement Fund v. Firemen's Pension Comm'r*, 808 S.W.2d 608, 612 (Tex. App.—Austin 1991, no writ).

A substantial evidence *de novo* standard does not require the Board to develop an evidentiary record supporting its decision.⁵⁸ The reviewing court, instead, serves as a fact-finder on the narrow issue described above. The court owes the same deference to the Board as it would if it were bound by the more traditional substantial evidence standard of review.⁵⁹ Specifically, the court may only overrule the Board's decision if it is found to be arbitrary, capricious, or unlawful, based on the facts as they exist at the time of the decision.⁶⁰ Similarly, the court may not simply substitute its judgment for that of the Board.⁶¹ The Board, however, need not build an administrative record.⁶² If the court finds that the Board's decision was reasonable considering all relevant facts, then it must uphold the Board's decision.⁶³

IV. There is only one reasonable way to resolve this conflict.

Opponents of Marvin Nichols seek "only the opportunity for the Region D water planning group to negotiate with the Region C water planning group, under the guidance of the Board, to see if there is a more acceptable alternative to Region D than the Marvin Nichols Reservoir."⁶⁴ The purpose of their lawsuit against the Board was "only to require the Board to follow the procedures in Section 16.053(h)(6)."⁶⁵ They recognize "that negotiations may fail and that the Board may resolve the conflict in favor of Region C."⁶⁶ Seemingly, the Region D plaintiffs have now received all they purported to seek with respect to Region C's reliance on Marvin Nichols in the 2011 Region C Regional Water Plan.⁶⁷

⁵⁸ See *Gilder*, 926 S.W.2d at 365.

⁵⁹ *Id.* at 371.

⁶⁰ *Id.*

⁶¹ *G.E. American*, 979 S.W.2d at 765.

⁶² See *Gilder*, 926 S.W.2d at 365.

⁶³ See *id.* at 365-366.

⁶⁴ *Ward Timber*, 411 S.W.3d at 559-60.

⁶⁵ *Id.* at 560.

⁶⁶ *Id.* at 562.

⁶⁷ See *id.* at 554.

Negotiations to resolve this conflict have been unsuccessful. The Board now must reasonably resolve the conflict. For the reasons cited above, the only reasonable resolution is for the Board to support Region C's recommendation that Marvin Nichols be included in the 2011 Region C Regional Water Plan and the 2012 State Water Plan. Any other action would not be in keeping with the criteria for state and regional water planning and would be contrary to applicable law. Region C respectfully recommends that the Board retain the Marvin Nichols Reservoir project in the 2011 Region C Regional Water Plan and the 2012 State Water Plan, and take all other actions deemed necessary by the Board to further and finally resolve the interregional conflict.