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North Texas Municipal Water District

April 12, 2018

Legislative Hearing on H.R._____, the “Permitting Litigation Efficiency Act of 2018,” and H.R. 4423 “North Texas Water Supply Security Act of 2017”



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Mike Rickman is the Deputy Director of the North Texas Municipal Water District (District) and has been employed with the District since October 2002. Mr. Rickman is directly responsible for the following District departments:

- Water, Wastewater and Solid Waste Operations
- Environmental Services
- Maintenance Services
- Information Technologies

The District was created in the 1950s to provide wholesale treated water to the areas north and east of Dallas. The District has added wastewater treatment and solid waste disposal services in its service area. The District's current service area covers approximately 2,000 square miles and continues to grow.

Prior to joining the District, Mike was employed by the City of Dallas Water Utilities Department for 33 years.

Mike and his wife, Pam, reside in Combine, Texas (a suburb of Dallas). They have three daughters, a son, and six grandchildren.

TESTIMONY OF MIKE RICKMAN, DEPUTY DIRECTOR, NORTH TEXAS MUNICIPAL WATER DISTRICT, BEFORE THE U.S. HOUSE OF REPRESENTATIVES, JUDICIARY COMMITTEE, REGARDING H.R. 4423, THE “NORTH TEXAS WATER SUPPLY SECURITY ACT OF 2017”

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Chairman Goodlatte, Chairman Marino, Ranking Member Nadler, Ranking Member Cicilline, Members of the Committee, my name is Mike Rickman, Deputy Director of the North Texas Municipal Water District (the “District”), headquartered in Wylie, Texas. I appreciate the opportunity to testify today in support of H.R. 4423, the “North Texas Water Supply Security Act of 2017.” This legislation provides much needed limitations on judicial review of decisions and authorizations associated with the Lower Bois d’Arc Creek Reservoir (“LBCR”) Project.

The District supplies drinking water to over 1.7 million people in North Texas. Our service area includes all or parts of ten (10) counties in North Texas, including Collin, Dallas, Denton, Fannin, Grayson, Hopkins, Hunt, Kaufman, Rains, and Rockwall Counties, covering 2,200 square miles. This area is also home to some of the fastest-growing cities in the United States. Over the next 50 years, the water demands are projected to increase by 1.5 times. To meet the demands of this rapidly-growing population in an area subject to drought conditions, we rely on a myriad of water supply resources. However, even with these resources and continued conservation programs to maximize existing supplies, the District needs to develop new water supply sources in order to maintain a reliable water supply and avoid water deficits.

Thus, the LBCR project is a critical component of the region’s long-term water supply plan. LBCR will be located near the City of Bonham in Fannin County and will cover 16,641 surface acres. Once completed, LBCR can provide up to 108 million gallons of water per day. In this area, LBCR is the only viable water supply that can address the District’s water supply needs—alternative water supply sources are unavailable as determined by the U.S. Army Corps of Engineers (“USACE”) during its review of the District’s application for a Clean Water Act Section 404 permit (the “404 Permit”) for LBCR. Consequently, LBCR is crucial in developing a new water supply to serve a rapidly growing population. In fact, with the addition of LBCR, the District is able to meet its projected water supply deficit through 2040. However, it is essential that LBCR come online by 2022 in order to perform that critical role in the District’s water supply portfolio.

To that end, on January 29, 2018, USACE issued its Record of Decision authorizing issuance of the 404 Permit to allow construction to begin on LBCR and USACE executed the final 404 Permit on February 2, 2018. The issuance of the 404 Permit comes after approximately 15 years of the District’s collaboration with federal, state, and local officials to study the proposed reservoir, obtain the necessary state water rights, and perform the required environmental reviews that are a condition precedent to being issued the 404 Permit. To date, the District has invested more than \$164 million toward planning, permitting, engineering, and acquiring land for LBCR. Construction commenced in April 2018, and is scheduled to be complete by 2021-2022. LBCR is the first major reservoir to be permitted and built in Texas in over 30 years.

I want to thank Congressman Sam Johnson for introducing H.R. 4423 and for Congressmen John Carter, Jeb Hensarling, John Ratcliffe, and Pete Sessions for their co-sponsorship. H.R. 4423 provides a critical protection for LBCR going forward. In short, H.R. 4423 limits judicial review of the 404 Permit so that this multi-year, \$1.6 billion water supply project is not constrained by legal challenges in a way that jeopardizes the already precarious water supply of the 1.7 million people in the North Texas region who LBCR will serve. H.R. 4423 accomplishes this goal in four ways:

First, H.R. 4423 limits who may challenge the environmental reviews associated with obtaining the 404 Permit and the 404 Permit itself. Such challenges would only be authorized to be brought by those who filed comments on the revised draft environmental impact statement for LBCR. As you may know, the National Environmental Policy Act (“NEPA”) requires federal agencies—including USACE to incorporate environmental considerations in major federal actions that could significantly affect the environment. In particular, the agencies are required to prepare detailed evaluations of potential environmental impacts, which are reduced to documents referred to as environmental impact statements (“EIS”). This environmental review incorporates significant and meaningful public participation processes. For instance, interested stakeholders can participate in a scoping meeting to guide development of the EIS, a public meeting following the publication of the draft EIS, and have at least 45 days to provide public comment on a draft EIS, and those comments must be sufficiently addressed by the federal agency before finalizing the EIS. Once the final EIS is published, the public has yet another minimum 30-day comment period.

For LBCR, public participation was afforded to a greater extent than what typically occurs. The USACE initially held a public scoping meeting and then prepared a draft EIS, then, in part due to the feedback received from the public, rather than moving toward a final EIS for approval, instead proceeded to develop a revised draft EIS. This step essentially started the environmental review process over, giving the public yet another opportunity to provide written comments.

Limiting standing to those who provided comments on the revised draft EIS is thus prudent for two reasons. As a practical matter, the decision to issue the 404 Permit was based solely on the revised EIS, not the initial EIS. Therefore, comments received on the EIS may no longer be relevant to the bases on which the 404 Permit was issued. Moreover, limiting standing to those who provided comments ensures that only those who are potentially affected can bring a lawsuit. The progress of LBCR has been largely publicized and the affected community has been continuously engaged. In addition to the public participation required by NEPA, the District has held numerous public meetings, workshops, and presentations to address and respond to public questions and/or concerns. Therefore, it is reasonable to assume that any person who has a legitimate concern about the project was sufficiently notified and able to participate during the permitting process. Thus, this limitation serves to preclude those who would bring suit because they object to the construction of a reservoir in principle.

Second, H.R. 4423 limits when a suit may be filed to challenge the environmental reviews, decisions and authorizations associated with LBCR. The timeframe within which a suit must be filed is narrowed to 60 days from February 1, 2018, which is the day before the 404 Permit was issued. Currently, a legal action could be brought up to six (6) years after the environmental reviews are completed or a final decision is issued. As you know, initial LBCR construction is

underway. The District is currently mobilizing resources to begin constructing the dam in the coming weeks. Construction will be ongoing for the next three (3) years, and the reservoir is anticipated to be full two (2) years after that. With that timeline, LBCR will come online right when the region is expected to start experiencing water supply deficits. Thus, time is of the essence and any delays as a result of frivolous litigation that is not timely filed would be crippling to our region.

Legal challenges could happen at any time during construction and impoundment of LBCR and could foreseeably include injunctive relief that would stop all work on or use of LBCR during the pendency of litigation. This means that infrastructure could sit partially built for years as legal challenges make their way through the courts. Further, a challenge could be initiated post-construction, which could mean an inability to use a critical and readily available water supply source as litigation proceeds.

The costs associated with halting construction of LBCR will be felt even if an injunction is granted today. The District has already begun construction. Therefore, ratepayers will be responsible for the costs of de-mobilizing during the pendency of the litigation. As time goes on, those costs increase exponentially and are compounded by the increased costs of re-mobilization, material and labor. Furthermore, the District has applied for funding in the amount of \$1.6 billion through the Texas Water Development Board for LBCR construction. Once those loans are issued, the District will be responsible for repaying them, irrespective of whether LBCR is actually built. And, as a consequence, the District would have to pursue other costly, infeasible water supply options causing ratepayers to not only have to pay for funding obtained for an unusable LBCR, but also the costs associated with the development of a water supply project or multiple water supply projects to replace LBCR. Thus, the longer potential plaintiffs have to bring suit, the more economic damage is done to the District and its ratepayers.

Most importantly, however, such delays for litigation will prevent the citizens of North Texas from receiving this critical water supply source. The region as a whole—not the just the District’s customers—need reliable water supplies in the very near future to ensure that water shortages do not occur and that growth can continue. Delayed initiation of legal challenges and prolonged litigation undermines that singular purpose of LBCR.

Third, H.R. 4423 limits where legal challenges may be brought to the U.S. District Court for the Eastern District of Texas, and requires the court to resolve any action as expeditiously as possible. This provision prevents potential plaintiffs from forum-shopping. With a project of this magnitude, it is important to the District to ensure that it is not unreasonably disadvantaged by having to defend itself and the USACE’s actions in a court outside of the State of Texas that was chosen simply because that court has the propensity to rule in favor of plaintiffs on NEPA and 404 permitting matters. Instead, H.R. 4423 ensures that the court closest to the LBCR Project will hear any challenge related thereto.

Moreover, H.R. 4423 requires the court to process any legal challenges as quickly as it is able. The purpose of this provision is to encourage the court to efficiently address litigation relating to LBCR so that the detriments of delay, as previously explained, are not exacerbated by judicial inefficiencies that can plague litigation for years.

Fourth, H.R. 4423 ensures that in any federal action for a temporary restraining order or an injunction against the construction or operation of LBCR, the court duly considers how critical this project is to the District and the North Texas region as a whole and how injurious stopping construction or use of LBCR may be. It specifically requires the court to consider how crucial this project is as a water supply reservoir to the people of North Texas and the harms—particularly water deficits—that the region faces in absence of the timely construction and use of LBCR. Moreover, it requires the court to consider the environmental impacts of such delays, particularly if construction has already commenced, and it requires the court to not dismiss the staggering economic impact for the District’s inability to continue to construct and use this \$1.6 billion investment within the timeline that the District needs. This balancing of harms is further promoted by mandating that the court not consider any of these harms to be reparable.

Further, H.R. 4423 prohibits a court from waiving the requirement under Federal Rule of Civil Procedure 65(c) that any movant for a temporary restraining order or injunction of LBCR post security in an amount that the court considers proper to pay the costs and damages of a party improperly enjoined or restrained. Aside from the general purpose of Rule 65(c) to ensure that a party is made whole for wrongful injunction or restraint, this provision helps to deter obstructionist plaintiffs whose only interest is in delaying the project or bleeding the District of its financial ability to continue to fight legal challenges in order to bring LBCR online. To that end, the security requirement serves as a gatekeeper to help ensure that only plaintiffs with legitimate claims get to pursue those claims against LBCR. In a further effort to streamline the legal process, H.R. 4423 requires the court to determine the requisite amount of security in the same proceeding in which the temporary restraining order or injunction is heard.

As you can see, what H.R. 4423 does *not* do is completely circumvent the judicial process. If enacted, H.R. 4423 prevents further unnecessary delays of this critical water supply project in federal courts. And, H.R. 4423 helps ensure that any legal challenge to the environmental reviews, decisions, and authorizations necessary for LBCR are legitimate and that the Court meaningfully balances the need for LBCR with attempts to obstruct its construction and use. As members of Congress, you understand just how important it is to ensure critical infrastructure projects are developed and maintained efficiently and economically.

While we are confident that USACE thoroughly considered and adequately explained its bases for issuing the 404 Permit for LBCR, we cannot be certain that legal challenges will not arise. Therefore, it is imperative that this critical water supply project be reasonably protected from frivolous legal challenges that have the potential to seriously harm the citizens of North Texas. H.R. 4423 provides that protection while still providing an avenue for legitimate legal challenges. Thank you again for the opportunity to testify today. I will be happy to answer any questions.