CAUSE NO. 1123430

VICENTE MEDINA, ASHLEY MEDINA and ARIS ANTONIOU	§	**COUNTY CIVIL COURT**
	§	
	§	**AT LAW NUMBER 1**
v.	§	
	§	
SAN JACINTO RIVER AUTHORITY	§	**HARRIS COUNTY, TEXAS**

DEFENDANT SAN JACINTO RIVER AUTHORITY'S PLEA TO THE JURISDICTION

Defendant San Jacinto River Authority pleas to the Court's jurisdiction and moves this Court to dismiss Plaintiffs' claims because Plaintiffs fail to demonstrate a waiver of the heavy presumption of SJRA's governmental immunity from Plaintiffs' claims and the evidence disproves any waiver on several grounds. In support, SJRA would show the Court as follows:

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INTRODUCTION

This case arises from SJRA's release of water from Lake Conroe in connection with significant inflows resulting from Hurricane Harvey. Plaintiffs contend that as a result of SJRA's release of water from the dam on Lake Conroe, their properties were flooded in violation of the Takings Clause of the Texas Constitution. As the evidence included with this plea shows, the reality is SJRA *reduced* the flows in the West Fork San Jacinto River at its Dam at the south end of Lake Conroe, more than 50 river miles north of Plaintiffs' properties and the only point on the West Fork San Jacinto River at which SJRA had any input to the river flow.

The evidence proves Plaintiffs cannot meet their burden to prove a waiver of SJRA's immunity from suit on several grounds. Even taking the facts of Plaintiffs' claims as true, Plaintiffs cannot produce evidence to prove each and every element of their takings claim, as they must. To the contrary, the evidence proves Plaintiffs cannot demonstrate a waiver of SJRA's immunity from suit.

This Plea is supported by the exhibits listed *infra* and attached hereto, which the Court must consider in connection with the Plea because it conclusively disproves Plaintiffs' only bald allegations made in an attempt to invoke this Court's jurisdiction. The evidence demonstrates that any flooding on Plaintiffs' properties resulted from a confluence of events and sources, that the peak outflow from the Lake Conroe Dam never exceed peak inflow, and that SJRA released water directly into the West Fork San Jacinto River. To be sure, SJRA released water from the Dam in accordance with its pre-existing Gate Operations Policy, which was developed by SJRA's engineers with a mandate to ensure that peak outflow would never exceed peak inflow over the course of a storm event. SJRA neither knew nor was substantially certain that, even if *arguendo*, any water SJRA released would end up on any Plaintiff's property, let alone that it would flood any Plaintiff's property to the extent of causing a taking. Moreover, Plaintiffs fail to

demonstrate how the flooding of which they complain occurred on any individual Plaintiff's property as a result of SJRA's judicially recognized limited governmental purpose or that any flooding that occurred on any Plaintiff's specific property was anything other than an unintended result.

Each of these facts is sufficient, in and of itself but certainly in combination, to show SJRA is immune from Plaintiffs' suit and, thus, the Court lacks subject matter jurisdiction over all Plaintiffs' claims. The Court should grant SJRA's Plea to the Jurisdiction and dismiss this action.

EVIDENCE SUPPORTING DISMISSAL

Exhibit A:	Affidavit of Hector Olmos
Exhibit Olmos-1:	CV of Hector Olmos
Exhibit Olmos-2:	Watersheds of the San Jacinto River Basin
Exhibit Olmos-3:	National Weather Service NCEP Stage IV QPE Mosaic: Hurricane Harvey Basin – Averaged Depths
Exhibit Olmos-4:	National Weather Service NCEP Stage IV QPE Mosaic: Hurricane Harvey Basin – Averaged Volumes
Exhibit Olmos-5:	SJRA Water Inflow and Discharge Calculation Spreadsheet
Exhibit Olmos-6:	Freese and Nichols Real-Time Water Inflow and Discharge Calculation Spreadsheet
Exhibit Olmos-7:	Freese and Nichols Post-Hurricane Harvey Water Inflow and Discharge Calculation Spreadsheet
Exhibit B:	Affidavit of Chuck Gilman
Exhibit B-1:	*History of Lake Conroe*, San Jacinto River Authority, http://www.sjra.net/lakeconroe/history/
Exhibit B-2:	Permit to Appropriate Public Waters of the State of Texas
Exhibit B-3:	Certificate of Adjudication 10-4963, as amended
Exhibit B-4:	Watersheds of the San Jacinto River Basin
Exhibit B-5:	San Jacinto River Basin Estimated Peak Flows: Hurricane Harvey August 25-30, 2017
Exhibit B-6:	Hurricane Harvey Storm Event: Briefing Regarding Lake Conroe Operations, available at http://www.sjra.net/wp-content/uploads/2017/09/Hurricane-Harvey-Rainfall-Event-Presentation_092817.pdf
Exhibit B-7:	Water Inflow Calculation Spreadsheet
Exhibit B-8:	Map of Rainfall Data
Exhibit B-9:	United States Geological Survey Water Discharge Data and Graph for Gage No. 08067650, August 25, 2017 through September 1, 2017
Exhibit B-10:	United States Geological Survey Water Discharge Data and Graph for Gage No. 08068000, August 25, 2017 through September 1, 2017
Exhibit B-11:	United States Geological Survey Water Discharge Data and Graph for Gage No. 08068090, August 25, 2017 through September 1, 2017
Exhibit B-12:	United States Geological Survey Water Discharge Data and Graph for Gage No. 08068500, August 25, 2017 through September 1, 2017
Exhibit B-13:	United States Geological Survey Water Discharge Data and Graph for Gage No. 08069000, August 25, 2017 through September 1, 2017
Exhibit C:	Affidavit of Jodi Chaney

UNDISPUTED MATERIAL FACTS

A. Lake Conroe Dam

Lake Conroe is a man-made reservoir in Conroe, Texas, that was constructed by damming the West Fork San Jacinto River. *See* Ex. A, at ¶ 4; *see also* Ex. B, at ¶ 4, Ex. B-1. Lake Conroe was designed and built for the express purpose of providing drinking water to the City of Houston, and Harris and Montgomery Counties. *See id.* When construction on Lake Conroe was completed in 1973, SJRA was charged with protecting the San Jacinto River basin in and around Lake Conroe, including releasing floodwater from the dam when necessary. *See id.*

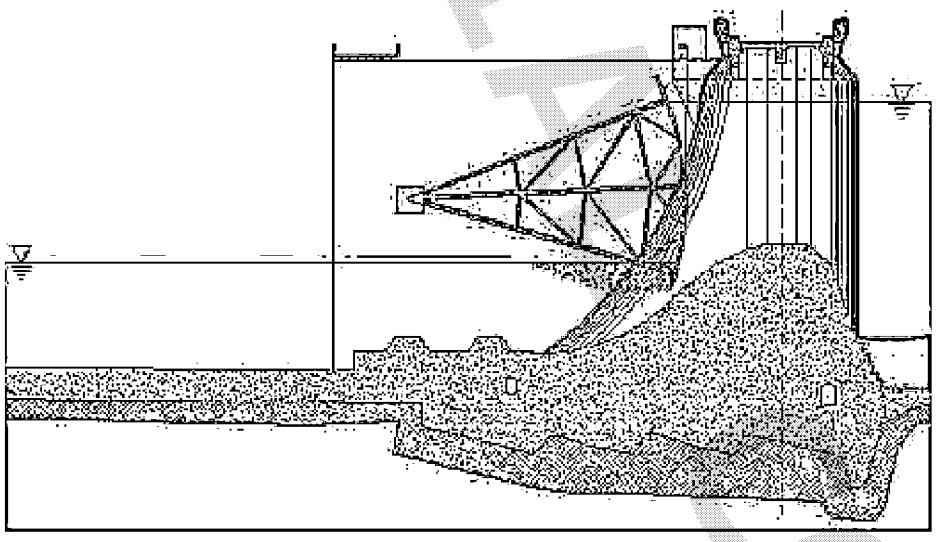
Lake Conroe has only a single dam at the south end of the Lake, which only discharges water directly into the West Fork San Jacinto River. *See* Ex. A, at ¶ 8; Ex. B, at ¶ 12, B-2, B-3. After entering the West Fork, any water released from Lake Conroe moves downstream toward Lake Houston, which itself eventually empties into the Gulf of Mexico. Ex. B-4, B-5. Before reaching Lake Houston, water in the West Fork San Jacinto River south of the Lake Conroe Dam is joined by water added by several tributaries flowing into the West Fork San Jacinto River, including Lake Creek, Spring Creek, and Cypress Creek. *See id.* The East Fork of the San Jacinto River merges with the West Fork even farther south, at Lake Houston. *See id.*

Under the state-issued water right that governs Lake Conroe, Certificate of Adjudication No. 10-4963, as amended, SJRA may not store more than 430,260 acre-feet of water, which equates to a lake level of 201 feet above mean sea level (*msl*).[1] Ex. B-3. This Permit also requires that the dam operate and maintain gates to avoid storing more water. *See id.* While SJRA has a flowage easement that allows the Authority to *temporarily* store water in the Lake Conroe reservoir up to a lake level of 207 feet above *msl*, SJRA is **required** to release any water that

[1] SJRA's "Permit to Appropriate Public Waters of the State of Texas," Exhibit B-2, was issued in 1960. Under that Permit, SJRA was only permitted to impound 380,430 acre feet of water in Lake Conroe, which at the time also corresponded to a lake level of 201 feet above *msl*. SJRA was required to release water above that lake level.

causes the lake level to exceed 201 feet above *msl* in accordance with its Permit. Ex. B, at ¶ 9, Ex. B-2, B-3. This is essentially all water that enters the Lake via rainfall or additional inflows. *Id.* Lake Conroe was not designed or constructed to function as a flood-control reservoir,[2] Ex. B, at ¶ 6, and SJRA is not a flood control entity, Ex. B, at ¶ 3, but the Authority's ability to temporarily store water up to 207 feet above *msl* allows the reservoir and Dam to act as somewhat of a buffer to actually reduce flows in the West Fork San Jacinto River that would otherwise flow uncontrolled downstream. Ex. A, at ¶¶ 11, 29.

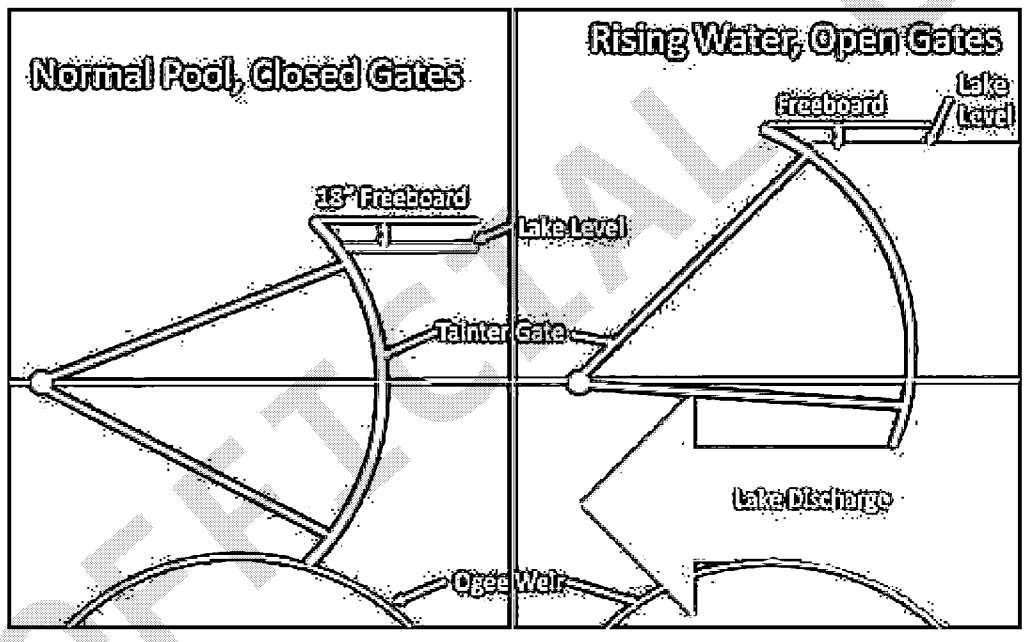
Water released from Lake Conroe Dam flows out of one of five tainter-style flood gates in the dam, each measuring 40 feet wide by 30 feet tall, and directly into the West Fork San Jacinto River. To release water, Dam operators raise the gates, which allows water to flow underneath the gate and out into the West Fork San Jacinto River, as demonstrated in the diagram below.[3] Ex. B, at ¶ 13.



[2] By comparison, the normal conservation pool at Lake Travis, which was specifically designed as a flood-control reservoir, stands at 681 feet above *msl* and holds 1.1 million acre-feet of water. LOWER COLO. RIVER AUTH., *Highland Lakes & Dams* (2019), https://www.lcra.org/water/dams-and-lakes/Pages/default.aspx. The Lake Travis spillway is at 714 feet above msl, allowing Lake Travis to hold an additional 787,000 acre-feet of floodwaters in its flood pool. *See id.*

[3] *Tainter Gate*, WIKIPEDIA.ORG, https://en.wikipedia.org/wiki/Tainter_gate#/media/File:LgRadialGatefigc4-6.jpg (last visited July 28, 2019).

When the gates are closed, the top of the Dam's tainter gates sit at an elevation of 202.20 feet above msl. Ex. B, at ¶ 14. Not only were the gates not designed to allow water flow over them, the gates cannot be opened if water overtops the gates. Ex. B, at ¶ 14; Ex A, at ¶ 11. Thus, if water overtops the gates, the result would be *uncontrolled* releases into the West Fork San Jacinto River downstream and likely failure of the tainter gates. Because the top of the gates rise as the gates are opened, as demonstrated in the diagram below, the only way to prevent water from overtopping the gates as the lake level rises is to raise the gates and, thus, effect a controlled release of water.



Ex. B-6; Ex A, at ¶ 11.

B. SJRA's Gate Operations Policy was created so peak outflow never exceeds peak inflow

SJRA's goal in releasing water from Lake Conroe has always been to reduce flow in the river below what would naturally occur, provide raw water to downstream customers, pass floodwaters through the Dam safely, comply with its Permit obligations, and protect the structural integrity of the Dam's earthen embankment and gates. Ex. B, at ¶ 15. To that end, in

2010, SJRA hired Freese and Nichols, Inc., the engineering firm responsible for originally designing and building the Lake Conroe Dam, to create a computer program that would accurately calculate how much water SJRA should release from the Lake Conroe Dam based on inflows into the Lake and the measured lake level. Ex. B, at ¶ 16; Ex. A, at ¶ 13.

The purpose of the Gate Operations Policy, and every other tool SJRA has used to determine how much water to release from the Dam in storm events and otherwise, is to reduce downstream flows in the river that would otherwise be left uncontrolled by releasing water from the Dam slower than it is entering the Lake.[4] *Id.* In order to accomplish this goal, SJRA specifically instructed Freese and Nichols to create the program so that the peak flow released from the dam's gates will never exceed a storm event's peak inflow into Lake Conroe.

Freese and Nichols updated the Gate Operations Policy in April 2017. *Id.* While the update made the program more user-friendly for the Dam operators, the purpose, application, and execution are essentially the same as those contained in the 2010 Gate Operations Policy. *Id.*

In its current iteration, the Gate Operations Policy is programmed so that release rates are always far below peak inflow in order to account for the effect wind, rain, and waves may have on lake level readings. For example, at the highest level—208.5 feet above msl—the Policy still only calls for a release rate at 70% of the peak inflow into the lake. Ex. B, at ¶ 18.

C. Releases in connection with Hurricane Harvey

During Hurricane Harvey, the Gate Operations Policy and its corresponding computer program functioned as designed. Ex. A, at ¶ 29; Ex. B, at ¶ 21. As the substantial inflow into Lake Conroe increased from both the 22 inches of rain dropped on Lake Conroe itself and the rainfall in areas north and tributaries north of the Lake began carrying that water into the

[4] As discussed *infra*, the Gate Operations Policy was designed in large part to ensure SJRA complied with the law of takings expressed by the Beaumont Court of Appeals in *Wickham* and *Hughes*: that, as a matter of law, there is no taking where peak inflow into a reservoir exceeds peak outflow from that reservoir during a storm event.

reservoir, the lake level began to rise with it. Ex. B-7. This necessitated that SJRA begin releasing water in order to continue protecting the structural integrity of the reservoir and Dam. Ex. B, at ¶ 21. More specifically, when the Lake reached 201.04 feet above msl,[5] SJRA opened the Dam gates in accordance with the computer guidance in the 2017 update to the Gate Operations Policy.[6] Ex. B-7. The evidence shows SJRA's release of water never exceeded the peak inflow of water caused by Hurricane Harvey and related rainstorms. Ex. B-7.

As the slow-moving "1000 Year" storm continued dropping unprecedented amounts of water on the Houston area, the lake level continued to rise and the flow into the lake from additional sources continued increasing. Specifically, during the time frame of Hurricane Harvey, peak inflow into the Lake reached 129,065 cubic feet per second ("*cfs*").[7] *Id.* While SJRA continued to release water from the Lake in accordance with the guidance of the Gate Operations Policy as the lake level rose, peak outflow[8] reached only 79,141 *cfs*, almost 40% less than peak inflow. The Dam also held back floodwaters that would otherwise flow uncontrolled downstream. *Id.* The evidence demonstrates beyond any reasonable argument that since peak outflow only reached 61% of maximum inflow resulting from Hurricane Harvey, the reservoir and gate operation resulted in substantial amounts of water being temporarily stored behind the flood gates until the storm passed and the water could be released at a much lower rate.[9]

[5] Lake Conroe was actually below normal pool elevation at the beginning of the storm event, with lake level at 200.40 feet above msl, so the SJRA was able to hold back additional water before it had to begin releases.

[6] This occurred at approximately 6:00 AM on August 26, 2017. At that time, inflow into the Lake was 1,722 *cfs*. SJRA began releasing water at a rate of 529 *cfs*.

[7] This occurred at approximately 1:00 AM on August 28, 2017.

[8] 11:45 AM on August 28, 2017.

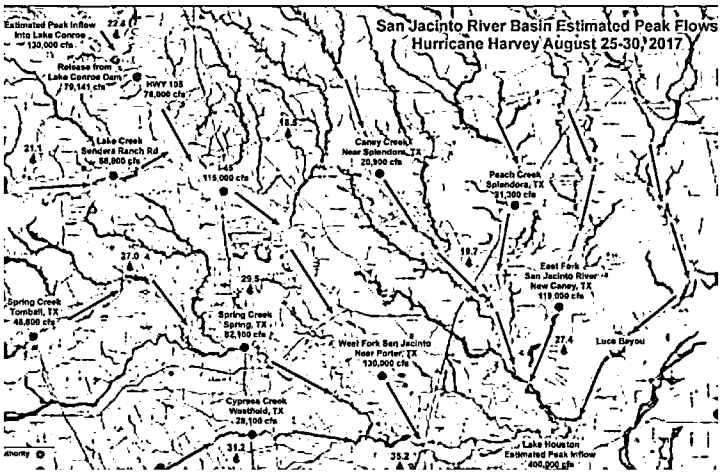
[9] Put another way, had the Dam not been in place and operated according to SJRA's Gate Operations Policy, water could have flowed into the West Fork San Jacinto River at nearly twice the flow rate it did.

Indeed, as inflows subsided and the Lake stopped rising after reaching peak elevation of 206.23 feet above msl, SJRA immediately reduced outflow. *Id.* Based on this slower, controlled release, it took until September 17, 2017 for the Lake to return to normal pool elevation.

D. Water from tributaries and rain poured into the West Fork San Jacinto River downstream of the Dam and before it reached Lake Houston

The United States Geological Survey gages[10] along the West Fork San Jacinto River show that the amount of water in the river and the speed of the flows continually increased from Lake Conroe as additional tributaries merged with the West Fork, irrespective of the releases from the Dam.

For example, Gage No. 08067650, the first gage downstream of Lake Conroe, recorded a maximum flow rate of 75,400 *cfs* at 4:30 PM on August 28, 2017. Ex. B-8. At the same time, Gage No. 08068000, which sits about halfway between Lake Conroe and Lake Houston, just after Lake Creek merges with the West Fork San Jacinto River, recorded a flow rate of 92,600 *cfs*, almost 23% higher than the *peak* outflow at Lake Conroe, the waters from which had not yet even reached Gage No. 08068000 at that time.



[10] The USGS (somewhat idiosyncratically) uses the spelling "gage" rather than "gauge." *See* United States Geological Serv., *Why does the USGS use the spelling "gage" instead of "gauge"* (2018), https://www.usgs.gov/faqs/why-does-usgs-use-spelling-gage-instead-gauge?qt-news_science_products=0#qt-news_science_products

Similarly, Gage No. 08068090, which sits above Lake Houston but before Spring Creek enters into the West Fork San Jacinto River, recorded a maximum discharge of 131,000 *cfs*. Ex. B-10. Gage No. 08068500, located along Spring Creek at I-45 before Spring Creek merges with the West Fork San Jacinto River, measured a peak discharge of 82,100 *cfs*. Ex B-11. That is, water that entered the West Fork San Jacinto River *miles downstream* of the Dam but upstream of all Plaintiffs' properties, already flowing at a speed equal to SJRA's peak release, joined water already in the West Fork San Jacinto River prior to reaching Plaintiffs' homes. There is no data[11] for the flowrate of the West Fork San Jacinto River entering Lake Houston after Cypress Creek merges with Spring Creek and Spring Creek spills into the West Fork San Jacinto River. But, based on the flow rate in Spring Creek, this additional confluence could only have caused even greater flow in the West Fork San Jacinto River before any portion of the River flowed anywhere near Plaintiffs' homes. Of course, Plaintiffs do not argue, and no one could contend, that SJRA had any control over these other sources of water, all of which the gage data shows substantially increased the flow of the River, cumulatively beyond even the peak through Lake Conroe Dam. Still, and obviously not just inexplicably, but impossibly, all Plaintiffs baldly contend *only* water from Lake Conroe flooded their properties.

The volume of water that fell over the collective relevant watersheds was nonetheless massive. According to National Weather Service data, rainfall amounts in the relevant area ranged from 20 to 35 inches during the storm. Ex. A at ¶ 22, Olmos-3, Olmos-4. Several watersheds contributing to the West Fork San Jacinto River and to Lake Houston received over 30 inches of average rainfall depth over the watershed during the storm, and the collective watersheds took on literally *millions* of acre-feet of water. *See id.* Only 13 percent of the total

[11] USGS Gage No. 08069500, which is downstream of the confluence of Spring Creek and West Fork San Jacinto River, now reports flow rate data, but did not record any such data during Hurricane Harvey.

rainfall volume over the Lake Houston watersheds fell over the Lake Conroe watershed. *See id.* The rain from those watersheds and from the 2,828 square mile Lake Houston watershed all flowed down toward West Fork San Jacinto River, East Fork San Jacinto River, and Lake Houston. There can be no argument this rainfall affected Plaintiffs' properties. Among other facts, this is fatal to Plaintiffs' burden to establish a waiver of SJRA's immunity from suit.

E. Plaintiffs' allegations

Plaintiffs allege their homes did not flood as a result of "Hurricane Harvey dropp[ing] more than fifty inches of rain on parts of southeast Texas," including, obviously Plaintiffs' own neighborhood and surrounding communities, but that Plaintiffs' homes flooded *only* as a result of SJRA's release of water from Lake Conroe into the West Fork San Jacinto River.[12] Plaintiffs baldly contend SJRA's release of water from the Lake Conroe Dam was the "actual, legal, producing, proximate, and 'but for' cause" of the flooding of Plaintiffs claim constitutes a taking of each of their properties.[13] Plaintiffs double down on their unsupported and insupportable argument by contending further that, under "natural conditions," (which Plaintiffs define as "the absence of the lake and SJRA's obligation to operate and manage the lake, including its real or perceived obligation to release Hurricane Harvey floodwaters"), their properties would not have flooded at all or that the flooding would not have been as extensive as alleged.[14]

To be sure, Plaintiffs suggest the Court ignore the public data from several independent sources, all of which show Plaintiffs' were all equally subjected to the 27 trillion gallons and millions of acre-feet of water that Hurricane Harvey deposited in the area, as was everyone else in Southeast Texas. Plaintiffs further suggest the Court ignore the fact the physics of the flow of

[12] Plaintiffs' First Amended Petition at ¶ 19.

[13] *See id.* at ¶ 36.

[14] *See id.*

all water in the area dictates that it goes from North to South, collecting water from the other rivers, streams, tributaries, and bayous upstream of and near their homes as the water flows toward Lake Houston and ultimately to the Gulf of Mexico. Accordingly, because Plaintiffs cannot explain how they can, as they do, ignore the confluence of other numerous water sources, including rains of undeniably historic proportions – called Biblical by some – that likely wholly caused or at least must have contributed to the flooding of which Plaintiffs complain. Particularly in light of the law that a flooding caused by a confluence of conditions and sources is not a takings claim under the Texas Constitution, this undeniable scientific data is equally fatal to Plaintiffs' burden to show a waiver of immunity for their claims.

The Court should not be duped into the obviously overly-simplistic *argument* that the timing of Plaintiffs' flooding *alone* substantiates Plaintiffs' allegations that the flooding was caused by the release of water from Lake Conroe into the West Fork San Jacinto River. The Plaintiffs' burden to show a waiver of immunity is much higher and, in light of actual evidence, insurmountable.

ARGUMENTS & AUTHORITIES

A. Plea to the Jurisdiction standard of review

Subject matter jurisdiction is essential to the power of a tribunal to decide a case, and without subject matter jurisdiction a court cannot render a valid judgment. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d, 440, 443 (Tex. 1993). Subject-matter jurisdiction cannot be presumed and cannot be waived. *Cont'l Coffee Prod. Co. v. Cazarez*, 937 S.W.2d 444, 448-49 n.2 (Tex. 1996). The question of whether a court has subject matter jurisdiction is a matter of law. *Hoff v. Nueces County*, 153 S.W.3d 45, 48 (Tex. 2004). A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638s (Tex. 2004).

Governmental entities are generally immune from suit. *See Mo. P. R. Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 813 (Tex. 1970). A party may establish consent to bring suit against a governmental entity only by showing legislative permission to bring suit in "clear and unambiguous language." *Little-Tex Insulation Co.*, 39 S.W.3d at 594 (Tex. 2001) (quoting *Univ. of Tex. Med. Branch v. York*, 871 S.W.2d 175, 177 (Tex. 1994)). Plaintiffs "cannot rely on artful pleading to establish a waiver of immunity where the law provides none." *City of Austin v. Silverman*, No. 03-06-00676-CV, 2009 Tex. App. LEXIS 3777, at *10 (Tex. App.—Austin May 21, 2009) (citing *Seamans v. Harris County Hosp. Dist.*, 934 S.W.2d 393, 395 (Tex. App.--Houston [14th Dist.] 1996, no writ)). Instead, Plaintiffs must demonstrate each element of a takings claim sufficient to establish a prima facie case and establish a waiver of SJRA's immunity from suit. Failure to do so means the Court lacks jurisdiction. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012).

The Texas Supreme Court has specifically held "[g]overnmental immunity from suit defeats a trial court's subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction." *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 637 (Tex. 1999); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004). The purpose of a plea to the jurisdiction is to "defeat a cause of action without regard to whether the claims asserted have merit" because Plaintiffs cannot show a waiver of governmental immunity. *Bland Indep. School Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

A court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised. A court "must [consider evidence] when necessary to resolve the jurisdictional issues raised." *Id.* at 555. "Where, as here, evidence is presented with a plea to the jurisdiction, the

court reviews the relevant evidence and may rule on the plea as a matter of law if the evidence does not raise a fact issue on the jurisdictional question, a standard that generally mirrors the summary-judgment standard." *Harris Cnty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 798 (Tex. 2016).

B. Plaintiffs cannot meet their burden of demonstrating a waiver of SJRA's immunity from suit for their inverse condemnation claims

Plaintiffs' inverse condemnation claims fail because the evidence conclusively demonstrates Plaintiffs cannot show a waiver of the "heavy presumption" of SJRA's immunity from suit. The elements of a cause of action of a takings claim under Section 17, Article 1 of the Texas Constitution are: (1) the government intentionally performed certain acts; (2) which resulted in a "taking" of property; (3) for the public use. *Houston v. Crabb*, 905 S.W.2d 669, 673 (Tex. App.—Houston [14th Dist.] 1995. This matter is particularly susceptible to a plea, because "[w]hether a 'taking' has occurred under inverse condemnation is a question of law," *Bennett v. Tarrant Cnty. Water Control and Improvement Dist.*, 894 S.W.2d 441, 448 (Tex. App.—Fort Worth 1995, writ denied), and "[i]n the absence of a properly pled takings claim, the [governmental entity] retains immunity." *Hearts Bluff Game Ranch v. State*, 381 S.W.3d 468, 476 (Tex. 2012) (citing *Little-Tex Insulation Co.*, 39 S.W.3d at 598-99).

In order to demonstrate a waiver of a governmental immunity for a taking claim, the Texas Constitution requires the plaintiff to present evidence proving each and every element of a takings claim under Section 17, Article 1 of the Texas Constitution. *See Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980). In other words, in light of the evidence presented, Plaintiffs must now produce evidence sufficient to show SJRA took their properties by knowingly and intentionally flooding the plaintiff's property for a public purpose. *See Crabb*, 905 S.W.2d at 673.

Not only does the evidence belie Plaintiffs' bald and literally incredible pleading allegations, it demonstrates SJRA's release of water from the dam in Lake Conroe in connection with inflows during Hurricane Harvey did not, as a matter of law, result in taking any Plaintiff's individual, specific property. Thus, Plaintiffs not only do not, they cannot, demonstrate a waiver of SJRA's immunity from suit for their claims. This Court is therefore without subject matter jurisdiction and must dismiss Plaintiffs' claims.

1. Any flooding on any Plaintiff's specific, individual property was not the result of a taking by SJRA

The evidence demonstrates the controlled release of water from the Lake Conroe Dam was simply not the cause of flooding on any Plaintiff's property. Relevant and controlling authority requires a plaintiff to prove numerous factors in order to show flooding on their property constituted a taking. Plaintiffs' failure to demonstrate any one of those factors is a failure to show a proper taking claim and the necessary waiver of immunity. Thus, this requires the Court to dismiss the plaintiff's takings claim for lack of subject matter jurisdiction.

Equally, SJRA's failure to pre-release water from the Lake Conroe Reservoir did not directly cause the flooding of any Plaintiff's property, an allegation which necessarily requires Plaintiffs to show their flooding was caused directly and only by a later release of water through the Lake Conroe Dam. While alleging the SJRA should have pre-released water from Lake Conroe prior to the storm has been a popular, but misguided, sentiment in public discourse following Hurricane Harvey, such an uninformed statement ultimately does nothing to show the any flooding on Plaintiffs' property constitutes a taking. The Texas Supreme Court has held that "inaction cannot give rise to a taking" and that a court considering a taking claim "must limit [] consideration to affirmative conduct." *Kerr*, 499 S.W.3d at 805.

a. There is no taking because peak outflow did not exceed peak inflow

A claim flooding was caused, or even increased by a governmental release of water cannot stand, and therefore cannot support a takings claim, where the government's peak release of water was less than the peak inflow it received, as indisputably occurred in the case at bar. *See Wickham v. San Jacinto River Auth.*, 979 S.W.2d 876, 883 (Tex. App.—Beaumont 1998, pet. denied); *Sabine River Auth. v. Hughes*, 92 S.W.3d 640, 642 (Tex. App.—Beaumont 2002, pet. denied); *Waller v. Sabine River Auth. of Tex.*, No. 09-18-00040-CV, 2018 Tex. App. LEXIS 10010, at *13 (Tex. App.—Beaumont Dec. 6, 2018).

As the *Wickham*, *Hughes*, and *Waller* courts all made clear, where the government never releases water at a rate greater than the highest rate flowing into the reservoir during the event in question, the release is not, both as a matter of fact and significant to the law of takings, increasing the flow of water downstream from what it would have been had the reservoir not been present at all. The evidence establishes this undeniable jurisdictional fact in contract to Plaintiff's mere, and wholly unsupported allegations of waiver on this point.

For example, in the *Hughes* case, the court held that, as a matter of law, there was no taking because "the flow into the reservoir was 385,000 cubic foot per second (*cfs*) while outflow, at its peak, was only 117,644 *cfs*" and the Sabine River Authority "never released more water than was entering the reservoir via rainfall." 92 S.W.3d at 642. In *Waller*, "the inflow into Toledo Bend Reservoir exceeded 600,000 *cfs*, while the peak discharge from the reservoir was approximately 207,000 *cfs* or 208,000 *cfs*." 2018 Tex. App. LEXIS 10010, at *13. Based on this fact, as undeniable in that case as in the case at bar, the *Waller* court also found that, as a matter of law, there was no taking, noting "the underlying facts that gave rise to the flood event in this case are closely aligned with the facts that we discussed in two of our prior cases that involved

flooding allegedly due to the operations of dams." *Id.* (citing *Hughes*, 92 S.W.3d at 642; *Wickham*, 979 S.W.2d at 883).

It is undeniable the inflow/outflow in this case closely mirrors the facts in *Wickham*, *Hughes*, and *Waller*:

	Max. Inflow	***Max. Outflow***	***Holding***
Wickham	105,288 cfs	45,575 cfs	No taking
Hughes	385,000 cfs	117,644 cfs	No taking
Waller	>600,000 cfs	208,000 cfs	No taking
Medina	**129,065 cfs**	**79,141 cfs**[15]	

Since it is equally indisputable that peak inflow to Lake Conroe in connection with Hurricane Harvey was nearly 130,000 *cfs*, while the peak discharge of water released from the dam at Lake Conroe in connection with Hurricane Harvey never exceeded more than 60% of peak inflow at 79,141 *cfs*. EX. B-6. This fact, alone, demonstrates, as a matter of law that Plaintiffs cannot establish the elements of a takings claim sufficient to effect a waiver of SJRA's immunity.

b. Plaintiffs' properties were affected by a confluence of water

Even if the indisputable fact SJRA "never released more water than was entering the reservoir," *Hughes*, 92 S.W.3d at 642, were not, *arguendo*, alone sufficient under the law to show there is no waiver of SJRA's immunity, the evidence also demonstrates all Plaintiffs'

[15] Plaintiff's Petition misstates the exact amounts of discharge, alleging that ""[d]uring the storm, water was flowing into the lake at a rate of 180,000 cubic feet per second," and the "released water was measured just below the dam as flowing at a peak rate of 33,400 cfs." (Pl.'s 1st Am. Orig. Pet. at ¶19.) Regardless, **Plaintiffs admit that the peak flow into the lake exceeded the peak outflow released from the dam by a significant margin.** This admission alone demonstrates Plaintiffs cannot discharge their burden to show a waiver of immunity

properties were affected by a confluence of events and water sources. The Texas Supreme Court has held this fact alone also negates a takings claim.

Under the Texas Supreme Court's holding in *Harris County Flood Control District v. Kerr*, 499 S.W.3d 793 (Tex. 2016), plaintiffs must show the government intended to cause *specific* harm to an individual plaintiff in order to effect a waiver. More specifically, under *Kerr* where there are, as here, factors other than just the government's actions leading to flooding, such a confluence of circumstances that cause flooding as matter of law "does not give rise to a takings claim." 499 S.W.3d at 799; *accord Wickham*, 979 S.W.2d at 883. Here, there is both a literal confluence of streams and other causes that at least contributed to flooding on Plaintiffs' properties.

In *Wickham*, plaintiffs lived along West Fork San Jacinto River, directly downstream from Lake Conroe Dam, beyond where Lake Creek merges with the West Fork San Jacinto River, but well before Spring Creek flows into the River. 979 S.W.2d at 883. Based upon this fact, the *Wickham* Court held that "[s]tanding alone, [the fact water released from Lake Conroe Dam flowed directly into the River and went downstream and mixed into other tributaries] would be sufficient [] evidence to negate the 'taking' element in appellants' inverse condemnation claim." *Id.*

In the instant case, Plaintiffs live much farther downstream than the *Wickham* plaintiffs; more than 40 river miles downstream of the Dam and below not only Lake Creek's convergence with the River, but also after Spring Creek, after Cypress Creek has already merged, flows into the West Fork as well. Ex. B-4, B-5. If SJRA's release of water in *Wickham* did not result in a taking of Plaintiffs' properties merely by virtue of the confluence of a single additional tributary that added water to the West Fork San Jacinto River before it reached any *Wickham* Plaintiff's

property, the confluence of several additional sources here makes *Kerr*'s holding applied in *Wickham* even more compelling.

Of course, analysis of only the many sources that added water to the West Fork before it reached any Plaintiff's property does not even begin to take into consideration the truly historic amounts of rain deposited on the Houston area, including directly upon every Plaintiff's home and neighborhood during the slow-moving storm. *Id.* **Approximately 27 trillion gallons of water fell on Texas and Louisiana – much of it in the Houston area – as a result of Hurricane Harvey.**[16] The evidence from the USGS gages shows that, as the water moved downstream from Lake Conroe toward Lake Houston during the time of Hurricane Harvey, more and more water was added due to rain from Hurricane Harvey and other tributaries traveling downstream, creating the very confluence of water the Supreme Court held in *Kerr* precludes Plaintiffs' taking claims as a matter of law. Ex. A-1 through A-5.

c. There is also no taking where, as here, all water is released directly into the river

Additionally, SJRA could not have, as a matter of law, engaged in taking any Plaintiff's property because the undisputed evidence shows SJRA released water only directly into the San Jacinto River, a public waterway, without any knowledge or control over whether any such released water could, assuming *arguendo* it did, even escape the banks of the river, let alone end up on any Plaintiffs' property, over 40 river miles away.

In *Wickham*, the Court held that, as an additional matter of law, when, as in the instant case, a landowner's complaint is based upon SJRA's release of water from Lake Conroe following torrential rains (of much lesser magnitude than caused by Hurricane Harvey) directly and only into the river fails to establish the necessary elements of an intentional taking. 979

[16] *See https://www.vox.com/science-and-health/2017/8/28/16217626/harvey-houston-flood-water-visualized.*

S.W.2d at 883. Just as in the instant case, the *Wickham* plaintiffs complained of a release of water from Lake Conroe "flowing directly into the San Jacinto River, not directly onto appellants' property." *Id.* As a matter of law, since "the water being released from the reservoir was not flowing directly onto [the plaintiff's] property but into the [river]," there can be no taking. *Hughes*, 92 S.W.3d at 642 (citing *Wickham*, 979 S.W.2d at 883); *see also Waller*, 2018 Tex. App. LEXIS 10010, at *13-14 (holding there could be no taking where "water released by SRA-T from the Toledo Bend Dam did not flow directly onto Appellants' properties; rather, it flowed into the Sabine River, and mixed with water from other tributaries and rainwater below the dam before overflowing the banks of the Sabine"). Since SJRA has no knowledge, let alone sufficient control, to have the requisite intentionality to affect water that may escape the river somewhere, anywhere, downstream necessary to establish a taking.

Thus, the undisputed evidence in the instant case proves there is no waiver of SJRA's immunity on this issue as well. The fact SJRA released water from Lake Conroe directly and only into the West Fork San Jacinto River, precludes Plaintiffs from establishing a waiver of immunity on this element of their takings claim as well. To be sure, SJRA could not have intended to take any Plaintiff's property by releasing all water from the Dam directly and only into a public waterway.

2. SJRA did not intentionally flood any Plaintiff's individual, specific property

Still, Plaintiffs' failure to show a waiver of SJRA's immunity is not limited to Plaintiffs' failure and indeed inability to demonstrate there was actually a taking. In order to establish subject matter jurisdiction on a takings claim under the Texas Constitution that provides the requisite waiver of the presumption of governmental immunity, "it is not enough merely to allege that the *act* causing the damage was intentional"; a plaintiff must show the government *intentionally took their property* through certain intentional acts. *See City of Austin v. Liberty*

Mut. Ins., 431 S.W.3d 817, 825 (Tex. App.—Austin 2014) (emphasis in original). "The Texas Supreme Court has made clear that, in takings cases, its objective has been to 'avoid what would be an anomalous result if the State, an entity otherwise generally entitled to immunity for negligence, were subject to liability for something less than intentional behavior.'" *Gulf Coast Waste Disposal Auth. v. Four Seasons Equip., Inc.*, 321 S.W.3d 168, 175-76 (Tex. App.—Houston [1st Dist.] 2010) (quoting *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 554 (Tex. 2004)). This distinction is significant to the instant case.

The intentionality element of a taking claim, and thus a waiver of the heavy presumption of immunity, was discussed at length by the Texas Supreme Court in *City of Dallas v. Jennings*:

> When a governmental entity physically damages private property in order to confer a public benefit, that entity may be liable under Article I, Section 17 if it (1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action -- that is, that the damage is 'necessarily an incident to, or necessarily a consequential result of,' the government's action.

142 S.W.3d 310, 314 (Tex. 2004).

"For damage to be a 'substantially certain' result of conduct requires more than that it was possible, at increased risk, or even more likely than not to occur." *City of Austin*, 431 S.W.3d at 825 (citing *Gulf Coast Waste Disposal Auth.*, 321 S.W.3d at 175. Therefore, "allegations demonstrat[ing] awareness . . . that an increased risk existed" do not satisfy the "necessarily incident to or a consequential result of" intent standard in a taking case. *Id.* "The governmental entity's awareness of the mere possibility of damage is no evidence of intent." *City of San Antonio v. Pollock*, 284 S.W.3d 809, 821 (Tex. 2009). "Thus, for an act to give rise to a takings claim, the act must at least be one in which the inevitability of damage is so obvious that its incurrence is deemed to be the deliberate infliction of harm *for the purpose of* carrying out the

governmental project." *City of Austin*, 431 S.W.3d at 825. The evidence presented with this Plea negates that element of Plaintiffs' burden to prove a waiver of SJRA's immunity, as well.

a. SJRA's reliance on the Gate Operations Policy negates any intent to flood downstream properties

The plaintiffs concede that, in order to establish a takings claim, they must prove SJRA intended to flood their properties by passing storm water through the Lake Conroe flood gates; that is, that SJRA *knew* that the manner in which it operated the flood gates would cause flooding, or increased flooding, at *their* properties. Plaintiffs' claims thus fail on this additional ground because the evidence confirms that was *not* SJRA's intent.

The Texas Supreme Court has held that, when a governmental entity has looked to experts for guidance with respect to scientific or technical issues, it is entitled to rely on that guidance. *See City of Keller v. Wilson*, 168 S.W.3d 802, 829 (Tex. 2005). When such experts provide advice regarding the appropriate course of conduct which the governmental entity follows the requisite intent necessary to a takings claim is missing. *See id.*

Here, the evidence establishes that:

- Massive amounts of water flowed into Lake Conroe during Hurricane Harvey. Without the dam, this water would have continued down the West Fork of the San Jacinto River to downstream properties.
- Keeping the flood gates closed in an effort to retain all of this water was not an option.
- SJRA had contracted for and been provided expert guidance regarding the operation of the flood gates during a major rain event. A key component of that policy was SJRA's requirement that the gate operation protocols must *not* cause or increase downstream flooding.
- SJRA followed the protocols established in the Policy in its releases of storm waters during Hurricane Harvey, limiting releases to approximately 50,000 cfs *less* than the peak inflows.

In utilizing the Policy and dam operating procedure developed by its consulting engineers to manage releases of water during the storm, SJRA intended to, and in fact did, hold in Lake Conroe significant amounts of water. And while beyond the scope of the question of whether Plaintiffs can show a waiver of SJRA's immunity from suit – they cannot – the evidence shows that, but for careful operation of the dam, water would have immediately overtopped the tainter gates and flowed downstream. This would have only exacerbated the flooding caused by the storm and by the numerous other sources of substantial water volume and higher flowage caused by the several tributaries and substantial rain. SJRA did not intend to cause flooding — it intended (and accomplished) exactly the opposite.

b. Plaintiffs cannot demonstrate SJRA knew or was substantially certain its release of water would end up on any specific Plaintiff's property

In light of both the evidence that SJRA only released water into the San Jacinto River coupled with the fact SJRA did not have a reason to believe its discharge would end up on any particular Plaintiff's property – if *arguendo*, any Plaintiff could show that actually happened – the undisputed, indeed indisputable, evidence shows SJRA did not and could not know the release of water from the Lake Conroe Dam would or was substantially certain to cause flooding on any Plaintiff's specific, individual property. *Compare Jennings*, 142 S.W.3d at 314. It is not enough for Plaintiffs to allege SJRA knew *some flooding* might occur, because the Texas Supreme Court expressly held in *Kerr* that a plaintiff must demonstrate SJRA knew or was substantially certain it would flood "*certain* private property." 499 S.W.3d at 800 (citing *Jennings*, 142 S.W.3d at 314) (emphasis in original). Anything less fails to establish the intentionality element of a takings claim.

c. The evidence also disproves the necessary recurrence requirement

"[A] single flood event does not generally rise to the level of a taking." *Toomey v. Tex. Dep't of Transp.*, No. 01-05-00749-CV, 2007 Tex. App. LEXIS 3009, at *11-12 (Tex. App.—Houston [1st Dist.] Apr. 19, 2007, no pet.). By this "recurrent requirement assures that the government is not held liable for taking property when a project's adverse impacts . . . are too temporal or speculative to warrant compensation." *Id.* at *12; *see also Ahart v. Tex. Dep't of Transp.*, No. 14-05-00027-CV, 2006 Tex. App. LEXIS 6952, at *9 (Tex. App.—Houston [14th Dist.] Aug. 1, 2006, pet. denied) (mem. op.) (emphasis added). While Plaintiffs allege their homes flooded as a result of past releases of water from the Lake Conroe Dam, not a single Plaintiff even notified SJRA of that contention, Ex. C, let alone how any Plaintiff could attribute prior flooding 40 river miles downstream from SJRA's release of water from the dam was the water that flooded any Plaintiff's property before 2017. Regardless, the absence of such evidence means Plaintiffs cannot meet their burden to substantiate the recurrence requirement so they can show a waiver of immunity for a takings claim on this element of a takings, either.

3. Any flooding of Plaintiffs' properties was not for a public purpose

Lastly, in order to demonstrate a waiver of SJRA's governmental immunity, Plaintiffs must provide evidence showing SJRA's intentional "placement" of water on Plaintiffs' properties, as Plaintiffs allege, was for a public purpose. *Houston v. Crabb*, 905 S.W.2d 669, 673 (Tex. App.—Houston [14th Dist.] 1995. As with the rest of Plaintiff's insupportable, conclusory allegations for which Plaintiffs have failed to produce any evidence, the lack of SJRA's knowledge that any water released from Lake Conroe could, even if *arguendo* it actually did, reach any Plaintiff's property disproves this element of Plaintiffs' takings claim.

A governmental entity's actions are for a public use in violation of the Takings Clause only in a situation where the alleged damage results from *intentional* actions within the specific,

government mandated purview of that governmental entity. *See Steele*, 603 S.W.2d at 790. Because the Texas Supreme Court has held that damage to a plaintiff's property caused by the unintended consequence of the governmental entity's actions, the damage was not for a public purpose and therefore cannot, as a matter of law, constitute a taking. *Tex. Highway Dep't v. Weber*, 219 S.W.2d 70, 71-73 (Tex. 1949). Like the hay burning in *Weber*, in the instant case, SJRA released water from the dam on Lake Conroe in order to prevent a failure of the dam due to substantial inflow resulting from Hurricane Harvey, not to flood any private property, let alone any private property 40 river-miles always that SJRA had no reason to anticipate would flood due solely to its release from Lake Conroe. Because flooding Plaintiffs' property was not the reason for SJRA's governmental action nor anticipated by the SJRA, as a matter of law SJRA's release, even if it did inadvertently end up on Plaintiffs' properties, was not for a public purpose.

C. Plaintiffs' easement claim also fails

Plaintiffs also contend that, as a result of the flooding, SJRA "has **taken** an inundation, flood, flowage, or drainage easement on, over, and across Plaintiffs' Property." This is simply duplicative of Plaintiffs' takings claims as it is a partial takings claim. *See Hubler v. Corpus Christi*, 564 S.W.2d 816, 824 (Tex. Civ. App.—Corpus Christi 1978). "[P]laintiff would have a cause of action for a partial taking if he could show that the defendants' completed projects directly caused the present increase of surface waters flowing across plaintiff's property and that such increase of surface waters *repeatedly* overflowed portions of plaintiff's land not previously subject to the natural drainage easement . . . On the other hand, occasional or intermittent overflows do not constitute a taking." *Id.*

Plaintiffs would be required to show the same waiver of immunity for a partial takings claim in order to prove a claim of an alleged taking of an easement by SJRA. Thus, since the evidence proves Plaintiffs cannot establish a waiver of immunity as to Plaintiffs' taking claims it

equally proves there is no waiver of immunity as to Plaintiffs' claim of a partial taking of an easement.

CONCLUSION AND PRAYER

Plaintiffs have failed on several bases, any single one of which is dispositive, to demonstrate a waiver of SJRA's immunity from suit as is their burden to vest this Court with subject matter jurisdiction. Indeed, the evidence proves no waiver of SJRA's immunity from suit is available for Plaintiffs' claims. The Court should thus grant SJRA's Plea to the Jurisdiction and dismiss Plaintiffs' claims with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on counsel of record by electronic filing, certified or regular mail, and/or by facsimile on this the 31st day of July, 2019.

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