

CAUSE NO. 1123430 (Consolidated)

VICENTE MEDINA, ASHLEY § IN THE COUNTY CIVIL COURT
MEDINA and ARIS ANTONIOU §
§ AT LAW NO. 1
v. §
§
SAN JACINTO RIVER AUTHORITY § HARRIS COUNTY, TEXAS

DEFENDANT SAN JACINTO RIVER AUTHORITY'S SUPPLEMENT TO ITS PLEA TO
THE JURISDICTION

**HUNTON ANDREWS
KURTH LLP**

J. Mark Breeding
State Bar No. 02942500
Michael D. Morfey
State Bar No. 24007704
Kelly Sandill
State Bar No. 24033094
600 Travis Street, Suite 4200
Houston, Texas 77002
(713) 220-4200
(713) 220-4285 (Fax)
mbreeding@HuntonAK.com
michaelmorfey@HuntonAK.com
kellysandill@HuntonAK.com

**LEWIS BRISBOIS
BISGAARD & SMITH LLP**

William S. Helfand
State Bar No. 09388250
Shane L. Kotlarsky
State Bar No. 24083329
24 Greenway Plaza
Suite 1400
Houston, Texas 77046
(713) 659-6767
(713) 759-6830 (Fax)
bill.helfand@lewisbrisbois.com
shane.kotlarsky@lewisbrisbois.com

**LLOYD GOSSELINK
ROCHELLE & TOWNSEND PC**

Jose E. de la Fuente
State Bar No. 00793605
James F. Parker
State Bar No. 24027591
Nathan E. Vassar
State Bar No. 24079508
Gabrielle C. Smith
State Bar No. 24093172
816 Congress Ave., Ste. 1900
Austin, Texas 78701
(512) 322-5800
(512) 472-0532 (Fax)
jdela Fuente@lglawfirm.com
jparker@lglawfirm.com
nvassar@lglawfirm.com
gsmith@lglawfirm.com

COUNSEL FOR DEFENDANT SAN JACINTO RIVER AUTHORITY

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SUPPLEMENT TO ITS PLEA TO THE JURISDICTION**

Defendant San Jacinto River Authority moves the Court, by its Plea to the Jurisdiction and Supplement to its Plea to the Jurisdiction, to dismiss Plaintiffs' suit for lack of subject-matter jurisdiction based on SJRA's governmental immunity:

INTRODUCTION

Plaintiffs' properties in Kingwood lie far downstream from Lake Conroe Dam. They are so far downstream, in fact, that Plaintiffs cannot establish the threshold element of proof that water from Lake Conroe flooded their properties during Hurricane Harvey, and expert hydrological modeling actually disproves Plaintiffs' allegation.

Consistent with basic logic, in light of the numerous sources of water between Lake Conroe and Plaintiffs' properties, Plaintiffs cannot demonstrate, as is their *threshold* burden, that SJRA's release of water caused flooding on Plaintiffs' properties. The expert hydrological analysis shows that Plaintiffs' properties flooded from numerous tributaries downstream from the Dam, including Lake Creek, Spring Creek, and Cypress Creek, and additional rainwater and sheet flooding that also entered the river downstream of the Dam. This confluence of events—all due to an act-of-God—prevents Plaintiffs from overcoming the initial jurisdictional hurdle of demonstrating causation as a matter of law,

as set forth by the Texas Supreme Court in *Harris County Flood Control District v. Kerr*, 499 S.W.3d 793 (Tex. 2016). For this reason alone, Plaintiffs cannot overcome the strong presumption of SJRA's immunity from suit to imbue this Court with subject matter jurisdiction because they cannot even show the first element of a takings claim—that SJRA's acts caused damage to their property.

Because the undisputed evidence shows SJRA released water through the Dam at a rate lower than the maximum rate of inflow into the reservoir, thereby reducing the flows in the West Fork San Jacinto River, SJRA's release of water from Lake Conroe does not constitute a taking as a matter of law. Texas law makes clear that a dam operator does not commit a taking when it does not release water from the dam in such a way that it increases the flow into the river or negatively changes the character of the flows in the river. *Wickham v. San Jacinto River Auth.*, 979 S.W.2d 876 (Tex. App. — Beaumont 1998, pet. denied).

The reasoning makes sense. To hold otherwise would impute nature's causative actions to dam operators, which would then become absolute insurers against every catastrophic rain event in their watersheds. Because a taking requires an intent that is clearly absent under these circumstances, Plaintiffs cannot demonstrate an exception to SJRA's immunity on this separate ground as well, as is required.

Consistent with Texas law, SJRA's engineers developed SJRA's Gate Operation Policy to ensure that, while SJRA must open the Lake Conroe Dam's floodgates to prevent damage to or failure of the Dam, peak outflow from the Lake Conroe Dam will not exceed peak inflow into the reservoir during a storm event. Because SJRA followed that

procedure during the Harvey storm event, SJRA lacked the requisite intent to cause any flooding downstream or invade or take any Plaintiff's property as a matter of law. Plaintiffs cannot overcome SJRA's immunity from suit because of this simple fact.

Each of these facts alone is sufficient, but certainly in combination, to show that SJRA is immune from Plaintiffs' suit. Thus, as more fully explained in detail *infra*, the Court lacks subject-matter jurisdiction over Plaintiffs' claims, and the Court should grant SJRA's Plea to the Jurisdiction and dismiss this action.

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EVIDENCE SUPPORTING DISMISSAL

Exhibit A: Declaration of Hector Olmos

Exhibit A-1: Curriculum vitae of Hector Olmos

Exhibit A-2: Watersheds of the San Jacinto River Basin

Exhibit A-3: SJRA Water Inflow and Discharge Calculation Spreadsheet

Exhibit A-4: Freese and Nichols Real-Time Water Inflow and Discharge Calculation Spreadsheet

Exhibit A-5: Freese and Nichols Post-Hurricane Harvey Water Inflow and Discharge Calculation Spreadsheet

Exhibit B: Declaration 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: Water Inflow Calculation Spreadsheet

Exhibit C: Declaration of Mark E. Forest

Exhibit C-1: Curriculum vitae of Mark E. Forest

Exhibit C-2: Gauge-Adjusted Radar Rainfall estimation

Exhibit C-3: Technical memorandum regarding topographic data summary

Exhibit C-4: Technical memorandum summarizing hydrologic modeling

Exhibit C-5: Technical memorandum summarizing hydraulic modeling

Exhibit C-6: Hydraulic modeling animations (in flash drive to be delivered to the Court by hand delivery)

Exhibit C-7: Hydraulic modeling animation screen-capture

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. SJRA follows its Gate Operations Policy, which is designed to reduce the flows in the river.

Though Lake Conroe is not designed to control floodwaters, SJRA operates the reservoir under a policy SJRA's engineers designed to protect the structural integrity of the Dam in compliance with state regulations while at the same time ensuring that it does not increase the floodwaters passing through the Lake Conroe Dam.

1. SJRA operates Lake Conroe as a water-supply reservoir.

Lake Conroe is a man-made reservoir in Conroe, Texas, that was constructed by damming the West Fork San Jacinto River, a pre-existing natural waterway. Ex. B at ¶ 4, Ex. B-1; Ex. A at ¶ 4. Lake Conroe was designed and built for the express purpose of providing a reliable water supply to customers across Harris and Montgomery Counties. Ex. A at ¶ 4. SJRA is responsible for protecting the San Jacinto River Basin in and around Lake Conroe, including releasing water from the Lake Conroe Dam when necessary. Ex. B. at ¶ 3.

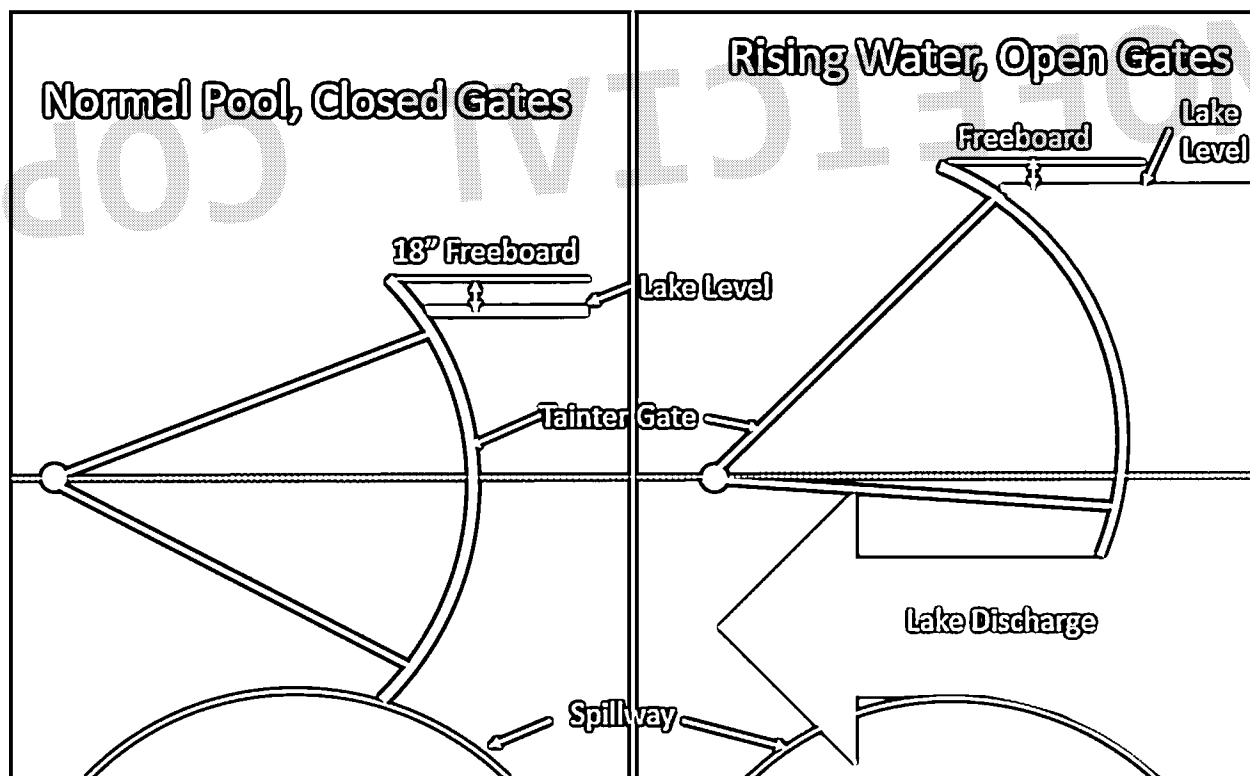
Lake Conroe is designed to be a water-supply reservoir, not a flood-control reservoir. Ex. B at ¶ 6. The difference between the normal lake level (201 feet above mean sea level (msl)) and the Lake's maximum level (207 feet above msl) is small compared to that of a flood-control reservoir.¹ *Id.* at ¶¶ 8-10. But while Lake Conroe was not designed

¹ By comparison, Lake Travis is a flood-control reservoir. LOWER COLO. RIVER AUTH., HIGHLAND LAKES & DAMS (2019), <https://www.lcra.org/water/dams-and-lakes/Pages/default.aspx>. The normal pool at Lake Travis stands at 681 feet above msl, holding 1.1 million acre-feet of water. *See id.* The spillway at 714 feet above msl allows Lake Travis to hold an additional 787,000 acre-feet of floodwaters in its flood pool. *See id.*

or constructed to function as a flood-control reservoir, *id.* at ¶ 6, SJRA's ability to temporarily store water up to 207 feet above msl allows the reservoir and Dam to act as a buffer to reduce the maximum flows in the West Fork San Jacinto River during flood events. *Id.* at ¶ 10.

2. SJRA releases water from the Lake Conroe Dam through tainter gates, which must not be overtopped.

To release water from the reservoir, Dam operators raise one (or more) of the five tainter-style floodgates in the Dam, each measuring 40 feet wide by 30 feet tall, which allows water to flow underneath the gate and out into the West Fork San Jacinto River, as demonstrated in the diagram below.



Id. at ¶ 13.

The tainter gates are not designed to allow water to flow over them, and Dam operators **can no longer open the gates** if they are overtopped. *Id.* at ¶ 14; Ex. A at ¶ 12. If water overtops the tainter gates at the Lake Conroe Dam, the likely result would be the failure of the tainter gates and water from the reservoir flowing over the top of the gates *uncontrolled* into the West Fork San Jacinto River downstream. Ex. A at ¶ 12.

However, when Dam operators open the gates, the tops of the gates, which sit at 202.5 feet above msl when closed, necessarily rise. Thus, somewhat paradoxically, it is only by opening the tainter gates, which releases some water from the reservoir, that the Dam can hold back water in the Lake at a level above 202.5 feet above msl. Ex. B at ¶ 13.

B. SJRA's engineers established a Gate Operations Policy intended to reduce flows in the river.

In 2010, SJRA hired Freese and Nichols, Inc., the engineering firm responsible for originally designing Lake Conroe Dam, to create a Gate Operations Policy in the form of 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. *Id.* at ¶ 16; Ex. A at ¶ 14. In accordance with SJRA's specific instructions, Freese and Nichols created the Policy so the peak flow passed through the Dam's gates would never exceed that storm event's peak inflow into Lake Conroe.² Ex. A at ¶ 19. In so doing, SJRA also complied with the guidance it received from relevant court decisions.

² Freese and Nichols updated the Gate Operations Policy in April 2017. Ex. A at ¶ 17. 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.*

The Gate Operations Policy is designed so that release rates are always below the peak inflow rate, including accounting for the effect that wind, rain, and waves may have on lake level readings. For example, at the highest lake level contemplated in the probable-maximum-flood scenario—208.5 feet above msl—the Policy still only calls for a release rate of 80% of the peak inflow into the Lake. Ex. B at ¶ 18; Ex. A at ¶ 20.

C. SJRA followed its Gate Operations Policy during Hurricane Harvey and reduced downstream flows.

During Hurricane Harvey, the Gate Operations Policy and its corresponding computer program functioned as designed. Ex. A at ¶ 22; Ex. B at ¶¶ 20-21. As the substantial inflow into Lake Conroe increased, the lake level began to rise with it. Ex. B-6. This required SJRA to begin passing floodwaters flowing into Lake Conroe through its gates to protect the structural integrity of the reservoir and Dam. Ex. A at ¶¶ 29-30.

Importantly, and consistent with its Gate Operations Policy, SJRA's release of floodwater never exceeded the peak inflow of floodwater caused by Hurricane Harvey and related rainstorms. Ex. B-6; Ex. C at ¶ 32. Specifically, during the time frame of Hurricane Harvey, inflow into the Lake reached a peak rate of between 106,000 and 129,000 cubic feet per second ("cfs").³ Ex. B-6; Ex. C at ¶ 32. SJRA's peak outflow only reached 79,141 cfs. Ex. A at ¶ 30. SJRA began reducing the rate of outflow as the inflows reaching the Dam subsided and the lake level stopped rising. Ex. A-3; Ex. A-4.

³ HDR's calculation of a peak inflow of 105,809 cfs is based on its modeling of the storm event and reflects rainfall and stream flows measured upstream of the Dam. Ex. C-4 at Table 1. Using a different methodology, Freese and Nichols calculated the peak inflow at 129,065 cfs, occurring at 1:00 AM on August 28, 2017. Ex. A at ¶ 30. To calculate the peak inflow, Freese and Nichols relied upon lake levels and measured discharges from the Dam's gate releases. *Id.* at ¶¶ 24-26.

2. SJRA adhered to its Gate Operations Policy and released less water than the peak flow into Lake Conroe.

From the moment the lake level rose over the pool level of 201 feet above msl at Lake Conroe Dam, SJRA operated the Dam's floodgates to release floodwater at a rate equal-to or less-than the rate called for in the Policy. Ex. B at ¶ 20. The result is that the Lake Conroe Dam held back some of the floodwaters that would otherwise have gone downstream.

The lake level began to rise at approximately 6:00 AM on August 26, 2017. Ex. A at ¶ 29. The Lake's rise was modest at first—from 200.40 feet above msl to the pool level of 201 feet above msl at 11:30 PM, at which point the Lake was receiving an inflow of only 1,722 cfs. Ex. A-3. Over the next two hours, the inflow increased, and SJRA opened the gates at 12:25 AM on August 27 to discharge 529 cfs downstream. *Id.*

Throughout the morning on August 27, rain continued to fall, inflow increased, and lake levels rose. Over the next two days, as flow into the Lake exceeded the amount released from the Dam, the lake level continued to rise. *Id.* **The peak inflow of floodwater into Lake Conroe reached between 106,000 and 129,000 cfs.** Ex. C at ¶ 32.

As dawn broke on August 28, the rain subsided and the rate of inflow slowed—to 76,202 cfs at 7:00 AM and 67,688 cfs at 10:30 AM. Ex. A-3. The overnight inflow was still flowing down the 21-mile-long lake towards the Dam, and the lake level at the Dam continued to rise, eventually reaching a peak level of 206.23 feet above msl at 8:00 AM on August 28. *Id.* Four hours later, at noon on August 28, Lake Conroe Dam reached its **maximum discharge rate of 79,141 cfs.** *Id.*; Ex. B at ¶ 21.

2. After Harvey's rainfall ended, Lake Conroe still held Harvey water.

That the maximum outflow from the Dam was well below the maximum inflow during Harvey's storm event is reflected in the measurements of Lake Conroe's elevation level before and after Harvey. Prior to Harvey's arrival in the area on the night of August 26, Lake Conroe's surface stood at 200.4 feet above msl, 0.6 feet below normal pool elevation. Ex. B-6. It was not until September 17—weeks after Harvey's rains had stopped and flow into the Lake from upstream had returned to normal—that the Lake returned to and stabilized at 201 feet above msl, still storing more than 11,000 acre-feet of Harvey's floodwater and preventing it from flowing downstream. Ex. A-4.

D. Other sources over which SJRA has no control converge with the West Fork San Jacinto River and contribute to flooding.

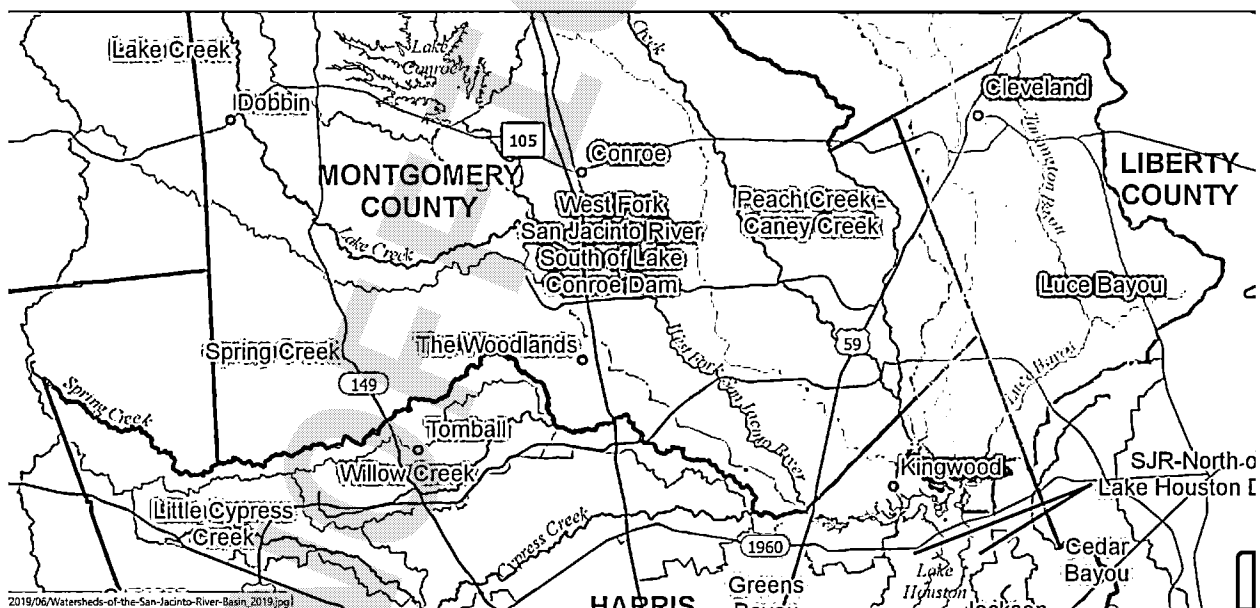
The United States Geological Survey gages⁴ along the West Fork San Jacinto River show that the amount of water in the river and the rate of the flows continually increased downstream from Lake Conroe as additional tributaries merged with the West Fork, downstream from and irrespective of releases from the Dam. Hydrologic and hydraulic modeling shows that all of the Plaintiffs' properties downstream flood as a result of flows from these tributaries, even when Lake Conroe Dam releases no water at all (which would have been impossible in the Harvey storm event, as the Dam would have been overtopped).

⁴ The USGS 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

1. Water that passes through Lake Conroe Dam flows directly into the West Fork San Jacinto River, which is fed by other tributaries before reaching Lake Houston.

After being released through the Lake Conroe Dam directly into the West Fork San Jacinto River, water moves downstream toward Lake Houston, which eventually empties into the Gulf of Mexico. Ex. A at ¶¶ 6-8; Ex. B at ¶ 11. Before reaching any individual Plaintiff's property, let alone Lake Houston, water in the West Fork San Jacinto River south of the Lake Conroe Dam is joined by water from numerous tributaries, including Lake Creek, Spring Creek, and Cypress Creek, all of which convey water from sources other than Lake Conroe and flow into Lake Houston. *See id.*

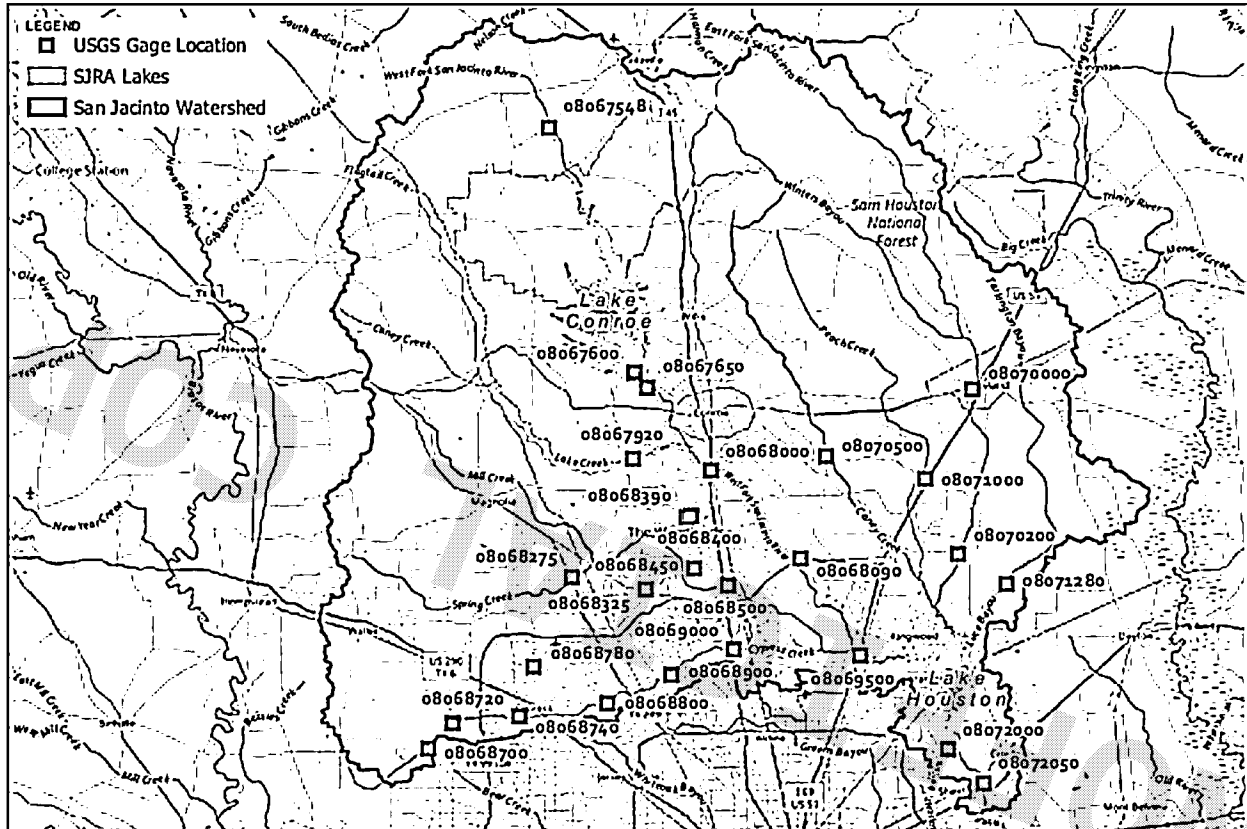
Even farther south, at Lake Houston, the East Fork San Jacinto River merges with the West Fork. *See id.* The map below reflects the watershed of the San Jacinto River, its tributaries between Lake Conroe and Lake Houston, and the sub-watersheds that comprise the San Jacinto River watershed:



Ex. B-4.

2. Floodwater passed through Lake Conroe Dam met floodwaters from other waterways that were also flooding.

The map below shows the location of the USGS gages in the San Jacinto River watershed:

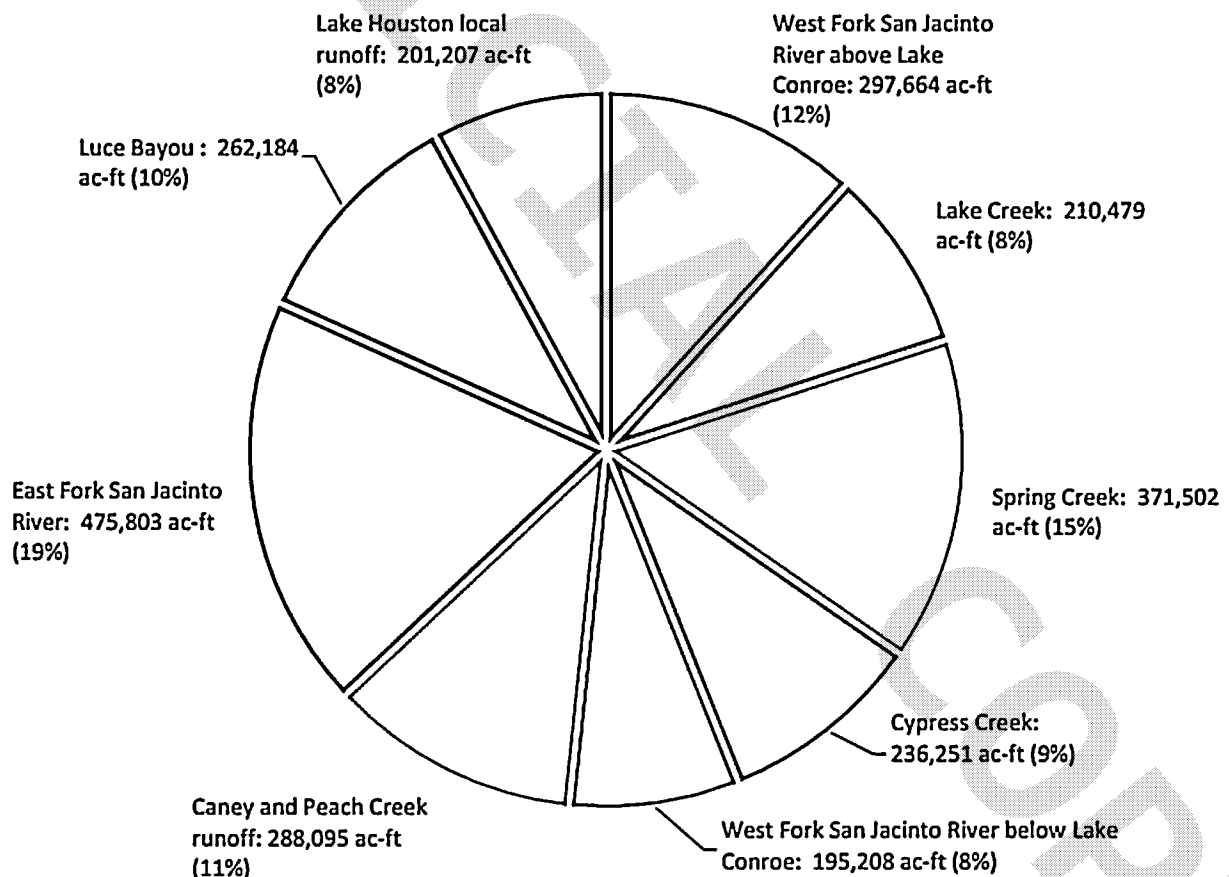


Ex. C-5.

As water flows downstream from Lake Conroe in the West Fork San Jacinto River toward Lake Houston, it first reaches Gage No. 08067650. That gage recorded a maximum flow rate of 75,400 cfs at 4:30 PM on August 28, 2017. 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. This was 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.

Similarly, Gage No. 08068090, which sits above Lake Houston but before Spring Creek enters into the West Fork San Jacinto River, recorded a peak flow 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 flow of 82,100 cfs. That is, Spring Creek, which joins with the West Fork San Jacinto River *miles downstream* of the Dam, contributed water flow much greater than SJRA's peak release.

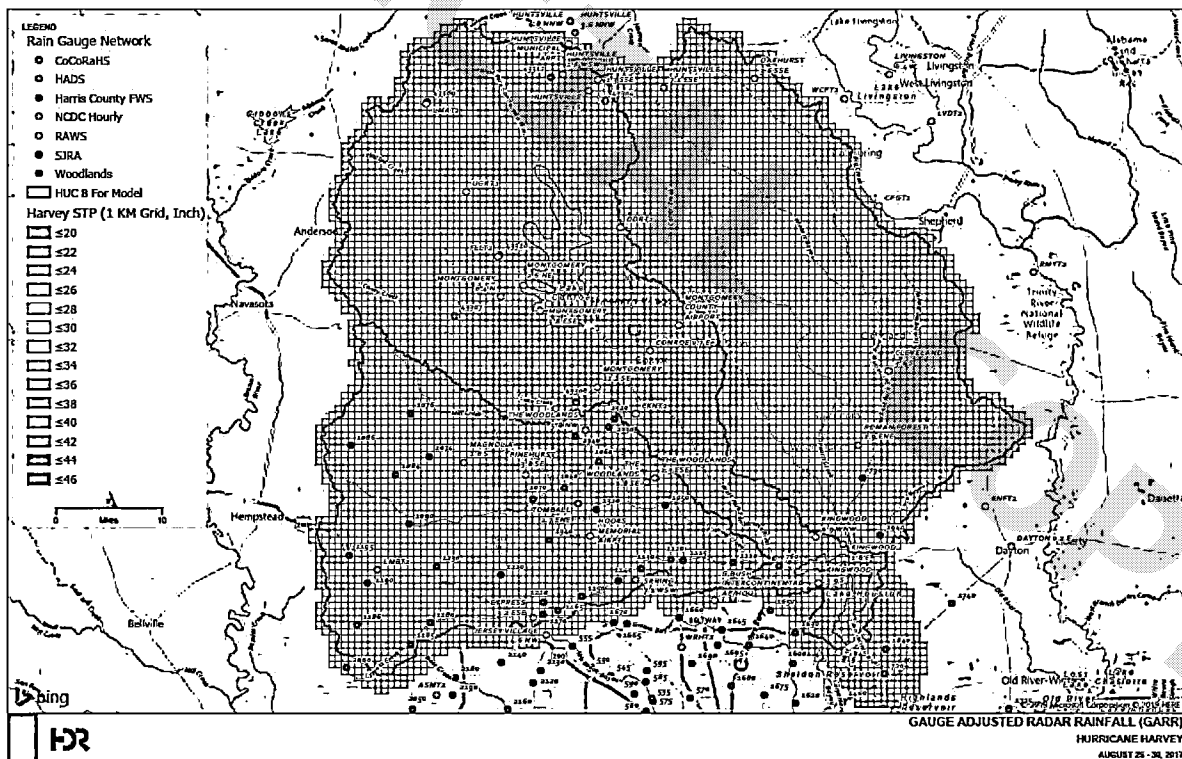
The chart below reflects the confluence, by volume, of water contributed by the numerous tributaries flowing into Lake Houston:



Ex. C-4 at 5.

3. Floodwaters from other waterways brought the West Fork San Jacinto River to flood stage before SJRA released any water from Lake Conroe Dam.

The volume of water that fell over the collective relevant watersheds was nothing less than massive, often colloquially referred to as being of biblical proportions. Rainfall amounts in the relevant area ranged from 20 to 35 inches during the storm. Ex. C-2. 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. *Id.* The rainfall over the Lake Houston watershed is reflected on the map below:



Id. at 4.

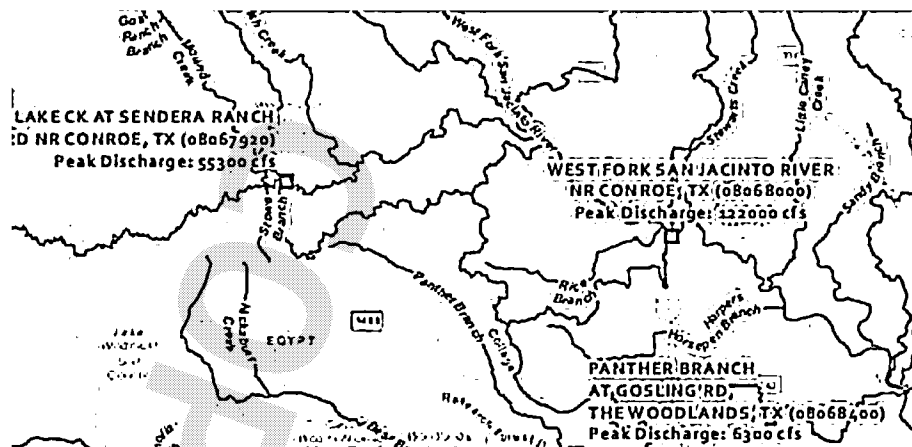
National Weather Service hydrographs, which show flowrates in the waterways over time, demonstrate the significant confluence effect of several other tributaries' independent flooding on the West Fork San Jacinto River during Hurricane Harvey.

a) Lake Creek.

Far north of Plaintiffs' properties, floodwaters from Harvey that passed through Lake Conroe Dam flowed, together with floodwaters from Harvey coming from Lake Creek and other unmeasured upstream tributaries, downstream to the City of Conroe. Notably, Lake Creek received no water from Lake Conroe Dam, as it feeds into the West Fork San Jacinto River downstream of Lake Conroe Dam.

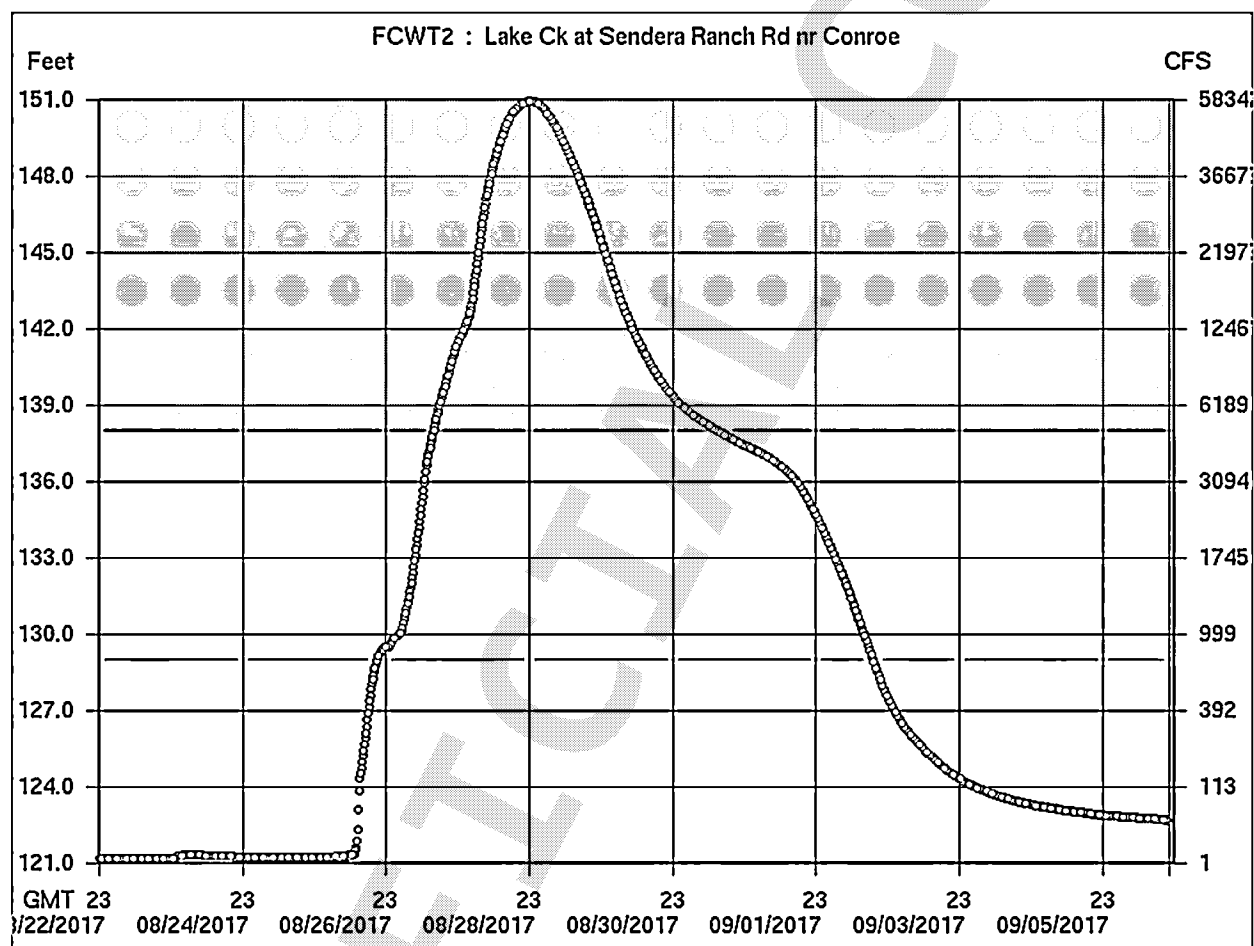
Importantly, both the West Fork San Jacinto River, which included a relatively small amount of floodwater passed through Lake Conroe Dam, and Lake Creek, which did not, both receded quickly. That quick reduction in the flow of floodwaters from these sources is very different from other tributaries that affected Plaintiffs' properties, and reflects the substantial effect those other tributaries had on flooding downstream.

The map below shows the area of confluence with Lake Creek:



Ex. C-5.

Lake Creek, which feeds into the West Fork San Jacinto River downstream of Lake Conroe Dam, crested at 151 feet at Sendera Ranch Road at 5:00 PM on August 28. The National Weather Service charted Lake Creek's flow throughout the Harvey storm event, which is reflected in the following hydrograph:⁵

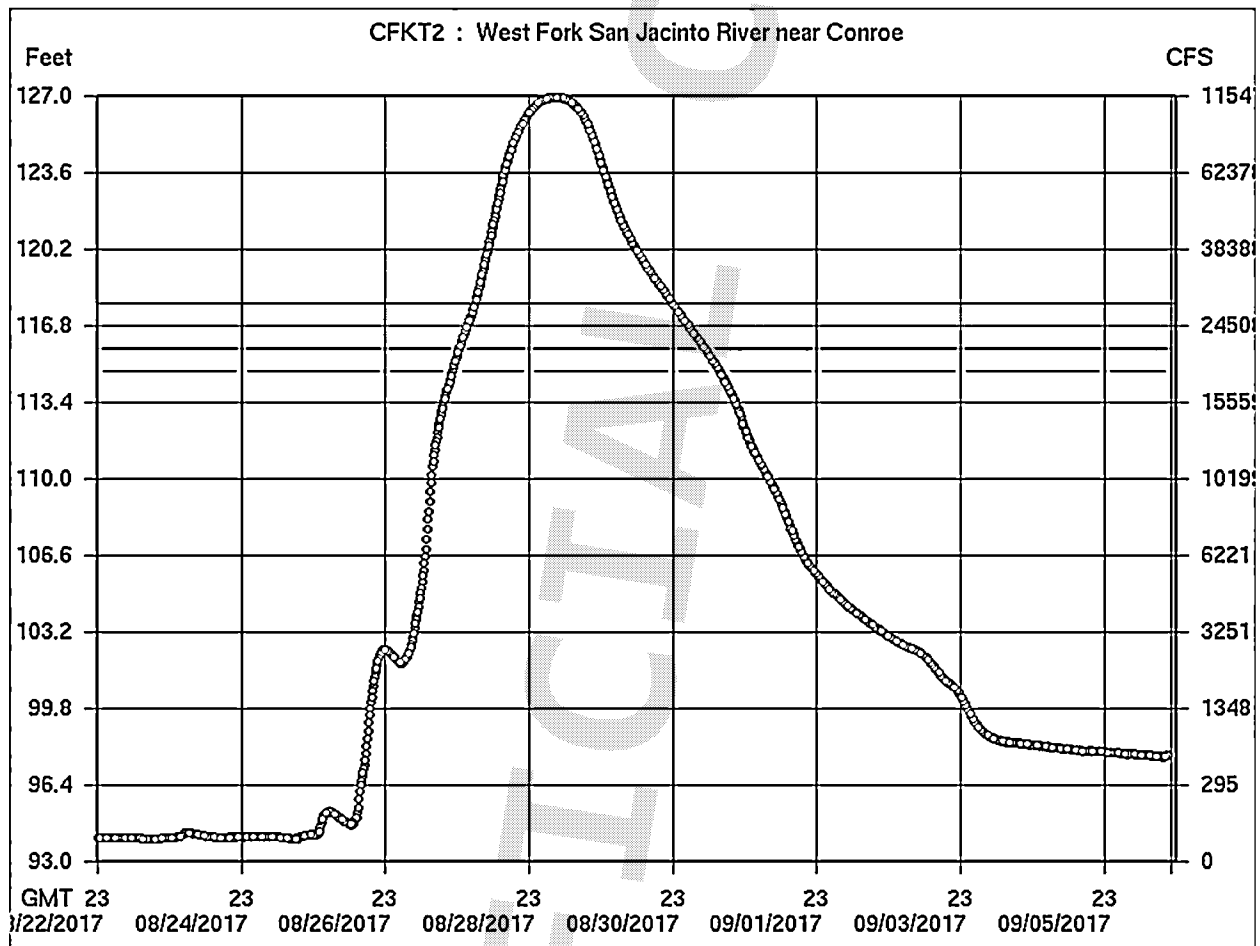


NATIONAL WEATHER SERVICE, HURRICANE HARVEY & ITS IMPACTS ON SOUTHEAST TEXAS (AUGUST 25-29, 2017), <https://www.weather.gov/hgx/hurricaneharvey> (click tab for "Rivers" and hydrograph labeled "FCWT2" to enlarge).⁶

⁵ The hydrographs measure time in Greenwich Mean Time (GMT). When the Central Time Zone is observing daylight savings time, GMT is seven (7) hours ahead of the local time in Houston.

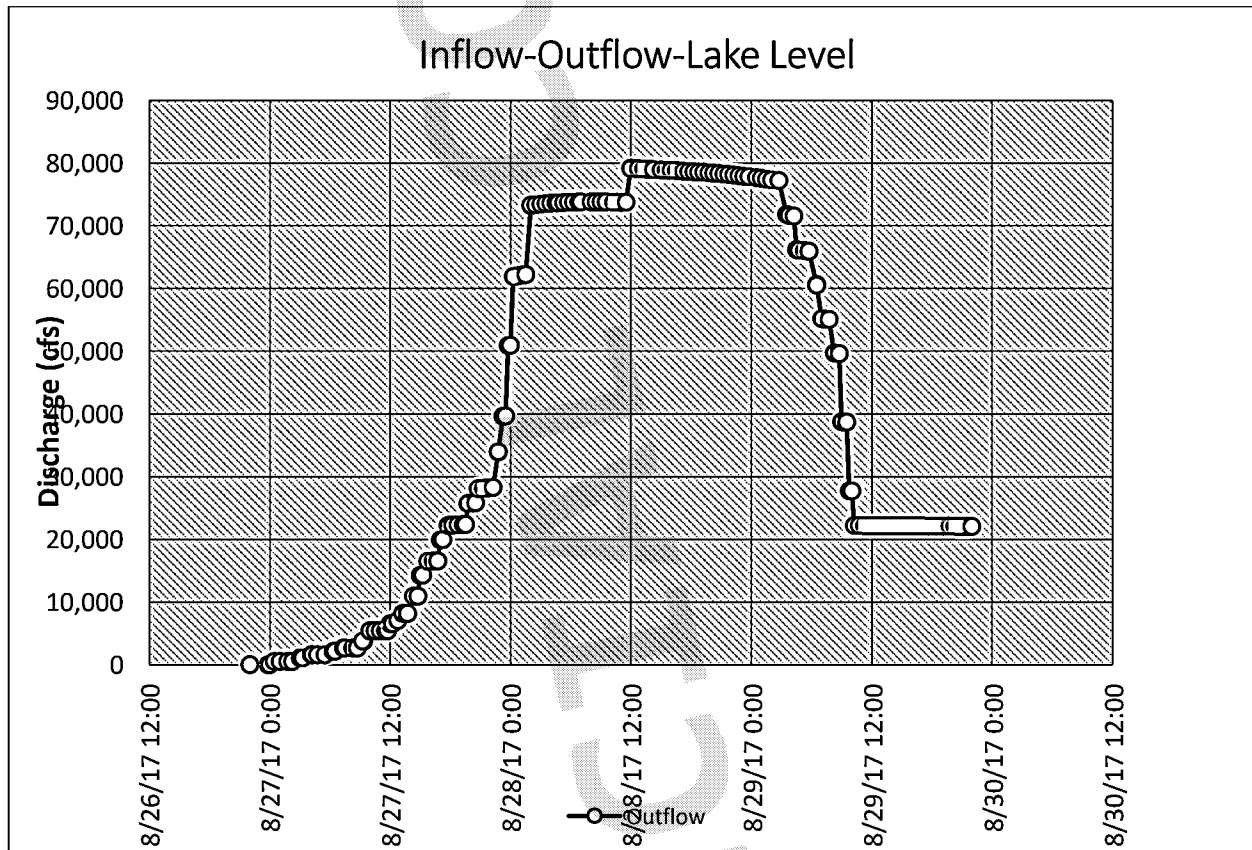
⁶ The yellow line on the hydrograph represents "bank full" stage. The section shaded yellow represents minor flood stage. The section shaded orange represents moderate flood stage. The section shaded purple represents major flood stage. *Id.*

At approximately 6:00 PM on August 28, the West Fork San Jacinto River crested at Conroe, downstream of the river's confluence with Lake Creek, at 127 feet. The West Fork San Jacinto River fell below flood stage at approximately 9:00 PM on August 30. Lake Creek fell below flood stage slightly later.



Id. (click on the hydrograph labeled "CFKT2" to enlarge).

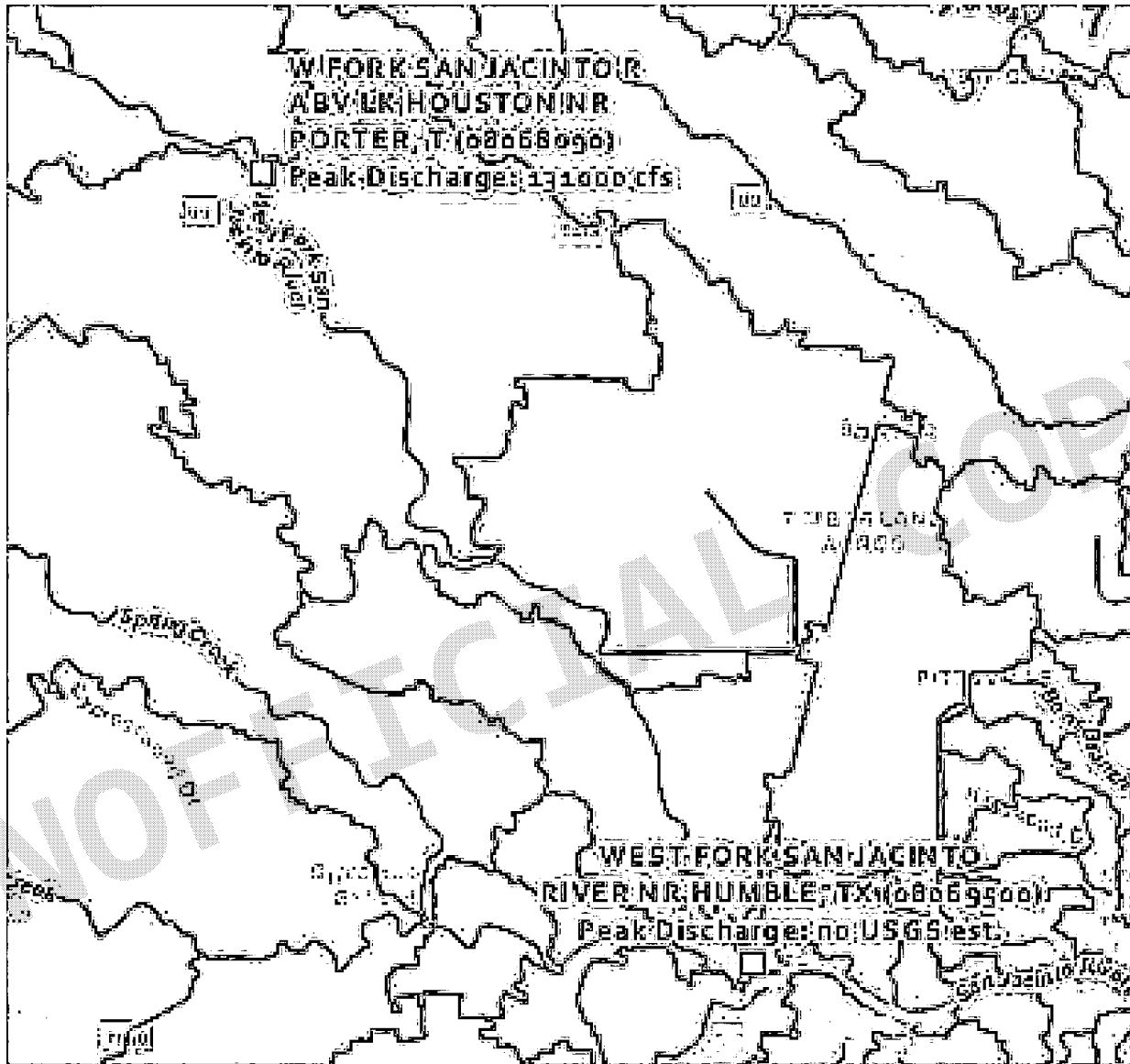
The quick recession of the flood level of those two waterways stands in stark contrast to the releases of floodwater from Lake Conroe Dam, which is reflected in the following chart:



Ex. A-3.

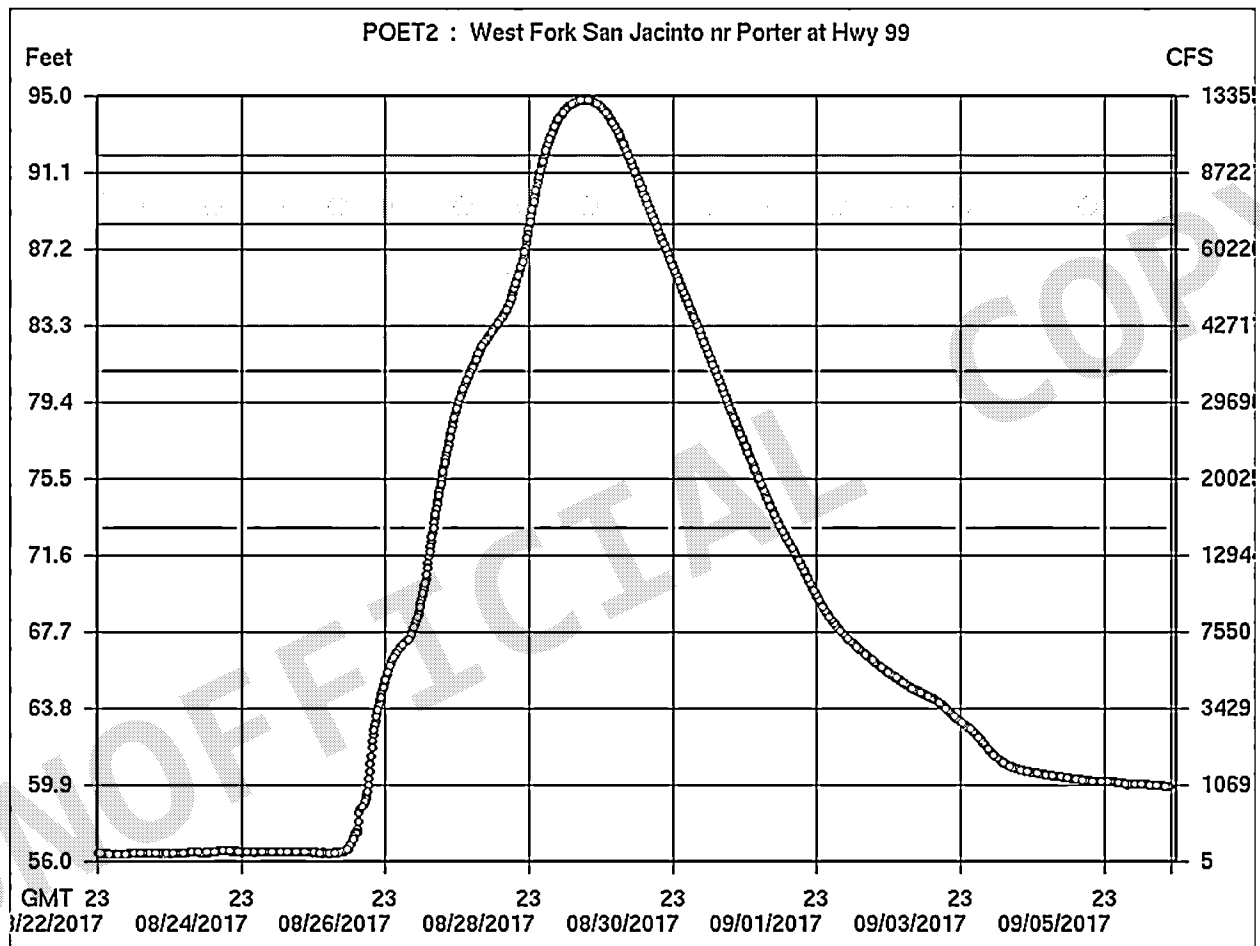
Lake Conroe Dam continued releasing floodwater near its peak release for approximately 15 hours. Ex. A-3. Beginning at 11:45 PM on August 28, SJRA released floodwater at a rate between 77,000 cfs and 80,000 cfs. Ex. A-3. But the near-peak flows in the West Fork San Jacinto River just downstream from the Dam did not reflect any material increase in response. This divergence reflects the impact other tributaries, such as Lake Creek, had on the flows in the West Fork San Jacinto River.

Further downstream, the river passes under Grand Parkway near Porter, shown in the map below.



Ex. C-5.

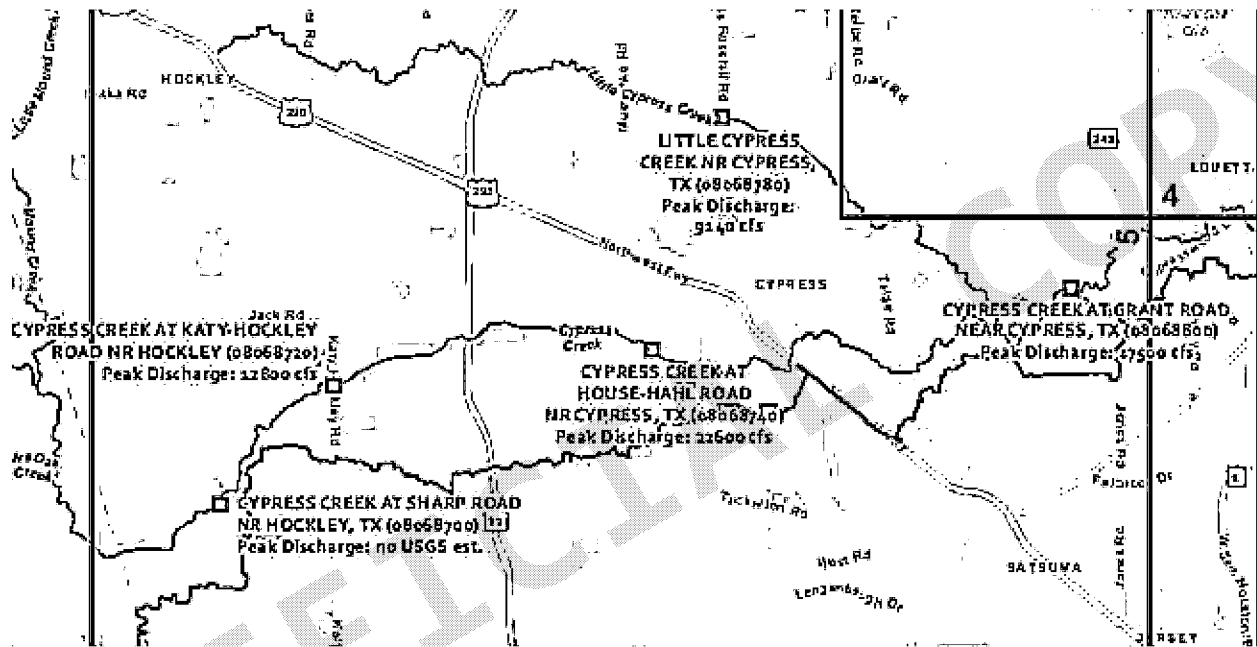
In the predawn hours of August 29, the West Fork San Jacinto River crested at 95 feet at Porter. Just as experienced upstream, the flood receded quickly, and by midnight on the morning of August 31, the West Fork San Jacinto River had dropped below flood stage.



NATIONAL WEATHER SERVICE, HURRICANE HARVEY & ITS IMPACTS ON SOUTHEAST TEXAS (AUGUST 25-29, 2017), <https://www.weather.gov/hgx/hurricaneharvey> (click on the hydrograph labeled "POET2" to enlarge).

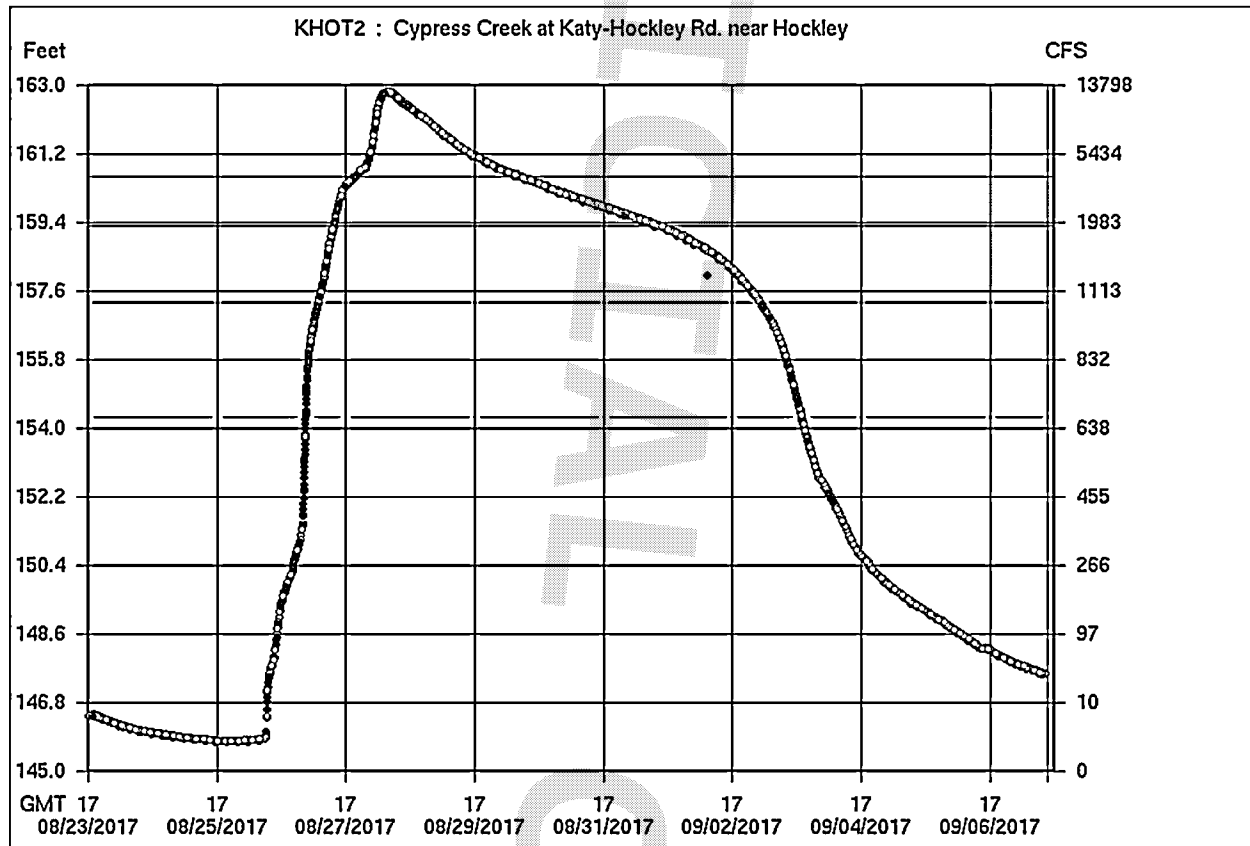
b) Cypress Creek and Spring Creek.

Along Cypress Creek and Spring Creek, both tributaries that reach the West Fork San Jacinto River far downstream of Lake Creek but upstream of Plaintiffs' properties, an entirely different flood developed. The location of the gages along Cypress Creek and Spring Creek are shown in the map below:



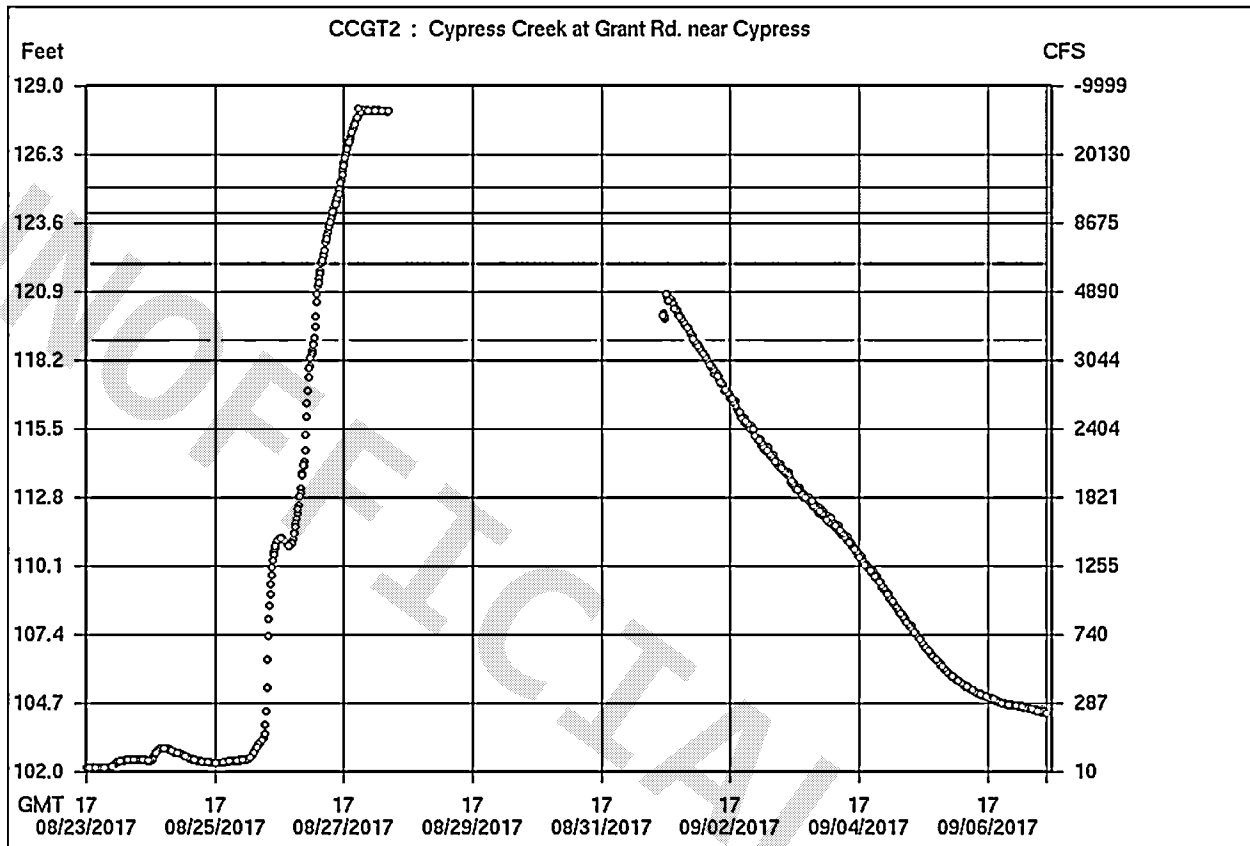
Ex. C-5.

At Katy-Hockley Road, approximately one mile outside Grand Parkway, Cypress Creek crested at 163 feet at approximately 10:00 PM on August 27, one day before the crests on Lake Creek and West Fork San Jacinto River at Conroe. In other words, the flood arrived earlier at these locations far downstream from Lake Conroe, and lasted longer, as well. Cypress Creek at Katy-Hockley Road did not drop below flood stage until approximately 4:00 PM on September 2, nearly three days after Lake Creek and the West Fork San Jacinto River dropped below flood stage.



NATIONAL WEATHER SERVICE, HURRICANE HARVEY & ITS IMPACTS ON SOUTHEAST TEXAS (AUGUST 25–29, 2017), <https://www.weather.gov/hgx/hurricaneharvey> (click on the hydrograph labeled “KHOT2” to enlarge).

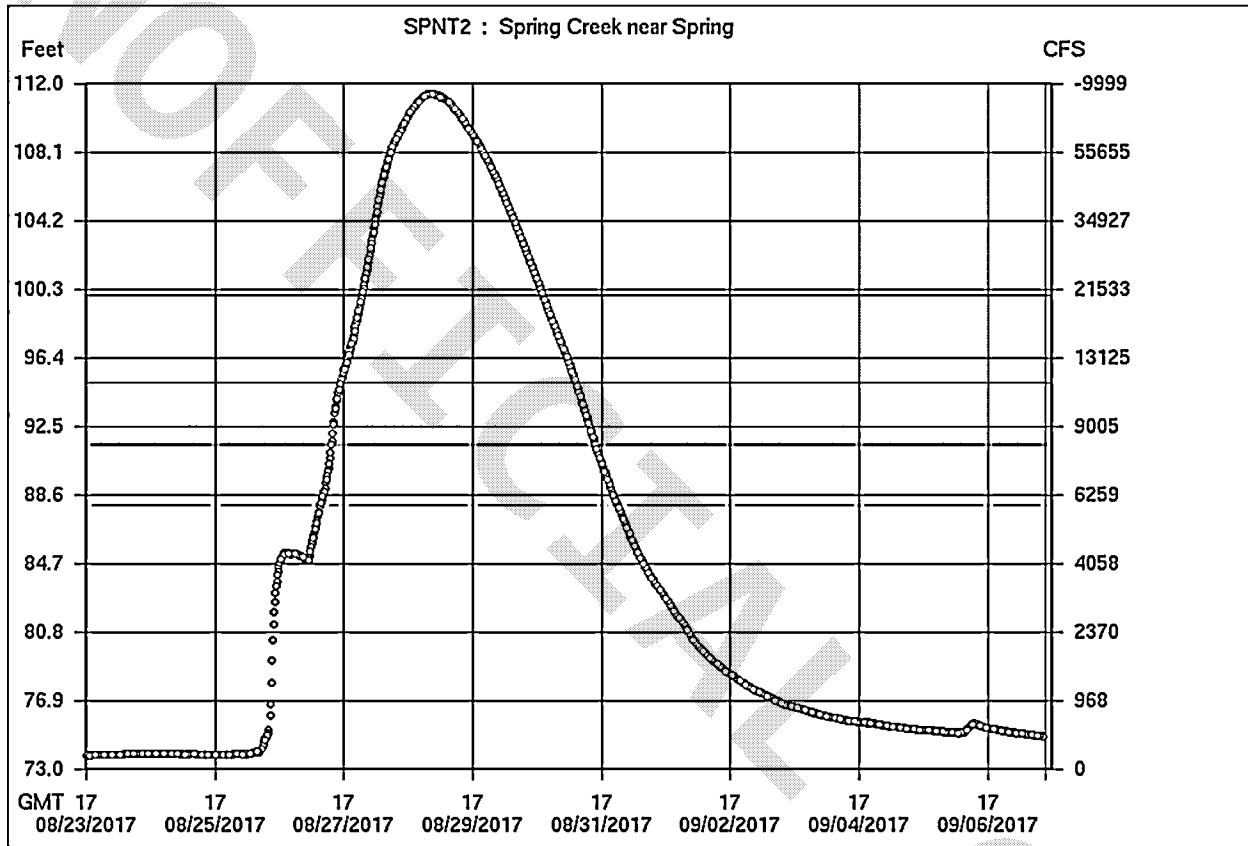
The gage on Cypress Creek downstream at Grant Road, just east of Cypress, reflects the same story:



Id. (click on the hydrograph labeled “CCGT2” to enlarge).

Downstream, near Cypresswood Golf Club, Cypress Creek meets Spring Creek.

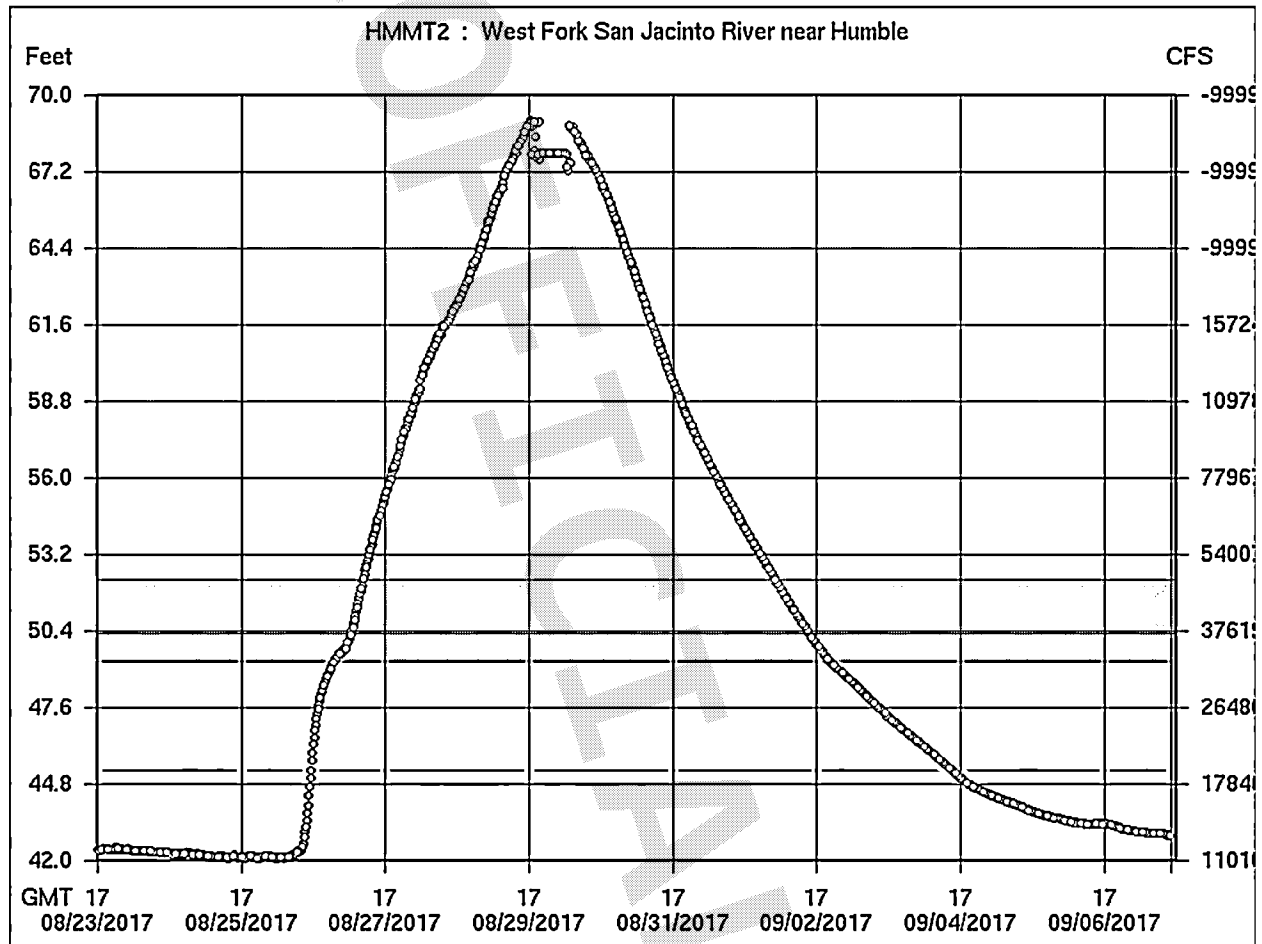
Spring Creek also flooded. At Spring, the creek crested at nearly 112 feet at about 5:00 PM on August 28 – approximately the same time Lake Creek crested at Sendera Ranch Road and the West Fork San Jacinto River crested at just below Lake Conroe Dam.



Id. (click on the hydrograph labeled “SPNT2” to enlarge).

The hydrograph of the West Fork San Jacinto River near Kingwood reflects all of these various inflows of floodwaters from Lake Creek, Spring Creek, and Cypress Creek, in addition to the floodwaters already in the West Fork San Jacinto River. Consistent with the early arrival of floodwaters from Cypress Creek, the River at Kingwood reached major flood stage early in the morning of August 27. That is before the River upstream

at Conroe – which is relatively close to the discharge from Lake Conroe Dam – even filled its banks.



Id. (click on the hydrograph labeled “HMMT2” to enlarge).

And, while upstream at Porter the river dropped below flood stage late on the night of August 30, at Kingwood it did not. Swelled with the confluence of substantial flows from Cypress Creek, Spring Creek, and other tributaries – all of which were greater than that from Lake Conroe – the West Fork San Jacinto River remained at flood stage into the afternoon of September 2.

The significant effect that the confluence of the separate and independent flooding of other tributaries had on the West Fork San Jacinto River just above Lake Houston demonstrates that, even if Plaintiffs could show that water released from Lake Conroe reached their properties, flooding on any Plaintiff's property was the result of a confluence of other sources.

4. Hydrological modeling of the flooding in the Kingwood area demonstrates a confluence of water sources caused the flooding of which Plaintiffs complain.

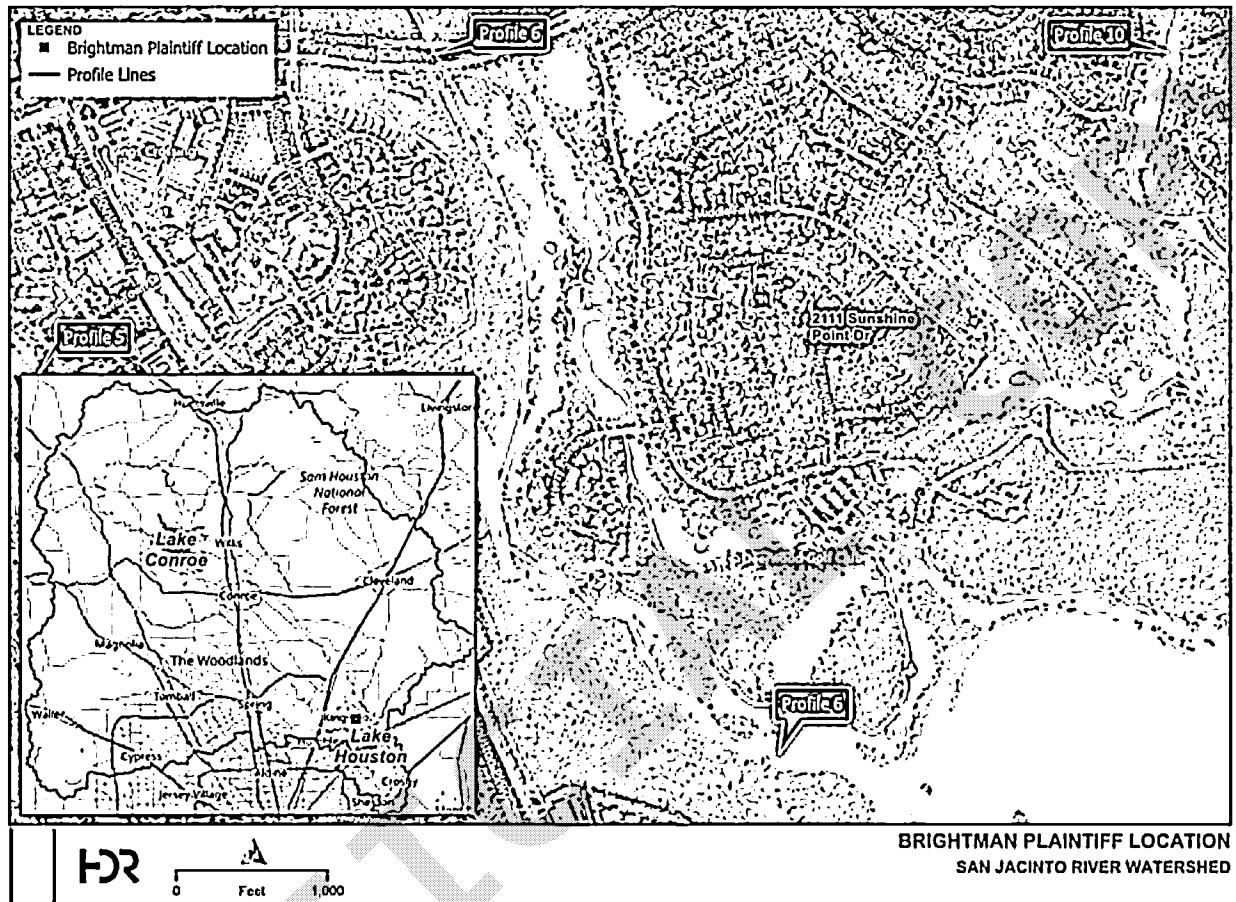
The hydrologic data confirms there is no way Plaintiffs can, as required to overcome SJRA's immunity from suit, demonstrate SJRA's operations of the Lake Conroe Dam caused downstream flooding, let alone that downstream flooding was not merely part of a confluence of sources which, as a matter of law, cannot form the basis of a takings claim. On the contrary, hydrologic modeling reflects that all of Plaintiffs' properties would have flooded even if SJRA released no water from Lake Conroe during the Harvey storm event.⁷

a) Hydrological modeling reflects that very little, if any, of the floodwaters that inundated Plaintiffs' properties passed through Lake Conroe Dam.

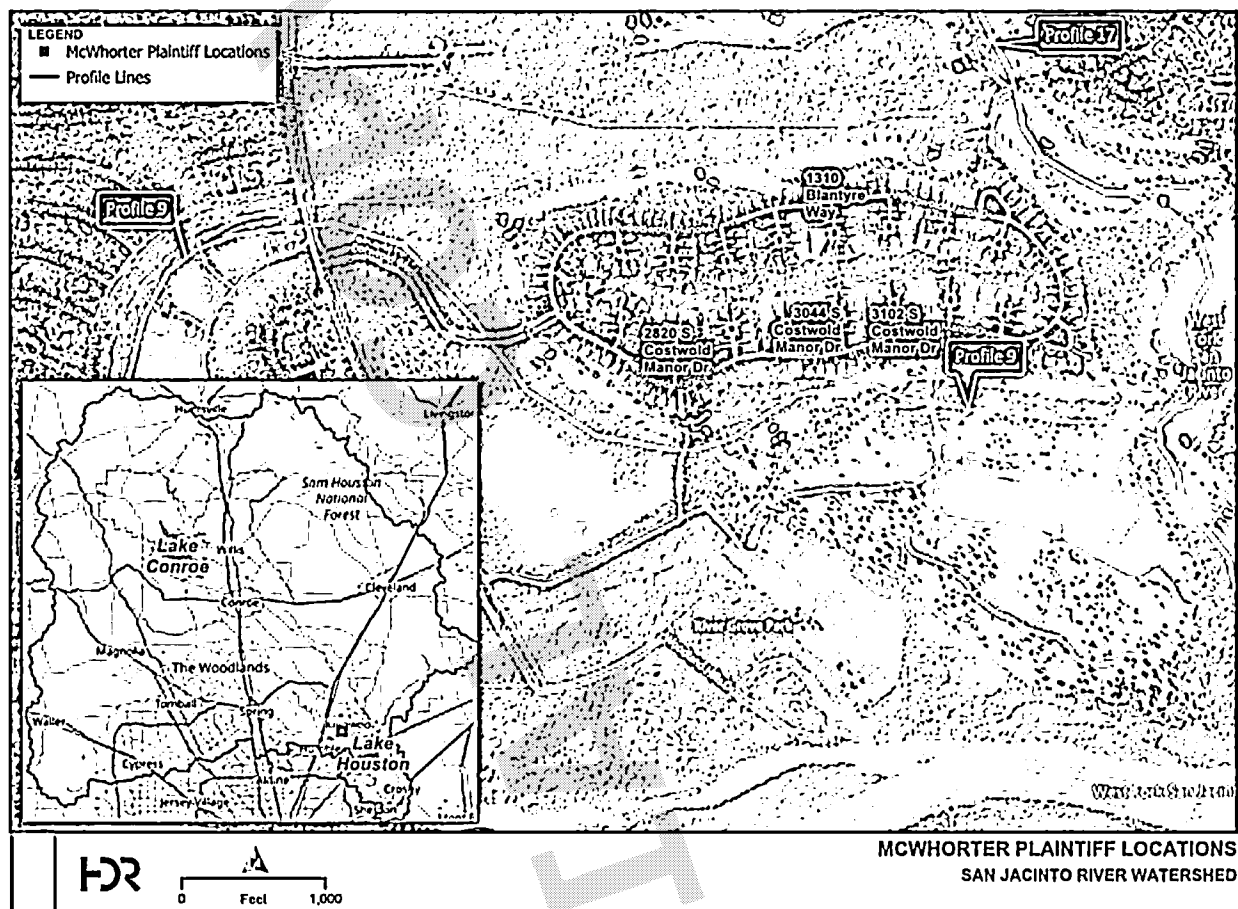
Plaintiffs' properties downstream from Lake Conroe Dam are all in Kingwood, more than 40 river miles downstream from the Lake Conroe Dam. (Brightman Pls.' Orig.

⁷ Again, this scenario is physically impossible because the only way to hold back water at a higher lake level would require raising the tainter gates, which necessarily releases water from the bottom of the gates.

Pet. at ¶¶ 3-5; McWhorter Pls.' Orig. Pet. at ¶¶ 3-9).⁸ The maps below show the location of the Plaintiffs' properties:



⁸ *Brightman*, previously Cause No. 1139562, and *McWhorter*, previously Cause No. 1139232, were consolidated into *Vicente Medina, Ashley Medina, and Aris Antoniou v. San Jacinto River Authority*, Cause No. 1123430.



Ex. C-5.

By the time the West Fork San Jacinto River reaches Kingwood, which is just upstream of its confluence with the East Fork San Jacinto River, the West Fork San Jacinto River flows with water from numerous tributaries that converge downstream of Lake Conroe Dam. As a result of that confluence, only 12% of the water flowing into Lake Houston at Kingwood went through the Lake Conroe Dam. Ex. C-4 at 5. Much of the rest came from downstream tributaries, such as Lake Creek, Spring Creek, Cypress Creek, Peach Creek, Luce Bayou, and the East Fork San Jacinto River, and numerous other smaller waterways, many of which are unnamed. *Id.* Additional water in the West Fork

San Jacinto River came from rain falling directly into the West Fork and its adjacent watershed downstream from the Dam. *Id.*

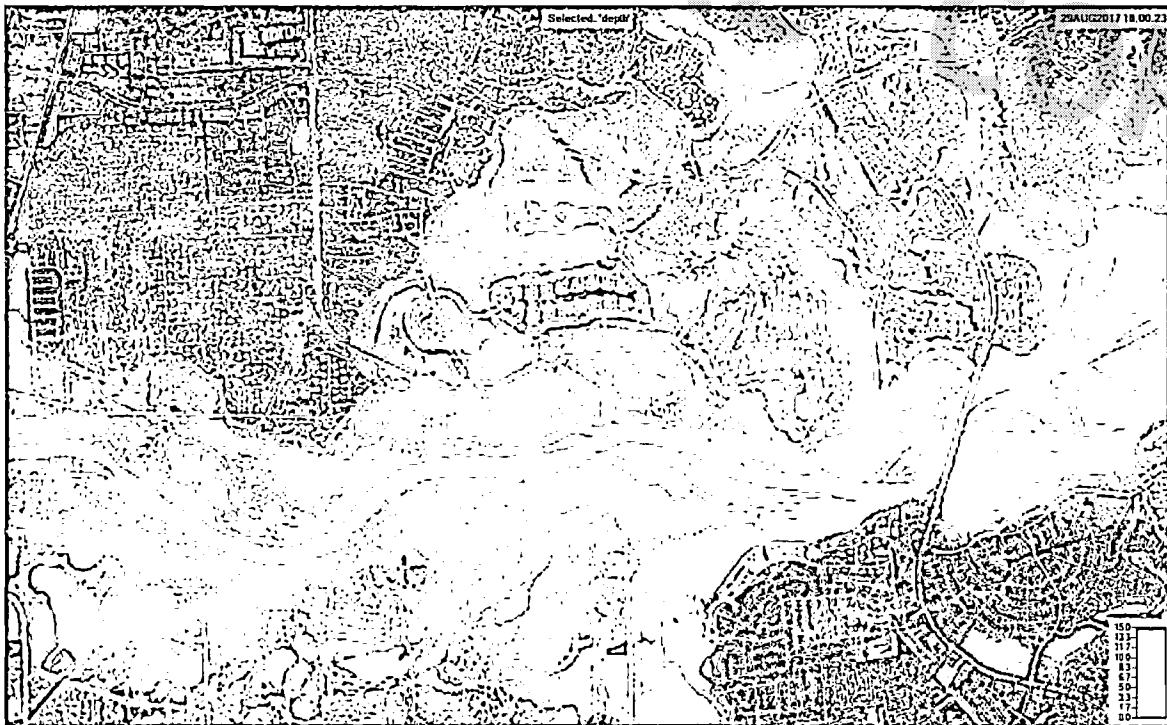
b) Hydrological modeling reflects that Plaintiffs would have flooded without any releases of floodwater from Lake Conroe Dam.

Hydrological modeling demonstrates that all of the Plaintiffs' properties would have flooded had SJRA not released any water at all from the Lake Conroe Dam. Ex. C-5. Of course, such a hypothetical is impossible with the Dam as it is currently constructed because, as previously discussed, Dam operators cannot open the floodgates if water overtops them. However, it reveals the true nature of the Harvey event and the reality that no action by SJRA could have caused Plaintiffs to flood.

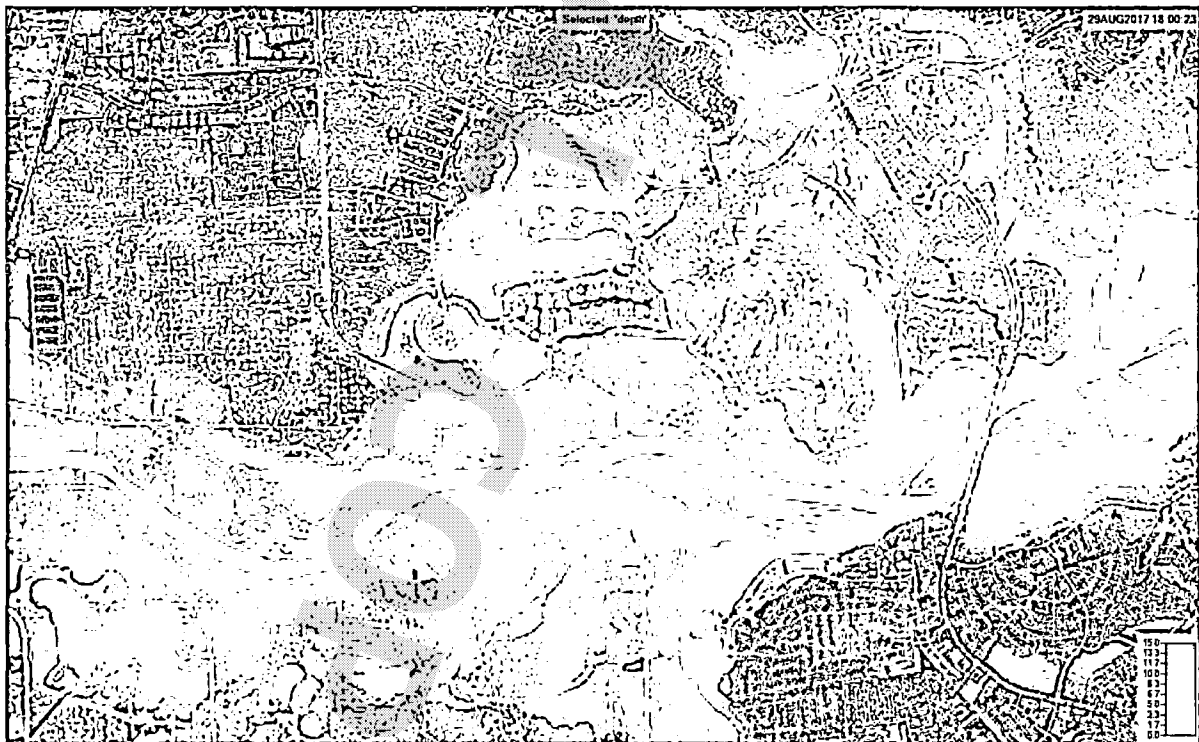
Nevertheless, in the hypothetical scenario in which somehow no water was released from the Lake Conroe Dam during Harvey, the flooding in the Lake Houston area still would have been catastrophic. Even with no flows from Lake Conroe at all, large areas of Kingwood would have flooded based solely on flows from Lake Creek, Spring Creek, Cypress Creek, Peach Creek, Luce Bayou, Caney Creek, East Fork San Jacinto River, the innumerable other downstream tributaries, and local urban area runoff that flow into Lake Houston at Kingwood. *Id.*

The maps below shows the difference between the riverine flooding that occurred during the Harvey storm event and the riverine flooding that would have occurred in the hypothetical scenario in which Lake Conroe did not pass any floodwater downstream. The difference — or, more accurately, the lack of a difference — is apparent.

The first map reflects the riverine flooding in the Kingwood area that occurred during the actual Harvey storm event (Plaintiffs' properties indicated in yellow):



The next map shows the flooding that would have occurred in the same area had Lake Conroe Dam released no water during the Harvey storm event:



Ex. C at ¶ 34; Ex. C-7.⁹

This demonstrates that all of the Plaintiffs would have suffered flooding as a result of Harvey even if Lake Conroe Dam had not released any water at all.

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). Subject-matter jurisdiction may be challenged through a plea to the jurisdiction. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Whether a court has subject-matter jurisdiction is a question of law. *Hoff v. Nueces Cty.*, 153 S.W.3d 45, 48 (Tex. 2004).

Governmental entities are presumed immune from suit. *See Lubbock Cty. Water Control & Improv. Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 300 (Tex. 2014). “Governmental 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).

⁹ A complete animation of the flood under both scenarios – (1) the Harvey storm event as it actually occurred, and (2) the hypothetical flood that would have occurred if Lake Conroe released no water downstream – is attached as Exhibit C-6.

A plaintiff alleging a taking must establish facts to support its claim in order to invoke the Court's subject-matter jurisdiction. *See id.* "In the absence of a properly ple[aded] takings claim, the state retains immunity." *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012).

A court deciding whether it has jurisdiction over a takings claim may consider evidence and must do so when necessary to resolve the jurisdictional issues raised. "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 Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 798 (Tex. 2016).

ARGUMENT AND AUTHORITIES

The undisputed evidence fatally undermines Plaintiffs' claims. Accordingly, the Court lacks subject-matter jurisdiction and should dismiss Plaintiffs' claims against SJRA, which retains its governmental immunity to suit.

A. Plaintiffs cannot meet their burden of demonstrating an exception to SJRA's immunity through Plaintiffs' inverse-condemnation claims.

Plaintiffs' inverse-condemnation claims fail because the evidence conclusively demonstrates Plaintiffs cannot show a constitutional taking. In this specific type of case—a "takings-by-flood" case—the elements Plaintiffs must prove are:

1. The governmental entity took affirmative action that caused the taking, damage, or destruction of the property;

2. The governmental entity's affirmative action that caused the taking of, damage to, or destruction of the property was intentional;
3. The taking of, damage to, or destruction of the specific property must be substantially certain to result from the intentional affirmative action of the governmental entity;
4. The governmental entity knew, or was substantially certain, that its affirmative action will result in the taking of, damage to, or destruction of the specific property; and
5. The governmental entity's taking of, damage to, or destruction of the property was for a public use.

See Kerr, 499 S.W.3d at 799–800 (discussing elements 1, 3, 4); *City of Dallas v. Jennings*, 142 S.W.3d 310, 313 (Tex. 2004) (discussing elements 2–5).

To vest the Court with subject-matter jurisdiction over their inverse-condemnation claims, Plaintiffs must present evidence proving each and every element of their claims. *See Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980). Here, the evidence demonstrates Plaintiffs cannot ever prove SJRA caused a taking of any Plaintiff's property. And, consistent with that fact, there is no evidence that could demonstrate SJRA knew or was substantially certain that any action it took would damage or destroy any Plaintiff's property. On the contrary, the evidence demonstrates that Plaintiffs' properties flooded because of water from a confluence of sources that flowed uncontrolled by anything SJRA did (or didn't) do.

1. Any flooding on any Plaintiff's property was not caused by action taken by SJRA.

The evidence disproves any allegation that SJRA caused the flooding of Plaintiffs' properties. Plaintiffs' takings claims therefore fail as a matter of law, and the Court lacks subject-matter jurisdiction to adjudicate Plaintiffs' suit against SJRA.

a) Plaintiffs cannot show causation because their properties were flooded by water from a multitude of sources.

Plaintiffs' properties lie far downstream of Lake Conroe Dam—more than 40 river miles—where all are affected by other creeks and streams over which SJRA has no control. This fact is determinative, as the Texas Supreme Court has held that a “confluence of particular circumstances”—including “heavy rainfall and . . . failure to fully implement the flood-control measures”—“does not give rise to a takings claim.” *Kerr*, 499 S.W.3d at 799, 807; accord *Wickham v. San Jacinto River Auth.*, 979 S.W.2d 876, 883 (Tex. App.—Beaumont 1998, pet. denied). More specifically, the *Kerr* Court held there is no taking where, as the hydrological evidence shows in this case, “the flooding resulted from multiple causes—Acts of God, the activities of other defendants, the alleged failure to complete the Pate Plan, and the approval of private development.” 499 S.W.3d at 807. The Supreme Court has “never recognized a takings claim under such attenuated circumstances.” *Id.* The *Kerr* court declined the invitation in that case to extend liability to circumstances where it would make “the government an insurer for all manner of natural disasters.” *Id.* at 810.

The factual scenario presented here is functionally identical—although of much greater magnitude—to the facts evaluated by a trio of cases decided by the Ninth Court of Appeals, all of which are consistent with the reasoning in *Kerr*. See *Waller v. Sabine River Auth. of Tex.*, No. 09-18-00040-CV, 2018 WL 6378510 (Tex. App.—Beaumont Dec. 6, 2018, no pet.); *Sabine River Auth. of Tex. v. Hughes*, 92 S.W.3d 640 (Tex. App.—Beaumont

2002, pet. denied); *Wickham*, 979 S.W.2d 876. *Wickham* is perhaps the most instructive, as that case involved the same dam and river authority. *Id.* at 878.

In *Wickham*, the court noted the legal significance of the fact that all plaintiffs lived along West Fork San Jacinto River, downstream from Lake Conroe Dam and beyond where Lake Creek merges with the West Fork San Jacinto River. *Id.* at 883. In *Wickham*, as in this case, Lake Creek flooded due to torrential rains. Based upon this fact, the *Wickham* Court held that “[s]tanding alone, this would be sufficient summary judgment evidence to negate the ‘taking’ element in appellants’ inverse condemnation claim.” *Id.* (emphasis added).

In this case, the West Fork San Jacinto River converges with not just Lake Creek, but also Spring Creek and Cypress Creek, downstream of the Dam and before reaching any of these Plaintiffs’ properties.¹⁰ Both literally and metaphorically, Plaintiffs’ properties flooded due to a confluence of events. These convergences—and their demonstrable effect on, and causal connection with, the flood—prevent Plaintiffs from demonstrating causation as a matter of law.

¹⁰ This case stands in stark contrast to *Tarrant Regional Water District v. Gragg*, 151 S.W.3d 546 (Tex. 2004), where the Texas Supreme Court found a taking of a single downstream property. In that case, the reservoir was designed to knowingly and continually flood the Gragg’s ranch and no other waterway flowed into the Trinity River between the Dam and the Gragg Ranch. *Id.* at 555. The direct causal link that could be drawn just eight river miles upstream in *Gragg* cannot be drawn more than 40 river miles upstream in this case, especially in light of the confluence of numerous water sources.

b) Plaintiffs cannot show causation because peak outflow did not exceed peak inflow.

A downstream plaintiff alleging flooding from a governmental release of water from a dam cannot prove causation where, as here, there is no evidence the government's actions increased the impact of flooding that would otherwise have occurred. A black-letter rule emerges from the trio of Beaumont Court of Appeals decisions discussed above: a dam operator does not commit a taking-by-flood when, as is the case here, peak outflow does not exceed peak inflow, and when water released from the Dam is released directly into the river, rather than onto the plaintiffs' properties, such that it cannot be isolated from other tributaries and sources. *Wickham*, 979 S.W.2d at 881-82; *Hughes*, 92 S.W.3d at 642; *Waller*, 2018 WL 6378510, at *5.

Federal courts have adopted and applied this rule in downstream takings-by-flood claims against the federal government.¹¹ See *Elliott v. City of N.Y.*, 497 F. App'x 108, 111

¹¹ In addition, other states that have considered the issue have followed the rule laid out by the Ninth Court of Appeals and the federal courts, underscoring the limits of causation when a dam operator releases a peak outflow that is lower than the peak inflow into the reservoir. See *Bryan v. Ala. Power Co.*, 20 So. 3d 108, 117 (Ala. 2009); *Smith v. E. Bay Mun. Util. Dist.*, 265 P.2d 610, 616 (Cal. 1954); *Kambish v. Santa Clara Val. Water Conserv. Dist. of San Jose*, 8 Cal. Rptr. 215, 217 (Cal. Ct. App. 1960); *Beauton v. Conn. Light & Power Co.*, 3 A.2d 315, 318 (Conn. 1938); *Baldwin Processing Co. v. Ga. Power Co.*, 143 S.E.2d 761, 766 (Ga. Ct. App. 1965); *Graham v. City of Springfield*, 319 N.E.2d 252, 254 (Ill. App. Ct. 1974); *Murphy v. Ky. Utils. Co.*, 803 S.W.2d 582, 584 (Ky. Ct. App. 1991); *Rockford Paper Mills v. City of Rockford*, 18 N.W.2d 379, 381 (Mich. 1945); *Iodice v. State*, 102 N.Y.S.2d 742, 744-45, 748 (N.Y. App. Div.), aff'd, 103 N.E.2d 348 (N.Y. 1951); *Allen v. City of New York*, 855 N.Y.S.2d 279, 281 (N.Y. App. Div. 2008); *Bruton v. Carolina Power & Light Co.*, 6 S.E.2d 822, 828 (N.C. 1940); *Crawford v. Cobbs & Mitchell Co.*, 253 P. 3, 4, aff'd, 257 P. 16 (Ore. 1927); *Shamnoski v. PG Energy, Div. of S. Union Co.*, 579 Pa. 652, 658, 858 A.2d 589, 592 (Pa. 2004); *Tenn. Elec. Power Co. v. Robinson*, 8 Tenn. App. 396, 403 (Tenn. Ct. App. 1928); *Lake Barcroft Estates, Inc. v. McCaw*, 93 S.E.2d 124, 126 (Va. 1956); but see *Burgess v. Salmon River Canal Co.*, 805 P.2d 1223, 1230 (Idaho 1991) (The peak inflow being greater than peak outflow is a factor in determining liability in a negligence context, but it is not determinative).

(2d Cir. 2012); *Key Sales Co. v. S.C. Elec. & Gas Co.*, 422 F.2d 389 (4th Cir. 1970); *Inland Power & Light Co. v. Grieger*, 91 F.2d 811, 816 (9th Cir. 1937); *In re Downstream Addicks*, --- Fed. Cl. ---, 2020 WL 808686, at *10–11 (Ct. Cl. Feb. 18, 2020); *Accardi v. U.S.*, 599 F.2d 423, 429 (Ct. Cl. 1979). This is significant because “[t]he protections of the Texas Constitution’s Takings Clause are presumed to be coextensive with the federal protections,” and Texas courts accordingly “look to federal takings jurisprudence for guidance.” *Univ. of Houston Sys. v. Jim Olive Photography*, 580 S.W.3d 360, 366 n.3 (Tex. App.—Houston [1st Dist.] 2019, pet. filed).

The peak inflow/outflow disparity in this case closely mirrors the facts in *Wickham*, *Hughes*, and *Waller* (and stands in contrast to the facts in *Gragg*):

	Max. Inflow	Max. Outflow
<i>Wickham</i>	105,288 cfs	45,575 cfs <i>Wickham</i> , 979 S.W.2d at 881–82.
<i>Hughes</i>	385,000 cfs	117,644 cfs <i>Hughes</i> , 92 S.W.3d at 642.
<i>Waller</i>	>600,000 cfs	208,000 cfs <i>Waller</i> , 2018 WL 6378510, at *5.
<i>Medina</i>	106,000–129,000 cfs	79,141 cfs

The evidence establishes that peak inflow to Lake Conroe in connection with Hurricane Harvey was between 106,000 and 129,000 cfs, while the peak rate of discharge of water from the Lake Conroe Dam in connection with Hurricane Harvey never exceeded that peak rate of inflow. Ex. A-3; Ex. B-6; Ex. C at ¶ 35. And as shown above in part D of the Statement of Undisputed Facts, floodwaters contributed by Lake Creek,

Spring Creek, Cypress Creek, and surface runoff poured water into the areas where the Plaintiffs live, both at higher rates and at different times than anything that could have been contributed by the Lake Conroe Dam. These facts demonstrate as a matter of law that Plaintiffs cannot establish the elements of a jurisdictional takings claim.

c) Plaintiffs cannot show causation because hydrologic data conclusively negates such a connection.

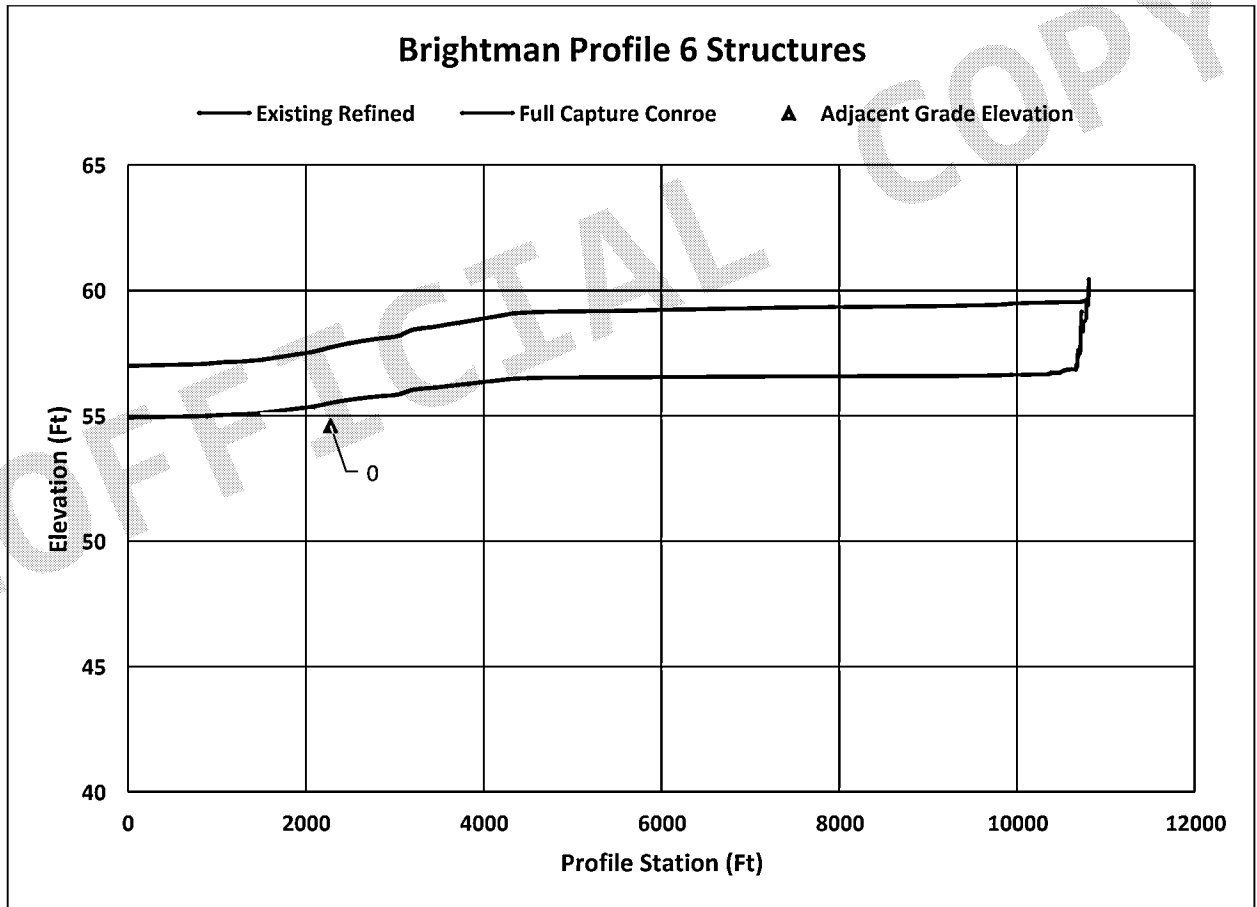
Plaintiffs in a takings-by-flood case typically must produce scientific expert modeling showing that their properties would not have flooded without the government action. *Cf., e.g., Gragg*, 151 S.W.3d at 552. In this case, the hydrological modeling conclusively disproves any allegation that releases of floodwater from Lake Conroe Dam—the peak rate of which was lower than the peak rate of inflow into the reservoir—caused downstream flooding.

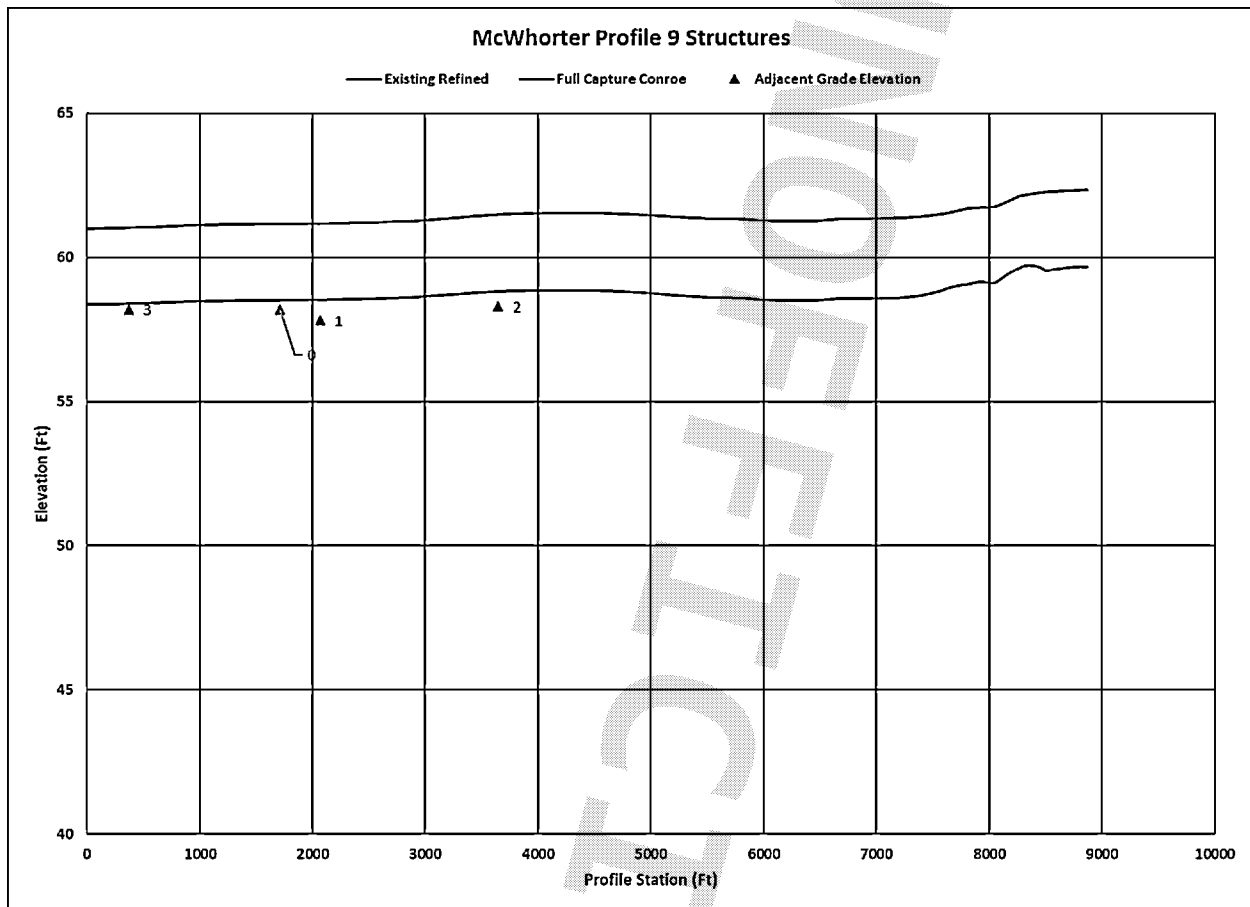
Relative to other contributing sources, the effect of water passed through Lake Conroe Dam decreased as the West Fork San Jacinto River flowed downstream. By the time the West Fork San Jacinto River reached Kingwood, floodwater released from Lake Conroe had an inconsequential effect on the scope of the riverine flood.

As reflected by the hydrological modeling, even if, hypothetically, SJRA had released *no* floodwater from Lake Conroe Dam—a physical impossibility—all of Plaintiffs' properties still would have been inundated by riverine flooding and/or local urban runoff. Ex. C at ¶ 34; Ex. C-5. That is because of insufficient urban drainage infrastructure and the massive amounts of water flowing downstream through other

uncontrolled waterways that converge with the West Fork San Jacinto River downstream of the Dam. Ex. C-5.

The below flood profile compares (1) the flood that occurred during the Harvey storm event (the blue line) with (2) the hypothetical flood that would have occurred had Lake Conroe Dam released no water at all (the orange line) at the location of the Plaintiffs. As shown on the flood profile, all Plaintiffs would have flooded even if no water from Lake Conroe had been passed through the Dam downstream:





Ex. C-5.¹²

Simply put, Plaintiffs' properties are too far downstream from the Lake Conroe Dam for the Dam's operations to cause (or prevent) the damage to Plaintiffs' properties. Accordingly, as a matter of law, Plaintiffs also cannot demonstrate the causation element of a takings claim under Texas law.

¹² A chart reflecting the data captured in the flood profiles and showing the elevation of the Plaintiffs' properties, along with the water surface elevation reached in the Harvey storm event and the water surface elevation that would have been reached had Lake Conroe Dam released no water during the Harvey storm event, is included in Exhibit C-5.

2. SJRA did not intentionally take any action that was substantially certain to flood any Plaintiff's property.

Plaintiffs' claims also lack the necessary element of intent. In order to establish a takings claim under the Texas Constitution, "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 affirmative acts. *City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 825 (Tex. App.—Austin 2014, no pet.). To intentionally take property, the taking must be substantially certain to result from the governmental entity's action. *See Kerr*, 499 S.W.3d at 799–800.

"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). "The governmental entity's awareness of the mere possibility of damage is no evidence of [the required element of] intent." *City of San Antonio v. Pollock*, 284 S.W.3d 809, 821 (Tex. 2009). 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.*

In this case, the evidence negates the requisite intent element of Plaintiffs' claim.

a) SJRA relied on the expert-developed Gate Operations Policy.

The Texas Supreme Court has held that when a governmental entity has obtained guidance from experts 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). If the

governmental entity follows the experts' recommendations for avoiding damage to or destruction of property, the requisite intent necessary to a takings claim is missing. See *id.*

As detailed above, SJRA contracted with Freese and Nichols, its consulting engineers, to draft SJRA's Gate Operations Policy, under which SJRA would not ever release more water from the Dam than the peak flow into the reservoir. Ex. B at ¶¶ 16–17; Ex. A at ¶¶ 14, 19. By doing so, SJRA intentionally implemented – and followed during Hurricane Harvey – a policy that would put SJRA in compliance with the Beaumont Court of Appeals' decision in *Wickham* and other relevant court decisions. In utilizing the Policy and dam-operating procedure developed by its engineers to manage releases of water during the storm, SJRA intended to, and in fact did, hold in Lake Conroe significant amounts of water that would otherwise have flowed downstream uncontrolled. SJRA did not intend to cause flooding – it intended exactly the opposite.

b) SJRA's decision not to pre-release water from Lake Conroe before Harvey is not an intentional action that can form the basis for a takings claim.

Plaintiffs allege SJRA committed a constitutional taking of its property when it failed to perform specific acts. Specifically, Plaintiffs allege that SJRA committed a taking when it “decided not to pre-release water to avoid risking unnecessary downstream flooding and potentially wasting critical stored water supply.” (Brightman Pls.' Orig. Pet. at ¶ 30; McWhorter Pls.' Orig. Pet. at ¶ 35). While the hydrological evidence, *supra*, demonstrates the scientific inaccuracy of this fanciful, wholly unsupported assertion, as

a matter of law, Plaintiffs' complaints about SJRA's **inaction** is no basis for a takings claim.

"Only affirmative conduct by the government will support a takings claim." *Kerr*, 499 S.W.3d at 799. "The government cannot be liable for a taking if 'it committed no intentional acts.'" *Id.* at 800 (quoting *City of Tyler v. Likes*, 962 S.W.2d 489, 505 (Tex. 1997)). The Texas Supreme Court has "not recognized a takings claim for nonfeasance." *Id.* Accordingly, allegations that a governmental entity failed to take action do not state a jurisdictional takings claim. *See id.*; accord *Meuth v. City of San Antonio*, No. 04-16-00183-CV, 2017 WL 603646, at *4 (Tex. App.—San Antonio Feb. 15, 2017, pet. denied) (holding that city's refusal to repair or relocate a drainage pipe did not constitute a taking).

Plaintiffs' allegations relating to SJRA's decision not to pre-release water from Lake Conroe before the storm's arrival, in addition to being plain wrong from a scientific standpoint, do not state a takings claim, and are not relevant to any claim Plaintiffs conceivably could have.

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

In light of the evidence that SJRA only released floodwater into the West Fork San Jacinto River, coupled with the fact SJRA did not have a reason to believe such floodwater would end up on any particular downstream properties, the undisputed evidence shows Plaintiffs cannot demonstrate SJRA knew or could have known any release of water from the Lake Conroe Dam would or was substantially certain to cause flooding on any Plaintiff's specific, individual property, as is required to successfully demonstrate a

takings claim. *Cf. Jennings*, 142 S.W.3d at 314. It is not enough for Plaintiffs to allege SJRA knew *some flooding* might occur somewhere, 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 intent element of a takings claim.

Despite requests for production directed at this element of Plaintiffs’ burden to show an exception to SJRA’s immunity and in support of their claim, Plaintiffs have not produced any evidence that could even potentially demonstrate SJRA knew or was substantially certain the release of floodwater from the Dam that would flood any individual downstream property due to the influence of downstream tributaries. This is but one more failure by Plaintiffs to adduce evidence to prove their takings claims.

B. Plaintiffs’ easement claim is essentially a partial takings claim for which Plaintiffs cannot show the required elements.

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.” (Brightman Pls.’ Orig. Pet. at ¶ 46; McWhorter Pls.’ Orig. Pet. at ¶ 51). This claim is duplicative of Plaintiffs’ takings claim—essentially it operates as a partial takings claim. *See Hubler v. City of Corpus Christi*, 564 S.W.2d 816, 824 (Tex. App. — Corpus Christi 1978, no writ). “[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 elements for a partial takings claim in order to prove a claim of an alleged taking of an easement by SJRA. Thus, because the evidence conclusively proves that Plaintiffs cannot establish a takings claim because of the absence of (1) intent or (2) causation, it equally defeats a partial taking by way of an easement.

C. Plaintiffs' claims for non-jurisdictional damages should be dismissed.

In Texas, a governmental entity is immune from tort liability unless the Legislature has waived sovereign immunity. *Tex. A&M Univ. v. Bishop*, 156 S.W.3d 580, 582 (Tex. 2005); *Dallas Cty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 338, 341 (Tex. 1998). Plaintiffs' claims for loss of income and consequential damages are barred by sovereign immunity. As framed by Plaintiffs in their petition, only a viable takings claim under an inverse-condemnation theory can overcome the bar of sovereign immunity. *City of New Braunfels v. Carowest Land, Ltd.*, 432 S.W.3d 501, 514 (Tex. App. — Austin 2014, no pet.).

Consequential damages are not recoverable for takings claims. *See AVM-HOU, Ltd. v. Capital Metro. Transp. Auth.*, 262 S.W.3d 574, 585 (Tex. App. — Austin 2008, no pet.); *City of Houston v. Wall*, 207 S.W.2d 664, 670 (Tex. App. — Galveston 1947, writ ref'd n.r.e.); *State v. Vaughan*, 319 S.W.2d 349, 354–55 (Tex. App. — Austin 1958, no writ); *See Hooten v.*

U.S., 405 F.2d 1167, 1168 (5th Cir. 1969). Nor can Plaintiffs recover lost income based on the claim of a partial temporary restriction of access, or lost profits of a business located on the property. See *City of Austin v. Avenue Corp.*, 704 S.W.2d 11, 13 (Tex. 1986); *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 871 (Tex. 2009); *AVM-HOU, Ltd.* 262 S.W.3d at 567-585. Because Plaintiffs cannot recover, in an inverse condemnation suit, loss of income and consequential damages, sovereign immunity applies and the Court must dismiss Plaintiffs' claims for such damages for lack of subject matter jurisdiction.

CONCLUSION AND PRAYER

Plaintiffs have failed on several bases, any single one of which is dispositive, to demonstrate a valid claim to which SJRA is not immune. Indeed, the evidence conclusively demonstrates that no constitutional taking occurred. The Court should therefore grant SJRA's Plea to the Jurisdiction and dismiss Plaintiffs' claims with prejudice.

Respectfully submitted,

HUNTON ANDREWS
KURTH LLP

LEWIS BRISBOIS
BISGAARD & SMITH LLP

LLOYD GOSSELINK
ROCHELLE & TOWNSEND PC

By: /s/ William S. Helfand

J. Mark Breeding
State Bar No. 02942500
Michael D. Morfey
State Bar No. 24007704
Kelly Sandill
State Bar No. 24033094
600 Travis Street, Suite 4200
Houston, Texas 77002
(713) 220-4200
(713) 220-4285 (Fax)
mbreeding@HuntonAK.com
michaelmorfey@HuntonAK.com
kellysandill@HuntonAK.com

William S. Helfand
State Bar No. 09388250
Shane L. Kotlarsky
State Bar No. 24083329
24 Greenway Plaza
Suite 1400
Houston, Texas 77046
(713) 659-6767
(713) 759-6830 (Fax)
bill.helfand@lewisbrisbois.com
shane.kotlarsky@lewisbrisbois.com

Jose E. de la Fuente
State Bar No. 00793605
James F. Parker
State Bar No. 24027591
Nathan E. Vassar
State Bar No. 24079508
Gabrielle C. Smith
State Bar No. 24093172
816 Congress Ave., Ste. 1900
Austin, Texas 78701
(512) 322-5800
(512) 472-0532 (Fax)
jdelafuente@lglawfirm.com
jparker@lglawfirm.com
nvassar@lglawfirm.com
gsmith@lglawfirm.com

ATTORNEYS FOR DEFENDANT

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 18TH day of March, 2020.

William Fred Hagans
fhagans@hagans.law
Jennifer B. Rustay
jrustay@hagans.law
Carl D. Kulhanek, Jr.
ckulhanek@hagans.law
Hagans Montgomery & Rustay, P.C.
3200 Travis Street, Fourth Floor
Houston, Texas 77006
Attorneys for All Plaintiffs

Michael W. Kerensky
mike@kerenskylawfirm.com
Mike Kerensky PLLC
440 Louisiana, Suite 2300
Houston, Texas 77002
**Attorneys for Plaintiffs Ryan
McWhorter, Kelly McWhorter, Minh P.
Le, Jihong Anita Tian, Michael H.
Murray and Sherri Bookey-Murray**

John Gregory Hale
greg@haleandmanicom.com
Hale & Manicom
12510 Cutten Road
Houston, Texas 77066
**Attorneys for Plaintiff Jennifer
Langeland**

Daniel P. Barton
dbarton@bartonlawgroup.com
Wayne D. Collins
The Barton Law Group
1201 Shepherd Drive
Houston, Texas 77007
Attorneys for All Plaintiffs

Dennis Reich
dreich@reichandbinstock.com
Reich & Binstock, LLP
4265 San Felipe, Suite 1000
Houston, Texas 77027
Attorneys for All Plaintiffs

/s/ William S. Helfand
WILLIAM S. HELFAND