

CAUSE NO. 21-03-04382

**LAKE CONROE ASSOCIATION,
SUSANNE MITCHELL ALLEN, &
ROBERT FERRANTE,
*Petitioners;***

v.

**THE CITY OF HOUSTON,
*Defendant;***

&

**THE SAN JACINTO RIVER
AUTHORITY,
*Defendant.***

§ **IN THE DISTRICT COURT**
§ **Montgomery County - 284th Judicial District Court**
§ **_____ JUDICIAL DISTRICT**
§ **OF**
§ **MONTGOMERY COUNTY, TEXAS**
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**PETITIONERS’ ORIGINAL PETITION FOR DECLARATORY JUDGMENT
AND REQUEST FOR SUPPLEMENTAL TEMPORARY
AND PERMANENT INJUNCTIVE RELIEF**

NOW COME, the Lake Conroe Association (“LCA”), Susanne Mitchell Allen, and Robert Ferrante (all together “Petitioners”), filing this their Original Petition for Declaratory Judgment and Request for Supplemental Temporary and Permanent Injunctive Relief against the City of Houston (the “City”) and the San Jacinto River Authority (the “SJRA”) as follows:

I. DISCOVERY LEVEL AND CLAIM FOR RELIEF

1. Pursuant to Tex. R. Civ. P. 190.1, this case is intended to be governed by Discovery Control Plan – Level 3, Tex. R. Civ. P. 190.4. Petitioners hereby move this Court for an order setting forth the conduct of discovery tailored to the circumstances of this specific suit. TEX. R. CIV. P. 190.4. Pursuant to Tex. R. Civ. P. 190.4, the limitations of Tex. R. Civ. P. 190.3 shall apply until such time as the Discovery Control Plan – Level 3 is ordered by this Court.

2. Pursuant to Tex. R. Civ. P. 47, Petitioners seek only non-monetary relief and a demand for judgment for all other relief to which Petitioners deem themselves justly entitled.

II. PARTIES

3. **Petitioner**, the Lake Conroe Association (Secretary of State of Texas File Number 40936201), is a Texas non-profit corporation organized for the purpose of acting as a civic organization for over-seeing, directing, initiating, and promulgating programs that directly affect the control, use, and enjoyment of Lake Conroe for the benefit of the citizens of Montgomery County, Texas, and is operated exclusively for such non-profit purpose. The goals of LCA are safe water levels, water conservation, resolving vegetation problems, and improving the overall quality of life around Lake Conroe.¹ LCA may be served notice in this proceeding by and through its lead counsel of record, David A. Ward, Jr., 10077 Grogan's Mill Road, Suite 540, The Woodlands, Texas 77380; ward@dwardlaw.com.

4. **Petitioner**, Susanne Mitchell Allen, is a natural person and resident of Montgomery County who may be served notice in this proceeding by and through her lead counsel of record, David A. Ward, Jr., 10077 Grogan's Mill Road, Suite 540, The Woodlands, Texas 77380; ward@dwardlaw.com. Ms. Allen currently lives on the north end of Lake Conroe and owns multiple lakeside properties. Low lake levels have forced Allen to expend approximately \$2,000 to mitigate erosion and repair her boat dock.

5. **Petitioner**, Robert Ferrante, is a natural person and the former owner of a business on Lake Conroe, located across from April Sound in Montgomery County, who may be served notice in this proceeding by and through his lead counsel of record, David A. Ward, Jr., 10077 Grogan's Mill Road, Suite 540, The Woodlands, Texas 77380; ward@dwardlaw.com. Mr. Ferrante opened

¹ LCA, "About LCA," at <https://lcatx.com/about-lca/>.

a bait shop to service the Lake Conroe tourist season in 2015. His shop went out of business in July of 2019 after lake lowering prevented fisherman from placing their boats in the lake.

6. **Defendant**, the City of Houston, is a home rule city, municipal body politic, incorporated by Act of 1905 within Harris County, Texas. Pursuant to Tex. Civ. Prac. & Rem. Code § 101.102 or other law, the City may be served through its City Secretary, Pat J. Daniel, at 900 Bagby Street, Room P101, Houston, Texas 77002.

7. **Defendant**, San Jacinto River Authority, is a Texas government entity created pursuant to Article XVI, § 59(b) of the Texas Constitution; H.B. No. 832, 1937.² Pursuant to Tex. Civ. Prac. & Rem. Code § 101.102 or other law, the SJRA may be served through its administrative head, Jace A. Houston, General Manager, at its headquarters located at 1577 Dam Site Road, Conroe, Texas 77304.

III. JURISDICTION

8. The relief requested is within the jurisdictional powers of this Court pursuant to Tex. Civ. Prac. & Rem. Code § 37.003 because the requested declaration and enforcement of rights pertain to real properties and natural resources, public and private, located in Montgomery County, Texas.³

9. The SJRA is a partner with the City in the 1968 initiative for joint construction of a water supply reservoir, “Lake Conroe,” on the West Fork of the San Jacinto River.⁴ “The lake

² Exhibit A, Act Creating San Jacinto River Conservation and Reclamation District, 45th Leg., R.S., ch. 426, 1937 Tex. Gen. Laws 861 (effective Aug. 21, 1937) [hereinafter “SJRA Act”].

³ “[S]uits for the recovery of land or damages thereto, to quiet title to land or to prevent or stay waste on land, must be brought in the county in which the land, or a part thereof, may lie.” *Elder v. Miller*, 116 S.W.2d 1171, 1173 (Tex. Civ. App.—Waco 1938). “It is further held that under said subdivision, all suits in respect of waste must be brought in the county in which the land lies.” *Id.*

⁴ Exhibit B, SJRA, “History of Lake Conroe,” at <https://www.sjra.net/lakeconroe/history/>.

covers a 21,000-acre area and extends about 21 miles from the dam to the upper reaches of the West Fork of the San Jacinto River, with 5,000 acres lying in the Sam Houston National Forest.”⁵

10. While Lake Conroe was constructed as a “water-supply reservoir, and not a flood-control facility,”⁶ the ability to store water in the lake “act[s] as a buffer to reduce the maximum flows in the West Fork San Jacinto River during flood events,”⁷ in effect reducing the uncontrolled flow of floodwaters into the West Fork of the San Jacinto River during major rain events.

11. This suit seeks a declaration and a supplemental enforcement of rights against state officials acting within Montgomery County, Texas. The activities of the state officials subject of this suit involve the maintenance and use of the Lake Conroe reservoir pursuant to Certificate of Adjudication and Amendment Nos. 10-4963 and 10-4963A. The complete certificates are on file in the Information Resources Division of the Texas Commission on Environmental Quality (“TCEQ”).⁸ Lake Conroe is primarily a water supply reservoir, and Conroe Dam and Lake Conroe are operated by the SJRA.⁹ Covering all or part of seven counties, the SJRA’s jurisdiction includes the entire watershed of the San Jacinto River and its tributaries, excluding Harris County.¹⁰

⁵ *Id.*; see also Exhibit C, Texas Water Dev. Bd., “Volumetric and Sedimentation Survey of Lake Conroe, June – August 2010 Survey” at 17 (July 2012) [hereinafter “Volumetric and Sedimentation Survey of Lake Conroe”], available at http://www.twdb.texas.gov/hydro_survey/conroe/2010-08/Conroe2010_FinalReport.pdf.

⁶ Exhibit D, Affidavit of Charles Gilman, Jr., Dir. of Water Res. & Flood Mgmt., SJRA, ¶ 6 at 2, *Vicente Medina*, et al. v. SJRA, Cause No. 1123430, Harris County, County Civ. Ct. at Law No. 1 (July 31, 2019).

⁷ Exhibit E, Defendant SJRA’s Plea to the Jurisdiction, *Nancy Daniels*, et al. v. SJRA, Cause No. 1140382, Harris County, County Civ. Ct. at Law No. 3, at 6 (Mar. 11, 2020); see also Exhibit B, History of Lake Conroe, *supra* note 4.

⁸ Exhibit F, Tex. Water Comm’n Certificate of Adjudication No. 10-4963 (Feb. 25, 1987); Exhibit F, TCEQ Amendment to Certificate of Adjudication, Certificate No. 10-4963A (July 20, 2010); Exhibit C, Volumetric and Sedimentation Survey of Lake Conroe, *supra* note 5, at 4.

⁹ Exhibit C, Volumetric and Sedimentation Survey of Lake Conroe, *supra* note 5, at 1.

¹⁰ Exhibit A, SJRA Act, *supra* note 2; see also Exhibit G, Press Release, SJRA, “SJRA Board of Directors Recommends Renewing Flood Mitigation Strategy” (Feb. 25, 2020) [hereinafter “SJRA Feb. 25 Press Release”].

12. Private parties may seek declaratory relief against state officials who allegedly act without legal or statutory authority. *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

Certain actions against state officials have been found not to implicate the sovereign immunity doctrine, and for such actions, no consent is required. Specifically, no consent is required when suit is filed seeking only a declaration or enforcement of rights. This may be by way of a suit under the Uniform Declaratory Judgment Act or in a suit alleging *ultra vires* or unconstitutional deeds. The former are actions against the State or state officials to settle “uncertainty and insecurity with respects to rights, status, and other legal relations.”

Nueces County v. Ferguson, 97 S.W.3d 205, 217-18 (Tex. App.—Corpus Christi 2002) (quoting TEX. CIV. PRAC. & REM. CODE § 37.002(b)(Vernon 1997)) (internal citations omitted).

13. Petitioners’ standing is affirmed by statute:

The remedies under this chapter are cumulative of all other remedies. Nothing in this chapter affects the right of a private corporation or individual to pursue any available common law remedy to abate a condition of pollution or other nuisance, to recover damages to enforce a right, or to prevent or seek redress or compensation for the violation of a right or otherwise redress an injury.

TEX. WATER CODE § 7.004.

14. This controversy is ripe for declaratory relief as contemplated by Tex. Civ. Prac. & Rem. Code § 37.003(c) in that the requested relief will terminate the controversy or remove an uncertainty. In addition to declaratory relief, Petitioners seek supplemental relief to enjoin future unlawful actions by state officials which are announced to begin on April 1, 2021, and to continue thereafter at seasonal intervals through at least December of 2022.¹¹ The unlawful acts sought to be enjoined were also committed on prior occasions.

¹¹ Exhibit F, SJRA Feb. 25 Press Release, *supra* note 9.

15. Section 37.011 of the Uniform Declaratory Judgments Act (“UDJA”) allows for “[f]urther relief based on a declaratory judgment” upon a showing that the relief is “necessary or proper.” TEX. CIV. PRAC. & REM. CODE § 37.011.

16. In connection with Tex. Civ. Prac. & Rem. Code § 37.011, “[a] permanent injunction may be obtained when the evidence establishes that a defendant will not comply with a declaratory judgment. The trial court may grant injunctive relief when the applicant proves the occurrence of a wrongful act giving rise to imminent and irreparable harm for which there is no adequate remedy at law.” *Shelton v. Kalbow*, 489 S.W.3d 32, 48 (Tex. App.—Houston [14th Dist.] 2016) (internal citation omitted).

17. “Waste of natural resources is against the public policy of this State. Many conservation laws have been enacted by our legislature which evidence such policy. They apply to privately owned as well as publicly owned resources. These laws need not be cited as they are generally known.” *Cantwell v. Zinser*, 208 S.W.2d 577, 579 (Tex. Civ. App.—Austin 1948).

18. In 1904, while addressing a percolating water, or groundwater, question by reviewing case law from several other states, the Supreme Court of Texas acknowledged that failure to make reasonable and legitimate use of water had been the basis for injunctive relief. The Supreme Court’s discussion noted a particular case in which “the defendant made no use whatever of the water, but, for no useful purpose, drained it away and discharged it through the sewers of a town, thus taking it from plaintiff, who was supplying it to the inhabitants of the town for drinking purposes. The court recognized the soundness of the doctrine which we have stated, but held that, **as the defendant was making no legitimate use of the water, he was properly enjoined from thus wasting it.**” *Houston & T. C. Ry. Co. v. East*, 98 Tex. 146, 151, 81 S.W. 279, 281 (1904) (emphasis added).

IV. VENUE

19. Venue is proper in Montgomery County, Texas pursuant to Tex. Civ. Prac. & Rem. Code § 15.002 because Montgomery County, Texas is the county in which all or a substantial part of the events or omissions giving rise to this suit occurred.

20. This suit is otherwise mandatory in Montgomery County, Texas pursuant to Tex. Civ. Prac. & Rem. Code § 15.011 so far as it involves interests in real property located in Montgomery County, Texas, and to prevent the waste of natural resources on lands located in Montgomery County, Texas.

V. NATURE OF CASE AND FACTS

21. The water in Lake Conroe is a natural resource held in public trust by the State of Texas, for the benefit of the residents of Montgomery and Harris counties for whom Lake Conroe provides the primary or backup drinking water supply, property owners, businesses, and recreational users. The Petitioners possess public and private interests in the use and enjoyment of this natural resource.

22. The Respondents, the SJRA and the City, are unlawfully discharging **billions of gallons** of water from Lake Conroe annually, without any authorized, permitted, or beneficial purpose. These discharges are causing Lake Conroe to remain at a “below full” capacity.

23. The Lake Conroe Dam is being operated contrary to state law and contrary to the interests of the parties for whom the lake is maintained, regulated, and conserved.

Waters of Lakes Are the Property of the State Held in Trust for the Public

24. “(a) The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater,

and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.” TEX. WATER CODE § 11.021(a).

25. The purpose of the State maintaining title to the beds and waters of all navigable bodies is to protect the public’s interest in those scarce natural resources. Lands underlying navigable waters are held in trust by the State for the use and benefit of all the people. The importance of the State’s duty to protect its natural resources is demonstrated by Tex. Const. art. XVI, § 59, which provides that “the conservation and development of all of the natural resources of this State ... and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties.” TEX. CONST. art XVI, § 59(a). “[T]he State, as trustee, is entitled to regulate those waters and submerged lands to protect its citizens’ health and safety and to conserve its natural resources.” *Cummins v. Travis County Water Control & Improvement Dist. No. 17*, 175 S.W.3d 34, 49 (Tex. App.—Austin 2005).

26. “(a) The waters of the state are held in trust for the public, and the right to use state water may be appropriated only as expressly authorized by law.” TEX. WATER CODE § 11.0235(a).

Appropriations of Lake Water Are Regulated by the TCEQ by Permit

27. “The Texas Natural Resource Conservation Commission is created as an agency of the state.” TEX. WATER CODE § 5.051. Legislation in 2001 authorized a name change for the Texas Natural Resource Conservation Commission (“TNRCC”). Effective September 1, 2001, it became the Texas Commission on Environmental Quality (“TCEQ”).¹²

¹² Act of June 15, 2001, 77th Leg., R.S., ch. 965 (H.B. 2912) (effective Sept. 1, 2001), available at https://lrl.texas.gov/LASDOCS/77R/HB2912/HB2912_77R.pdf.

28. “The right to the use of state water may be acquired by appropriation in the manner and for the purposes provided in this chapter. When the right to use state water is lawfully acquired, it may be taken or diverted from its natural channel.” TEX. WATER CODE § 11.022 (emphasis added).

29. “[N]o person may appropriate any state water or begin construction of any work designed for the storage, taking, or diversion of water without first obtaining a permit from the [TCEQ] to make the appropriation.” TEX. WATER CODE § 11.121.

30. By final decree of the 155th Judicial District Court of Waller County, in Cause No. 10,023A, *In Re: The Exceptions of the San Jacinto River Authority to the Adjudication of Water Rights in the San Jacinto River Basin* dated December 1, 1986, a right was recognized under Permit 1962B authorizing the SJRA, the City, and the Texas Water Development Board (“TWDB”) to appropriate waters of the State of Texas.¹³

31. Certificate of Adjudication and Amendment Nos. 10-4963 and 10-4963A¹⁴ grant 100,000 acre-feet of water rights annually to the SJRA and the City for the following diversion “USE” purposes:

- a. Municipal;
- b. Industrial;
- c. Mining; and
- d. Agricultural.

32. Lake Conroe was built in the early 1970s as a partnership between the City, the SJRA, and the TWDB as a water supply reservoir for the region.¹⁵ Lake Conroe “was planned and

¹³ Exhibit F, Certificate of Adjudication No. 10-4963, *supra* note 8; Exhibit F, Certificate No. 10-4963A, *supra* note 8.

¹⁴ Exhibit F, Certificate of Adjudication No. 10-4963, *supra* note 8; Exhibit F, Certificate No. 10-4963A, *supra* note 8.

¹⁵ Exhibit G, SJRA Feb. 25 Press Release, *supra* note 10.

constructed shortly after the record seven-year drought of the 1950s as part of a reservoir-building boom intended by state water planners to prevent a repeat of the water shortages experienced during the drought.”¹⁶ The City owns two-thirds of the water rights in Lake Conroe; SJRA owns the other one-third.¹⁷ The City may call for the release of water from Lake Conroe for the City’s permitted use at any time.¹⁸ Upon release, the City’s water flows down the West Fork of the San Jacinto River, eventually ending up in Lake Houston for use by the City.¹⁹

The SJRA and the City Are Only Authorized to Appropriate (Divert) Water for the Specific Uses Stated in the Permit

33. “No right to appropriate water is perfected unless the water has been beneficially used for a purpose stated in the original declaration of intention to appropriate water or stated in a permit issued by the commission or one of its predecessors.” TEX. WATER CODE § 11.026.

The total amount of water to be used shall be stated in definite terms, *i.e.*, a definite number of acre-feet annually or, in the case of a seasonal, emergency, or temporary water right application, over the period for which application is made. The purpose or purposes of each use shall be stated in definite terms. If the water is to be used for more than one purpose, the specific amount to be used annually for each purpose shall be clearly set forth. If the application requests authorization to use water for multiple purposes, the application shall expressly state an annual amount of water to be used for the multiple purposes as well as for each purpose of use. If the amount to be consumptively used is less than the amount to be diverted, both the amount to be diverted and the amount to be consumptively used shall be specified.

30 TEX. ADMIN. CODE § 295.5 (emphasis added).

34. “A right to use state water under a permit or a certified filing is limited not only to the amount specifically appropriated but also to the amount which is being or can be beneficially used

¹⁶ Exhibit B, History of Lake Conroe, *supra* note 4.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

for the purposes specified in the appropriation, and all water not so used is considered not appropriated.” TEX. WATER CODE § 11.025 (emphasis added).

35. TCEQ’s rules define “municipal use” as “(A)The use of potable water within a community or municipality and its environs for domestic, recreational, commercial, or industrial purposes or for the watering of golf courses, parks and parkways, other public or recreational spaces; or (B) the use of reclaimed water in lieu of potable water for the preceding purposes; or (C) the use of return flows authorized pursuant to Texas Water Code, § 11.042, in lieu of potable water for the preceding purposes....” 30 TEX. ADMIN. CODE § 297.1(34)(A)-(C); *see, e.g., City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 99 (Tex. 2006).

36. “Industrial use” is defined as “[t]he use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including the development of power by means other than hydroelectric, but does not include agricultural use.” 30 TEX. ADMIN. CODE § 297.1(25).

37. “Mining use” is defined as “[t]he use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.” 30 TEX. ADMIN. CODE § 297.1(32).

38. “Agricultural use” is defined as “[a]ny use or activity involving agriculture, including irrigation.”²⁰ 30 TEX. ADMIN. CODE § 297.1(2).

²⁰ “Agriculture or agricultural” is defined as:

Any of the following activities:

- (A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;
- (B) the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or non-soil media by a nursery grower;
- (C) raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value;
- (D) raising or keeping equine animals;

The SJRA and the City Enacted a Seasonal Lake Lowering Program

39. Starting in 2018, the SJRA and the City adopted the Seasonal Lake Lowering Program (“SLLP”), a policy of diverting, or discharging, water from Lake Conroe during several months in the spring and late summer on a temporary basis to facilitate dredging in the West Fork of the San Jacinto River. The SLLP is also known as the Lake Lowering Strategy.²¹

40. In February 2020, the SJRA and the City took official action to continue a modified version of the SLLP for at least three additional years.²²

41. The SJRA and the City now describe the lowering of Lake Conroe as a continuing “flood mitigation program” to “create extra capacity to catch rainfall and storm water runoff.”²³ “The strategy of temporarily creating capacity in Lake Conroe on a seasonal basis began in 2018 to provide flood mitigation benefits for regional downstream constituents in both Montgomery County and Harris County by catching rainfall and runoff in Lake Conroe.”²⁴

42. In February 2020, the SJRA Board of Directors approved the following recommendation to the City regarding the future operation of Lake Conroe:²⁵

- a. Spring strategy: Beginning April 1, release only an amount of water from Lake Conroe to create a one-foot capacity to catch rainfall and storm runoff

(E) wildlife management;

(F) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure; and

(G) aquaculture as defined in Texas Agriculture Code, § 134.001, which reads “‘aquaculture’ or ‘fish farming’ means the business of producing and selling cultured species raised in private facilities. Aquaculture or fish farming is an agricultural activity.”

30 TEX. ADMIN. CODE § 297.1(1).

²¹ Exhibit H, Brianna Gallagher, Flood Mgmt. Div., SJRA, “Seasonal Lake Lowering and other Short-Term Initiatives” (May 2019), *available at* <https://www.sjra.net/2019/09/seasonal-lake-lowering-and-other-short-term-initiatives/>.

²² Exhibit G, SJRA Feb. 25 Press Release, *supra* note 10, at 1.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

(from 201' mean sea level [msl] to 200' msl). Recapture of lake level beginning June 1.

- b. Fall strategy: Beginning August 1, release only an amount of water from Lake Conroe to create a one foot capacity to catch rainfall and storm runoff (from 201' msl to 200' msl). After September 1, increase capacity an additional six inches (from 200' msl to 199.5' msl). If a named storm is predicted to impact our region, [the City] may initiate an additional release of six inches (to 199' msl) by notifying SJRA in writing of their call for release. Recapture beginning October 1.
- c. All releases come from [the City's] 2/3 share of permitted water supply in Lake Conroe at the city's request. SJRA staff to coordinate with [the City] staff on the details and timing of any releases.
- d. If the lake level of Lake Conroe has already dropped to the target elevation due to natural evaporation, no releases should be made.²⁶

The SLLP Ignores the “Normal Operating Conditions” of the Gate Operation Plan of Lake Conroe

43. Lake Conroe is impounded by the Lake Conroe Dam, which is an earthfill structure with a length of approximately 11,800 feet.²⁷

44. The SJRA is required to create and submit a Gate Operation Plan to the TCEQ. “(a) The owners of all existing intermediate- and large-size dams, as defined in § 299.13 of this title (relating to Size Classification Criteria), with gated spillways shall have a professional engineer develop a gate operation plan....” 30 TEX. ADMIN. CODE § 299.44(a).

45. “(b) The gate operation plan must include: (1) gate procedures for use during normal operating conditions, flood events, other varying hydrologic events, and power failures....” 30 TEX. ADMIN. CODE § 299.44(b)(1) (emphasis added).

²⁶ *Id.*

²⁷ Exhibit I, Affidavit of Hector Olmos, P.E. CFM, *Vicente Medina*, et al. v. *SJRA*, ¶ 8 at 2, Cause No. 1123430, Harris County, County Civ. Ct. at Law No. 1 (July 31, 2019) [hereinafter “Olmos Affidavit”].

- a. Lake Conroe’s normal “conservation capacity” is at an elevation of 201' above NGVD 29²⁸ (equal to msl for the Gulf of Mexico).²⁹
- b. The “normal pool elevation” of the lake is 201' above msl.³⁰
- c. Lake Conroe is “officially full” at 201' above msl.³¹
- d. The base condition (*i.e.*, **the current gate operation plan**) operates Lake Conroe at 201' above msl.³²

46. In order to operate the dam in compliance with state regulations and guidance (as promulgated by the TCEQ), SJRA engaged the engineering and consulting firm Freese and Nichols to develop a Gate Operations Policy for the dam.³³

47. The Dam’s “Gate Operations Policy” of April 2017 consists of a written set of guidelines, as well as a spreadsheet that performs calculations to recommend gate operations based on lake levels and estimated inflows to Lake Conroe.³⁴

48. “When closed, the gates on the Lake Conroe Dam have a top elevation of 203.24 feet (NGVD 29). If the surface level of the lake rises above 203.24 feet and the dam gates have not been raised/opened to release water from the bottom, water would spill uncontrolled over the gates.

²⁸ “Zero” needed to be somewhere, so Galveston, Texas was selected as the “Primary Benchmark of the United States,” and Local Mean Sea Level (“LMSL”) there was set equal to “0.00 ft” in 1929. Center for Geoinformatics, La. St. Univ., “FAQ Detail,” at <https://c4g.lsu.edu/index.php/ticket-system/faq/IS-NGVD29-THE-SAME-AS-MEAN-SEA-LEVEL-10>.

²⁹ Exhibit J, TWDB, “Lake Conroe (San Jacinto River Basin),” at www.twdb.texas.gov/surfacewater/rivers/reservoirs/conroe/index.asp.

³⁰ Exhibit H, Olmos Affidavit, *supra* note 27, ¶ 5 at 2.

³¹ Exhibit K, SJRA, “Lake Conroe Reaches Full Pool Elevation” (May 12, 2014), at <https://www.sjra.net/2014/05/lake-conroe-reaches-full-pool-elevation/>.

³² Exhibit L, Freese & Nichols Tech. Memo. from Jeremy D. Dixon, P.E., CFM, to Michael V. Reedy, P.E., “Lake Conroe Dam Gate Operations Modification Analysis” at 4 (Apr. 10, 2018) [hereinafter “Freese & Nichols Tech. Memo.”], *available at* http://www.sjra.net/wp-content/uploads/2018/05/FNI_Lake-Conroe-Dam-Gate-Operations-Modification-Analysis_20180410.pdf.

³³ Exhibit I, Olmos Affidavit, *supra* note 27, ¶ 13 at 3.

³⁴ *Id.* ¶ 14 at 3.

That means that the flow from the lake will not just be released downstream, but it will also be released in an uncontrolled manner and at an uncontrolled rate that could jeopardize the structural integrity of the gates, possibly resulting in a catastrophic failure.”³⁵

The SLLP Is an Unauthorized, Non-permitted, Use of Lake Conroe Reserved Water and Is Not Otherwise Beneficial

49. The Lake Conroe Dam’s official Gate Operations Policy of 2017 sets forth the pool elevation measurements which trigger mandatory flood gate releases calculated to protect the structural integrity of the Lake Conroe Dam and to ensure that the conservation elevation is not exceeded. The Gate Operations Policy does not include operational parameters designed to protect other, downstream structures, although the SLLP is alleged by the SJRA and the City to serve such purposes.

50. The SLLP is alleged by the SJRA and the City to be a discretionary deviation from the Gate Operations Policy of 2017 for “flood control purposes.” Unlike the implementation of the SLLP at Lake Conroe, “flood control” releases from dams elsewhere in Texas, which unlike the Lake Conroe Dam are on reservoirs designed and operated for flood control purposes, are otherwise specifically engineered and undergo rigorous approval processes, including specific federal or state agreements and TCEQ approval, and are often referenced in the administrative proceedings evaluating flood control as an appropriated use and/or in water management plans.³⁶

³⁵ *Id.* ¶ 11 at 2.

³⁶ The TCEQ recognizes legitimate releases for “flood control purposes” “when water is continuously discharged over the spillway of a dam.” TCEQ, *Application of Lower Colo. River Auth. for Amendment to Its Water Mgmt. Plan*, Docket No. 2015-1444-WR, 2015 TX Commn on Envntl Quality LEXIS 1308 (Nov. 18, 2015), at att. Lakes Buchanan and Travis Water Mgmt. Plan ¶ 5.4 at *150. Because Lake Travis, *e.g.*, was designed and constructed for both water supply and flood management (unlike Lake Conroe), the Lower Colorado River Authority (“LCRA”) develops and maintains standard guidelines and procedures for two modes of operations: (1) Water Supply Operations; and (2) Flood Operations. *Id.*; *see also id.* ¶ 1.3.5 at *68. For example, at Mansfield Dam on Lake Travis, “Flood Operations occur when water is discharged through Mansfield Dam because the level of Lake Travis exceeds or is

51. Flood control dams are specifically engineered for such purpose. Because Lake Conroe was not designed as a “flood control reservoir,” there is no evidence that the SLLP is based upon “flood control purposes” nor is there evidence that demonstrates implementation of the SLLP will not undermine the normal operations of the dam, but rather, the SLLP was adopted by the SJRA as an emergency and temporary measure to be in place while downstream dredging of the West Fork of the San Jacinto River was being completed.³⁷ The dredging was completed in September 2019.³⁸ The SLLP as implemented has become a regular, seasonal approach to addressing potential future downstream floods.

52. The regular, seasonal SLLP is justified, in part, by the SJRA based on the Freese and Nichols, “Lake Conroe Dam Gate Operations Modification Analysis,” completed in April 2018. The analysis references an inquiry, dated December 18, 2017, from Representative Lyle Larson, then Chair of the Texas House of Representatives Committee on Natural Resources, as to whether Lake Conroe *could be* used for flood control purposes.³⁹

53. Notably, Freese and Nichols, the engineering firm providing technical guidance for revisions to the Gate Operations Policy, noted “[t]he addition of a flood pool below the current

expected to exceed the conservation pool elevation of 681 feet msl. LCRA conducts Flood Operations at the six dams that form the Highland Lakes to mitigate downstream damages due to uncontrolled inflows to the lakes. Flood Operations take precedence over scheduled water supply and environmental release operations.” *Id.* ¶ 5.4.2 at *160 (emphasis added).

³⁷ Exhibit L, Freese & Nichols Tech. Memo., *supra* note 32, at 1. The Executive Director of TCEQ temporarily acquiesced to the SLLP in a June 2018 letter to the SJRA and the City, stating that the Office of the Executive Director would exercise “enforcement discretion” with regard to any exceedance of the annual permitted amounts authorized for diversion or release that resulted from the SLLP based on its understanding that the lowering measures would be used seasonally and would only be utilized on a temporary basis while dredging activities were completed. *See* Exhibit M, Letter from Stephanie Bergeron Perdue, Interim Exec. Dir., TCEQ, to Jace A. Houston, Gen. Mgr., SJRA, & Carol Haddock, Dir., Houston Pub. Works, Houston, at 1-2 (June 15, 2018).

³⁸ Galveston Dist., U.S. Army Corps of Eng’rs, “West Fork San Jacinto Emergency Dredging Placemat,” at <https://www.swg.usace.army.mil/Business-With-Us/Emergency-Management-Office/West-Fork-San-Jacinto-Emergency-Dredging/>.

³⁹ Exhibit L, Freese & Nichols Tech. Memo., *supra* note 32, at 1.

normal pool elevation of 201 ft-msl will likely require a change to the gate operations policy” and recommended that the “modifications to the gate operations policy for Lake Conroe Dam not be undertaken without:

- A thorough study of the impact of the revised policy on lake levels and flows for multiple storm events, up to and including the [Probable Maximum Flood].
- A detailed design storm review to make sure that the dam can safely pass the appropriate design storm with the revised policy.
- A significant initial and ongoing investment to develop additional streamflow gauging stations upstream of Lake Conroe Dam to more accurately quantify inflow into the lake.⁴⁰

54. Despite the recommendation that the Gate Operations Policy not be modified for regular, seasonal flood control releases, the SJRA and City unilaterally enacted the SLLP.

55. In addition, and under every available examination, the SLLP is being conducted by officials of the SJRA and the City during “normal operating conditions” without attempting to conserve water or justify its waste. The SJRA should be managing water levels and conserving water by lowering the lake elevation only during temporary or emergency conditions which authorize “flood control” discharge.

56. Because the SLLP does not utilize water releases solely as temporary or emergency measures, the releases constitute a “use.”

57. The SLLP is a “use” of the Lake Conroe reservoir which is not permitted by Certificate of Adjudication and Amendment Nos. 10-4963 and 10-4963A, because “flood control” is not a “Municipal,” “Industrial,” “Mining,” or “Agricultural” Use.

58. The speculative and non-perfected appropriation of water from Lake Conroe, far in advance of actual, certain rainfall events or flooding, is an unlawful wasting of waters belonging

⁴⁰ *Id.* at 12 (emphasis added).

to the State of Texas. “[N]o person may appropriate any state water or begin construction of any work designed for the storage, taking, or diversion of water without first obtaining a permit from the [TCEQ] to make the appropriation.” TEX. WATER CODE § 11.121.

59. Further, there is no evidence that the lake lowering conducted through the SLLP is “beneficial,”⁴¹ even if “flood control” during “normal operating conditions” were somehow permitted.

60. The efficacy of the one-foot spring reduction was not evaluated by SJRA or Houston. There has never been a spring flooding event associated with Lake Conroe. The spring release results in the most damage to Lake Conroe, artificially lowering the level of the lake heading into the hot, dry summer season and resulting in a year-round reduction in the volume of water available in Lake Conroe.

61. SJRA’s 2018 Freese and Nichols Analysis determined the SLLP would provide minimal flood reduction: “The benefits to those downstream, though the water surfaces are reduced by a foot or more in places, are generally not enough to be considered wholesale improvements to the flood hazard and show minimal differences in spatial extent.”⁴² The Freese and Nichols Analysis also concluded that for a rainfall event greater than the 500-year event—*i.e.*, another Hurricane Harvey-type storm—Lake Conroe, artificially lowered by the SLLP, “could potentially increase the flood hazard downstream.”⁴³

⁴¹ “(b) State water also may be appropriated, stored, or diverted for any other beneficial use.” TEX. WATER CODE § 11.023(b). Nor do Certificate of Adjudication and Amendment Nos. 10-4963 and 10-4963A authorize any other beneficial use except for municipal, industrial, mining, and agricultural.

⁴² Exhibit L, Freese & Nichols Tech. Memo., *supra* note 32, at 11. The “foot or more” reduction in flood levels was measured against flood waters that were already eight feet above the river channel banks for a 100-year flood and 12 feet above the banks for a 500-year flood. *Id.*

⁴³ “For storm events larger than a 500-year event, it is anticipated that the addition of extra flood pool will likely yield no additional benefit to the upstream and could potentially increase the flood hazard downstream of the dam” *Id.*

62. The 2018 Harris County Flood Control Harvey Summary Report found the benefits of lowering Lake Conroe to be negligible.⁴⁴

63. The Bleyl Study determined that lowering Lake Conroe by two feet could result in a maximum reduction in floodwaters in the Lake Houston area of three inches at a point where the floodwaters were already seventeen feet high (a less than 1.5% reduction in the height of the flood waters).⁴⁵

64. Prior to spring precipitation this year, the SLLP had reduced the yearly daily lake levels to drought-like levels for almost two years.

65. The City is calling for the water to be released from Lake Conroe pursuant to the SLLP, purportedly for municipal purposes, but it already has such an overabundance of water in Lake Houston that it is releasing even greater volumes of water from Lake Houston within the same timeframes⁴⁶. In other words, the City is calling for water from Lake Conroe at times when it does not need the water for municipal use, or any other permitted beneficial use—the only purpose is to lower the level of Lake Conroe.

⁴⁴ See Exhibit N, Memo. from Jeff Lindner, Dir. of Hydrologic Ops./Meteorologist, & Steve Fitzgerald, Chief Eng’r, Harris County Flood Control Dist., to HCFCD Flood Watch/Partners at 12 (June 4, 2018) (finding that Lake Conroe releases contributed only 16% of the total water flow into Lake Houston), available at <https://www.hcfcd.org/Portals/62/Harvey/immediate-flood-report-final-hurricane-harvey-2017.pdf>.

⁴⁵ Exhibit O, Letter from Ryan Londeen, PE, Bleyl Eng., to Kevin Lacy, LCA at 5 (Feb. 14, 2020).

⁴⁶ While the SLLP was first adopted by the SJRA and the City three years ago, the SJRA is now seeking to study the effects of releasing water from both Lake Conroe and Lake Houston. In an application for funding submitted to the TWDB, the SJRA described the purpose of its proposed project as “to develop a joint operations strategy for Lake Conroe and Lake Houston.” Exhibit P, SJRA Application to TWDB, “FIF Abridged Application: Lake Conroe – Lake Houston Joint Reservoir Operations Study” at 4 (of pdf) (June 15, 2020), available at https://www.sjra.net/wp-content/uploads/2020/09/FIF-Abridged-Application_-Lake-Conroe-Lake-Houston-Joint-Reservoir-Operations-Study_FINAL.pdf. “[The City] is currently in the design phase of a project to add new tainter gates at the Lake Houston dam which could greatly increase the controlled release capacity of the dam.” *Id.*

66. The SJRA recently conceded: “[T]he legal aspects of pre-releases from [both Lake Conroe and Lake Houston], as related to water rights permits, must be evaluated to ensure there are no detrimental impacts to water supply. Pre-releases from either reservoir, as well as standard releases from Lake Houston, must also be optimized to ensure that water supply is not unnecessarily released from either reservoir.”⁴⁷

The Water Use Reports Submitted to TCEQ by the City Contain Material Misrepresentations of Facts Related to the City’s Diversion of Water from Lake Conroe

67. On its 2018 and 2019 Water Use Reports (“WURs”) submitted to the TCEQ, the City categorized the use for the releases from Lake Conroe as “municipal/domestic.”⁴⁸

68. The City’s WURs do not contain any information identifying that the seasonal releases were subsequently used for a permitted beneficial use.

69. In 2020, the City reported that it diverted water under the Amended Certificate during the months of April, May, and August 2019. Specifically, for 2019, the City’s WURs indicate seasonal releases from Lake Conroe (*i.e.*, releases pursuant to the SLLP) of 66,167 acre-feet (23,825 acre-feet in April, 25,244 acre-feet in May, and 17,098 acre-feet in August).⁴⁹ The City categorized the use for those releases as “municipal/domestic,”⁵⁰ but as discussed, state law and

⁴⁷ *Id.* at 5 (emphasis added).

⁴⁸ Exhibit Q, “Texas Commission on Environmental Quality Report of Surface Water Used for the Year Ending 2018,” filed by Houston, Water Right No. 4963, at WUR USE: Municipal/Domestic (Mar. 12, 2019) [hereinafter “2018 WUR”]; *see also* Exhibit Q, “Texas Commission on Environmental Quality Report of Surface Water Used for the Year Ending 2019,” filed by Houston, Water Right No. 4963 (Feb. 28, 2020) [hereinafter “2019 WUR”]. Similarly, Houston categorized pre-storm releases from Lake Houston for flood control purposes as a “municipal/domestic” use. Exhibit Q, Letter from Veronica R. Osegueda, Div. Mgr., Water Res., Houston Water Planning, to Kathy Alexander, Water Availability Div., TCEQ (Mar. 13, 2019) [hereinafter “Osegueda Letter”]. For example, in 2018, pre-storm releases from Lake Houston totaled 117,644 acre-feet.

⁴⁹ Exhibit Q, 2019 WUR, *supra* note 48; *see also* Exhibit Q, Osegueda Letter, *supra* note 48.

⁵⁰ Exhibit Q, 2018 WUR, *supra* note 48; *see also* Exhibit Q, 2019 WUR, *supra* note 48.

TCEQ rules do not include flood reduction as a municipal/domestic use. For 2018, seasonal releases from Lake Conroe were 18,265 acre-feet.⁵¹

70. Houston has also categorized pre-storm releases from Lake Houston for flood control purposes as a “municipal/domestic” use.⁵²

71. Reconciliation of the water data shows that Houston exceeded the volume of its allocated water rights through diversions associated with the SLLP in 2019.⁵³

72. A review of discharge data from Lake Conroe also reveals that in both May 2019 and May 2020, the releases from Lake Conroe exceeded the permitted maximum diversion rate of 700.00 cubic feet per second (cfs) established by Certificate of Adjudication and Amendment Nos. 10-4963 and 10-4963A.⁵⁴ For example, in an effort to quickly lower the level of Lake Conroe at the end of May 2020 at the City’s request, SJRA discharged water from Lake Conroe at a rate of 1,581 cfs—over twice the permitted rate.⁵⁵

⁵¹ Exhibit Q, 2018 WUR, *supra* note 48.

⁵² Exhibit Q, Osegueda Letter, *supra* note 48.

⁵³ Exhibit R, “Lake Houston and Lake Conroe – Inflow, Discharge, and Water Levels, For Seasonal Lowering Periods (+/–one month) from Fall 2018 through Spring 2020.” The table is a subset of the complete data set evaluated by LCA. The complete data set is available for review at <https://spaces.hightail.com/space/XdBM36nmjl>.

⁵⁴ Exhibit F, Certificate of Adjudication No. 10-4963, *supra* note 8, § 3.B at 2.

⁵⁵ See Exhibit S, E-mail from Jace Houston, Gen. Mgr., SJRA, to Jace Houston [Bd. Members] (May 29, 2020, 9:48 a.m.) (“In order to reach the City’s goal, it will take a release rate of approximately 1,500 cfs, which is three gates open six inches. We are in the process of gradually ramping up to that release rate.”). SJRA’s website shows a maximum release rate of 1,581.00 cfs from May 25 through June 2, 2020. SJRA, “Seasonal Lowering Flow” (May 25 – June 2, 2020), from SJRA Contrail® System, at https://sanjacinto.onerain.com/sensor/?time_zone=US%2FCentral&site_id=13189&site=b6f6df4e-f5a5-4398-a2e9-1a3508c4e9b5&device_id=23&device=130e3e6f-4040-444f-8260-99da894a0d3c&bin=86400&range=Custom%20Range&markers=false&legend=true&thresholds=true&refresh=off&show_raw=true&show_quality=true&data_start=2020-05-25%2000%3A00%3A00&data_end=2020-06-02%2023%3A59%3A59. Similarly, SJRA’s website shows a maximum release rate of 1,056.00 cfs from May 5 through 25, 2019. SJRA, “Seasonal Lowering Flow” (May 5-25, 2019), from SJRA Contrail® System, at https://sanjacinto.onerain.com/sensor/?time_zone=US%2FCentral&site_id=13189&site=b6f6df4e-f5a5-4398-a2e9-1a3508c4e9b5&device_id=23&device=130e3e6f-4040-444f-8260-99da894a0d3c&data_start=2019-05-05%2000%3A00%3A00&data_end=2019-05-

SLLP Releases from Lake Conroe Are a Waste of Water in Violation of Texas Administrative Code Title 30, Section 297.48(a)

73. Texas Administrative Code Title 30, Section 297.48(a) provides: “The waste of water is prohibited and is an unlawful use of state water. A water right holder using state water shall use those measures necessary to ensure the beneficial use of water without waste in accordance with these rules and the terms and conditions of the water right and applicable law.” 30 TEX. ADMIN. CODE § 297.48(a).

74. As identified by two recognized water rights experts in Texas, Carlos Rubinstein and Herman R. Settemeyer, P.E.:

The review of documents reveals that water from Lake Conroe was released as a pre-storm event and wrongfully classified as used for municipal purposes. There is no documentation to indicate that the water was subsequently used for a permitted beneficial use. The only intended use was the desire to lower the lake level at Lake Conroe for flood control purposes. Such use of this water is not authorized by the water right and constitutes a waste of a valuable resource.⁵⁶

SLLP Releases from Lake Conroe Violate an Agreement of which Petitioners Are Direct Beneficiaries or Third-Party Beneficiaries

75. The SJRA and the City are directly breaching their agreement with the public of the State of Texas, as enforced by the TCEQ: “(c) Acceptance of the water right by the water rights holder will be an acknowledgment and agreement that the holder will comply with all the terms,

25%2023%3A59%3A59&bin=86400&range=Custom%20Range&markers=false&legend=true&thres holds=true&refresh=off&show_raw=true&show_quality=true.

⁵⁶ Exhibit T, Letter from Carlos Rubinstein, Principal, & Herman R. Settemeyer, P.E., Partner, RSAH₂O, to Erich Birch, Birch, Becker & Moorman, LLP, at 1 (June 29, 2020). Mr. Rubinstein and Mr. Settemeyer also note that the process of lowering and refilling Lake Conroe seasonally is a process “that could subject the lake and potentially the bays to potential environmental impacts.” *Id.* They continue: “This change in operation has not been subject to a TCEQ environmental review approval process as would be required by any permit amendment.” *Id.* Mr. Rubinstein has 35 years of water policy experience, including positions as Chairman of the TWDB, a Commissioner of the TCEQ, and Watermaster of the Rio Grande Basin. Mr. Rubinstein is currently Chairman of the Texas Water Foundation. Mr. Settemeyer has 43 years of water policy experience, including Engineer Advisor to the Canadian, Pecos, Red, Rio Grande, and Sabine River Compacts, Texas Representative to the Association of Western States Engineers, and Manager of TCEQ’s Water Rights Permitting program.

provisions, conditions, limitations and restrictions embodied in such water right.” 30 TEX. ADMIN. CODE § 297.59.

76. The Petitioners possess public and private interests intended to be protected and conserved by Certificate of Adjudication and Amendment Nos. 10-4963 and 10-4963A.

77. Petitioners continue to be affected in their rights to their use and enjoyment of Lake Conroe. As stated by Jordan Austin, Operations Manager of SJRA’s Lake Conroe Division: “the general rule [is] that all portions of the reservoir and SJRA lands surrounding the reservoir are generally considered open to the public” and there are “limited circumstances in which public access may be restricted.”⁵⁷ The SLLP continues to create natural barriers preventing access to Lake Conroe, reducing or eliminating means of ingress/egress to and from the water reserves.

78. The effects on Petitioners include, but are not limited to:

- a. Potential unavailability of water for use during “abnormally dry” or “moderate drought” conditions and failure to store and conserve water resources for use during the predicted, more severe drought conditions;
- b. Greater risk of accidents and Injury to persons caused by boats, skiers, tubers, etc., striking submerged objects;
- c. Collapsed bulkheading from persistently unbalanced pressures due to low water levels;
- d. Reduced access to boat ramps and docks, including resulting damage to grounded boats;

⁵⁷ Exhibit U, Jordan Austin, SJRA, “Lake Conroe Rules and Regulations,” DOCK LINE MAGAZINE (Lake Conroe Ed) ¶ 3 at 22 (July 2015), *available at* <http://www.sjra.net/wp-content/uploads/2015/01/Lake-Conroe-Rules-Regulations.pdf>. The complete rules are available at <http://www.sjra.net/wp-content/uploads/2015/03/Lake-Conroe-Rules-and-Regulations-2015.pdf>.

- e. Bank and property erosion, including damage to ramps and docks;
- f. Reduced revenue arising from lake tourism and recreation;
- g. Reduced revenue from commercial lake uses;
- h. Reduced recreational purpose; and
- i. Loss of investments made in reliance upon a lawful and consistent lake level during normal operations.

79. As further demonstration of particularized injury to these Petitioners and of water waste, Petitioners now reference and incorporate herein for all purposes the affidavits attached hereto of Susanne Mitchell Allen, Robert Ferrante, Melanie Clement, Daniel Krueger, and Matthew P. Newsom.⁵⁸

The SLLP Otherwise Violates the Duty to Engage in Conservation Intended to Benefit the Public

80. “Conservation” is defined in Chapter 11 of the Water Code as:

- (A) the development of water resources; and
- (B) those practices, techniques, and technologies that will reduce the consumption of water, reduce loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

TEX. WATER CODE § 11.002(8) (emphasis added).

81. The Amendment to Certificate of Adjudication Nos. 10-4963, Certificate No. 10-4963A states:

CONSERVATION

Owners shall implement water conservation plans that provide for the utilization of those practices, techniques, and technologies that reduce or maintain the consumption of water, prevent or reduce the loss or waste of water, maintain or improve the efficiency in the use of water, increase the

⁵⁸ Exhibit W, Affidavits of Susanne Mitchell Allen, Robert Ferrante, Melanie Clement, Daniel Krueger, and Matthew P. Newsom.

recycling and reuse of water, or prevent the pollution of water, so that a water supply is made available for future or alternative uses....⁵⁹

82. Through implementation of their Water Conservation Plans, the City and SJRA prohibit their water supply customers from wasting water while the City and SJRA themselves drain tens of thousands of acre-feet of water from Lake Conroe for no beneficial purpose.⁶⁰

83. The most recent drought map released by the United States Drought Monitor identifies Harris County and most of Montgomery County as “Abnormally Dry.”⁶¹ Parts of eastern Montgomery County and far northeastern Harris County, though, have been newly classified as “Moderate Drought.”⁶²

84. The “U.S. Seasonal Drought Outlook” categorizes much of the Lake Conroe/Lake Houston area as “drought development likely” for the timeframe of March 18 through June 30, 2021, but parts of Montgomery County were newly classified as “drought persists” as of March 18, signaling a worsening of drought conditions in the area.⁶³

85. The spring lowering will result in the unauthorized diversion or waste of at least seven billion gallons of water, enough volume to supply water to over 200,000 households for one year. The water impact on households would be even greater if mandatory water use restrictions were to be implemented during drought conditions. For the water to be available during future drought conditions, Lake Conroe must be used for its water conservation purposes to store the maximum

⁵⁹ Exhibit F, Certificate No. 10-4963A, *supra* note 8, § 2.

⁶⁰ See Exhibit V, SJRA, Lake Conroe Div., “Water Conservation Plan” (Feb. 28, 2019), *available at* <http://www.sjra.net/wp-content/uploads/2019/03/WCP-Lake-Conroe-02-28-2019.pdf>.

⁶¹ U.S. Drought Monitor, Map, “Texas,” valid Mar. 23, 2021, (Mar. 25, 2021), *available at* <https://droughtmonitor.unl.edu/CurrentMap/StateDroughtMonitor.aspx?TX>.

⁶² *Id.*

⁶³ Climate Prediction Center, Nat’l Weather Serv., Nat’l Oceanic & Atmospheric Admin., “U.S. Seasonal Drought Outlook, Drought Tendency During the Valid Period,” Mar. 18–June 30, 2021 (released Mar. 18, 2021), *available at* https://www.cpc.ncep.noaa.gov/products/expert_assessment/sdo_summary.php.

amount of water allowed, otherwise future drought conditions will be exacerbated. Water drained during the spring lowering period of the SLLP is water that will never be available for use.

VI. REQUESTED DECLARATIONS

86. Pursuant to Tex. Civ. Prac. & Rem. Code § 37.003, Petitioners request the following declarations:

- a. Any discharge through the gates of the Lake Conroe Dam pursuant to the SLLP, when the level of Lake Conroe has not exceeded or is not, in all reasonable probability, expected to exceed the conservation pool elevation of 201' above msl as stated in the Gate Operation Plan submitted to the Executive Director of the TCEQ pursuant to 30 Tex. Admin. Code § 299.44, is an unlawful appropriation and use of State Water pursuant to 30 Tex. Admin. Code § 297.48(a), unless the SJRA and the City first obtain a permit or permit amendment from the TCEQ pursuant to Tex. Water Code § 11.121, which perfects such an appropriation for Tex. Water Code § 11.023 purposes;
- b. Pursuant to Tex. Water Code § 11.026, Certificate of Adjudication and Amendment Nos. 10-4963 and 10-4963A do not perfect an appropriation for flood control purposes as implemented through the SLLP; and
- c. The Lake Conroe Seasonal Lake Lowering Program, as the term is referenced by the SJRA and the City, is not a “municipal use” as such is referenced by Texas Water Code § 11.023 or 30 Tex. Admin. Code § 297.1(34).

VII. APPLICATION FOR SUPPLEMENTAL TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION

87. As a result of the conduct of state officials described above, the Petitioners have and will continue to suffer immediate and irreparable injury unless Respondents are enjoined from

further conduct of the types described, whether they be specific violations of Certificate of Adjudication and Amendment Nos. 10-4963 and 10-4963A, or otherwise.

88. Petitioners believe that ongoing conduct of the SJRA and the City will continue to unlawfully appropriate, use, and waste the State Water in Lake Conroe as is prohibited by Tex. Water Code § 11.081, thereby depriving Petitioners of their rights to the use and enjoyment of the waters of Lake Conroe, which are held by the State of Texas, for which Petitioners will have no adequate remedy at law to protect the public's interest in those scarce natural resources.

89. Petitioners' application for a Temporary Restraining Order and Temporary Injunction are authorized by Tex. Civ. Prac. & Rem. Code § 37.011. Petitioners are further entitled to injunctive relief since they have shown a likelihood of success on the merits of this petition due to the clear statutory violations of law and the likelihood that Respondents will otherwise refuse to comply with the terms of Petitioners' requested Declaration even if granted.

90. Through submission consideration, an *ex parte* hearing, or an all-parties hearing, Petitioners seek the issuance of an immediate Temporary Restraining Order, and upon final determination, a Final Injunction ordering Respondents and any person in active concert or participation with them to:

- a. Not, until expressly permitted by the TCEQ through approval of an amendment to Certificate of Adjudication and Amendment Nos. 10-4963 and 10-4963A or another lawful authority, make or cause flood control releases, diversions, or discharges from Lake Conroe when the level of Lake Conroe has not exceeded or is not, in all reasonable probability, expected to exceed the conservation pool elevation as stated in the Gate Operation Plan submitted to the Executive Director of the TCEQ pursuant to 30 TAC § 299.44.

91. Petitioners further request that this Court set this matter for a hearing on the Petitioners' Application for a Preliminary Injunction within fourteen (14) days. Upon a final trial on the merits, Petitioners request that the Court grant the Petitioners' Application for Permanent Injunction as pleaded herein.

VIII. RULE 193.7 NOTICE

92. Pursuant to Rule 193.7 of the Texas Rules of Civil Procedure, Petitioners hereby give actual notice to Respondents that any and all documents produced may be used against the Respondents, producing the document at any pretrial proceeding and/or at the trial of this matter without the necessity of authenticating the documents.

IX. PRAYER

WHEREFORE, Petitioners request that the Court grant Petitioners' Application for Temporary Restraining Order, request that Respondents be cited to answer and appear herein, and request that the Court set a hearing on the Application for Preliminary Injunction and grant the Preliminary Injunctive relief as pleaded herein. Upon final hearing hereof, Petitioners request that they have a declaratory judgment terminating this controversy, and a preliminary and permanent injunction as pleaded herein against Respondents, and such other relief as they may show themselves justly entitled.

Respectfully submitted,

WARD LAW FIRM

By: /s/ David A. Ward, Jr.

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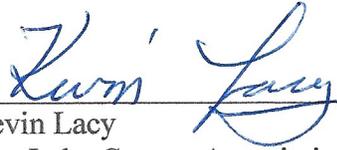
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**ATTORNEYS FOR PETITIONERS
LAKE CONROE ASSOCIATION,
SUSANNE MITCHELL ALLEN, AND
ROBERT FERRANTE**

VERIFICATION

THE STATE OF TEXAS §
 §
COUNTY OF MONTGOMERY §

BEFORE ME, the undersigned authority, on this day personally appeared Kevin Lacy, authorized representative for Petitioner, Lake Conroe Association, who being by me duly sworn on oath deposed and said that he has reviewed Petitioners' Original Petition and all exhibits thereto, and the statements contained therein are true and correct based on his personal knowledge except as otherwise stated herein.



Kevin Lacy
For: Lake Conroe Association
Title: President

SUBSCRIBED AND SWORN TO BEFORE ME this the 31 day of March, 2021, to certify which witness my hand and seal of office.



NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

